BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS

Governance Toolkit

A GUIDE TO NATION BUILDING

LETTER FROM REGIONAL CHIEF JODY WILSON-RAYBOULD

Dear Leaders,

The BCAFN is pleased to present the ***BCAFN Governance Toolkit: A Guide to Nation Building*** in accordance with the ***Building on OUR Success*** action plan and the first pillar of that plan, "Strong and Appropriate Governance." The Governance Toolkit is a comprehensive guide intended to assist your Nation in building or rebuilding governance and navigating its way out from under the *Indian Act* at its own pace and based on its own priorities. Since it was first conceived, this project has taken on a life of its own and continues to grow. The Governance Toolkit also continues the work of previous BC Regional Chiefs and draws on the growing governance experiences of Nations in BC, working together to improve the lives of our people.

Simply defined, "Governance" means "establishing rules to coordinate our actions and achieve our goals." As societies, the institutions we create to make rules and then enforce them, we call "government." Governance and government come in many forms but are always needed. They can, of course, be done well or badly. Research and experts tell us that the quality of governance, much more than its specific form, has a huge impact on the fortunes of any given society. Ours are no exception. Societies that govern well simply do better economically, socially and politically than those that do not. Strong and appropriate governance increases a society's chances of effectively meeting the needs of its people.

In many diverse ways, based on our different cultures and traditions, this is exactly what our peoples did for centuries before the arrival of Europeans. The reality that we lived in productive, sustainable and viable societies is a testament to the fact that our governing systems worked. With the arrival of the newcomers, all this quickly changed. While we may have had some form of government under the *Indian Act*, we were for the most part denied the powers (jurisdictions) we needed to govern and the governing institutions that could exercise power effectively.

During the colonial period, our governments were based on models developed by the federal government to deliver its programs and services. The powers of our governments were very limited. The effects on us were unfortunate, as the *Indian Act* system promoted an impoverished concept of government. "Government" for us became little more than managing programs (education, health, housing, social assistance, etc.) and distributing limited resources (money, jobs, influence and services). The concept of government as being about making laws, resolving disputes and generating the means to pursue a collective vision was smothered by the need for federal programs and services and the fact that the local "band office" was the instrument to deliver them.

Thankfully, this is changing, and a more robust concept of governance based on Indigenous legal traditions is re-emerging as we slowly rebuild strong and appropriate governance. This is happening for many reasons. One reason is the advancement of our right to self-determination, both domestically through section 35 of the *Constitution Act, 1982* and internationally through the *United Nations Declaration on the Rights of Indigenous Peoples*. It is also a reflection of the growing political realization — not just among us but among others — that our Nations truly need strong and appropriate governance in order to succeed. Finally, this is happening because our Nations are increasingly raising more of their own revenues to provide strong governance.

In BC, our Nations are leading the way. Between them, they have made over 2,500 contemporary bylaws and laws, and they are the leaders in numerous "sectoral" and "comprehensive" governance initiatives in Canada along a continuum of governance reform. Governance is being exercised on "Lands reserved for Indians," treaty settlement lands and Aboriginal title lands, as well as on ancestral lands that transcend all other categories of First Nation lands.

The Governance Toolkit draws on all of this work in post-colonial governance and brings it together in one document. Much of this work has, in truth, only taken place in the last 25 years as we have translated legal and political victories into practical benefits on the ground, in our communities.

The Governance Toolkit includes a number of parts. The core of the Toolkit is Part 1, ***The Governance Report***, which takes a comprehensive look at options for governance reform and considers, subject by subject, the powers (jurisdictions) of our Nations. The report is written from the perspective that the Nation is the building block of governance and that our Nations have the inherent right to govern. It looks at how we are moving in this direction along a continuum of governance options and reforms by providing a snapshot of what our Nations in BC are actually doing.

Part 2 of the Governance Toolkit is ***The Governance Self-Assessment*** in two modules that your Nation can use to evaluate the effectiveness of your institutions of governance and the effectiveness of your administration. The evaluation is an important exercise that any Nation can undertake to identify what is working well and what is not working so well, where the institutional framework may be deficient and where there are gaps, both in terms of the institutions of governance and the powers of government that may need to be advanced.

Part 3, ***A Guide to Community Engagement: Navigating Our Way through the Post-Colonial Door***, will assist your Nation in beginning or continuing discussions with your citizens about the importance of strong and appropriate governance and options for governance reform, including moving beyond the *Indian Act*.

I am pleased to say that the Governance Toolkit has been developed in-house by the BCAFN with the support and contributions of many individuals and organizations. Drafts of the report were reviewed by peer groups, and the self-assessment modules were piloted in a number of our communities and revised extensively following insightful dialogue. The Governance Toolkit is available on the BCAFN website (www.bcafn.ca), where there are also links to most of the primary documents that are referenced in *The Governance Report*.

Finally, transforming *Indian Act* governance is no small task. After more than a century of living under the *Indian Act*, it may be difficult for some Nations, as indeed it has been for the federal government, to shed the routine of colonialism and tackle the seemingly overwhelming task of Nation building or Nation rebuilding. For some, the status quo works and unfortunately serves their self-interest. For others, it may be hard to shed the old ways. Many more will simply be afraid of change, preferring to live "with the devil they know rather than with the one they do not." At times, there will be tensions between current and traditional practices, and it will be a challenge to reconcile them. What is encouraging, though, is that despite the challenges, many of our Nations have already walked through, or are walking through, the "post-colonial door," are reconciling with the Crown, and are establishing strong and appropriate governance with their own institutions of governance and the range of powers they need to govern. While considerable work remains, we are well on our way to realizing our collective vision.

I hope the Governance Toolkit will be a practical and useful resource for your Nation during this exciting period of change and of Nation building and rebuilding. *Gilakas'la*.

Respectfully,
Puglaas (Jody Wilson-Raybould)
Regional Chief

PART 1 /// 2ND EDITION

The Governance Report

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The Governance Report

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Jody Wilson-Raybould is a descendant of the Musgamagw Tsawataineuk and Laich-Kwil-Tach peoples, which are part of the Kwakwaka'wakw, the Kwak'wala speaking peoples. She is a citizen and an elected councillor of the We Wai Kai Nation. Prior to being elected Regional Chief of the BC Assembly of First Nations in October 2009 and re-elected in 2012, Jody served as a BC Treaty Commissioner for six years and before that four years as a provincial crown prosecutor in Vancouver. She is a director of the First Nations Lands Advisory Board, and chair of the First Nations Finance Authority. Jody has a Bachelor of Laws from the University of British Columbia and a Bachelor of Arts in Political Science and History from the University of Victoria.

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About the BC Assembly of First Nations

The BC Assembly of First Nations ("BCAFN") is a provincial-territorial organization whose membership is made up of 203 First Nations in British Columbia. The BCAFN is one of the ten regional organizations affiliated with the national Assembly of First Nations (AFN) whose members include over 600 First Nations across Canada. The Regional Chief of the BC Region also serves as a member of the Executive of the AFN. The Regional Chief represents the regional concerns of the BCAFN constituents on the Executive Committee to ensure that regional perspectives are included in national political discussions and decision-making. The Regional Chief also holds specific portfolios that deal with national policy issues and concerns. The BCAFN is also an incorporated society under the BC *Society Act* (S-45919). This allows the BCAFN to operate with its own regionally specific mandates and to establish relationships with the Provincial government and other organizations, in addition to the relationship that the BCAFN holds with the AFN. The BCAFN operates to create linkages between the regional and national political processes to ensure that these activities are communicated and represented at a First Nation level.

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The British Columbia Assembly of First Nations, and our Board of Directors, would like to thank the many people and organizations that made invaluable contributions to *The Governance Report*. Specifically, we would like to recognize the BC First Nations leadership and citizens for your tireless work. We appreciate and acknowledge each of your efforts and commitment to our peoples during this period of transition and Nation building and rebuilding. While we have endeavoured to acknowledge every individual or organization that has contributed this work, we apologize for any person who has been inadvertently excluded. *Gilakas'la*.

Governance Report 2nd Edition (2014)

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First Nations Financial Management Board
First Nations Tax Commission
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FOREWORD TO THE SECOND EDITION FROM REGIONAL CHIEF JODY WILSON-RAYBOULD

Across Canada and particularly in British Columbia, our Nations are exercising their right to self-determination and accordingly are deciding to be self-governing. Our people are moving away from being governed over by the federal government under the *Indian Act* and taking back control of their lives under their own institutions and laws in accordance with evolving Indigenous legal traditions. The project of Nation building or rebuilding, and ongoing reconciliation with the federal and provincial governments as part of that project, is not simply some political or legal exercise backed up by an academic argument about rights and reclaiming power. Rather, it reflects a deep understanding among our leaders and our citizens that strong and appropriate governance is truly necessary if our Nations are to reach their full potential, our peoples' opportunities maximized and our collective future as Indigenous peoples within Confederation certain.

This is the second edition of *The Governance Report*. The report has been prepared by the BC Assembly of First Nations (BCAFN) as Part 1 of the three-part *BCAFN Governance Toolkit: A Guide to Nation Building* (the "Toolkit"). It is a companion document to *The Governance Self-Assessment* (Part 2 of the Toolkit) and *A Guide to Community Engagement: Navigating Our Way through the Post-Colonial Door* (Part 3 of the Toolkit). Based on the positive feedback we received on the first edition, we felt it was important to release a second edition as soon as possible, given the number of developments in First Nations governance reform since the first edition was published, including the implications of the first declaration of Aboriginal title in the *Tsilhqot'in* decision.

The report is intended as a reference tool that supports Part 2 and Part 3 of the Toolkit and is referred to throughout both of those parts. The report provides timely and essential information for anyone wanting to know more about what First Nations in BC are actually doing on the ground to support and create strong and appropriate governance. It will be of particular use to First Nations communities and community leaders in developing their Nations' own "critical paths" to implementing governance reform and re-establishing or establishing governance for their peoples and lands and, if necessary, engaging in reconciliation discussions with the Crown. This includes governance over lands that have been set aside as existing Indian reserves, treaty settlement lands and Aboriginal title lands, as well as ancestral lands that transcend all other categories of First Nation lands.

Governance has been defined as "establishing rules to coordinate our actions and achieve our goals." This report poses important questions and presents options: What are the rules needed to coordinate a Nation's priorities and achieve its goals? What are the institutions a First Nation requires to make these rules and then enforce them? The appropriate answers to these questions will, of course, depend on each First Nation's priorities and particular circumstances.

The report covers a range of options currently available to First Nations in undertaking or approaching governance reform. These options for moving beyond the *Indian Act* to re-establish strong and appropriate governance are the result of advances that our First Nations have made individually or collectively in the courts, through negotiations or by simply exercising their rights on the ground. This report would not have been possible 25 years ago, since many of the options discussed in it were not then available. The options, along what we call a "governance continuum," include governance reform under the *Indian Act*, reform as part of sectoral governance initiatives, and recognized governance reform through comprehensive governance arrangements made with the federal government and, where appropriate, the government of British Columbia. Other options for implementing First Nations governance beyond the *Indian Act* that are being contemplated or are under development are also addressed in the report.

Moving forward, it is essential that First Nations have governance choices, share information and build on the experience and work of other First Nations. It was our intention that the Toolkit should continue to be helpful in this regard. I hope that by assembling our Nations' governance stories all in one place, in a way that is both accessible and logically organized, the report will assist each of our First Nations in sorting through the governance options and, if they have not already done so, in developing their own "critical path" for moving beyond the *Indian Act* at their own pace and based on their own governance priorities.

The authors of the first edition of the report made three important assumptions that guided its drafting and tone. While these assumptions are still very much relevant for the second edition, they have been informed by political and legal developments since the first edition was released.

First, the report has been written from the perspective that First Nations have the right to self-determination and that in accordance with that right they may determine to be self-governing. This is a fundamental right among all Indigenous Peoples throughout the world and is recognized in the *United Nations Declaration on the Rights of Indigenous Peoples*, which was endorsed by the government of Canada on November 12, 2010. Moreover, the inherent right of self-government is an Aboriginal right that is recognized and affirmed by section 35 of the *Constitution Act, 1982*. Our peoples have fought hard for this right, and it continues to evolve.

Second, the report is written from the premise that the primary level of government for our peoples, and through which the "inherent" right of self-government is exercised, is the "Nation" — in other words, not necessarily the *Indian Act* band or existing tribal organizations and never regional (provincial) or national bodies. Moving forward, the structure and form of government for each Nation and the way a Nation might participate in institutions of governance beyond the Nation (e.g., though aggregation or confederation with other Nations, or participation in other institutions of contemporary governance) is determined by each Nation, as appropriate for that Nation.

For the most part, this report uses the term "Nation" interchangeably with "First Nation," but care should be taken to consider the appropriate political unit of governance in each situation, as well as the context in which the term is used. This is very important, particularly after *Tsilhqot'in*, because the right to self-determination and, by implication, self-government rests with the group of Aboriginal people that has Aboriginal title (the "proper title-holder") and with no other political entity. Further, the way in which the inherent right is being implemented is continually evolving.

Third, the report is written from the perspective that the primary relationship between First Nations and the Crown is through the federal government in light of section 91(24) of the *Constitution Act, 1867*, which assigns the federal government primary responsibility for "Indians, and Lands reserved for the Indians." Subject to any governance arrangements negotiated with the Crown, or a court ordering that the *Indian Act* or parts of it are unconstitutional for infringing on the inherent right of self-government, Canada governs "Lands reserved for Indians" and "Indians" through the *Indian Act* and other statutes and in doing so creates a "fiduciary" relationship with First Nations. This will only change if Canada, after considering our interests, has the political will to enact legislation to amend or repeal the *Indian Act* and alter its application to reserves and "Indians." It is important not to let the federal fiduciary responsibility become a barrier to progress, and it is important that we reconcile the fiduciary relationship with our Nation-building or rebuilding processes.

Since the first edition of the report, developments in the law have suggested that the strict constitutional division of powers between the federal and provincial governments may not be so hard and fast or important, and that indeed the provincial government may have equal, if not more, responsibility with respect to First Nations peoples and certainly with respect to governance matters beyond reserve lands and within the broader ancestral lands of a Nation. The evolving relationship between First Nations and the Crown (both federal and provincial) must be kept in mind as questions of multi-level governance are being answered and reconciled and as our Nations rebuild.

It is well established that good governance is a prerequisite of sustainable and long-term economic development. A key to success for both Canadian and American tribes has been effective self-government, according to the Harvard Project on American Indian Economic Development. However, despite the need for governance reform and past efforts to effect change, some First Nations and, indeed, some citizens are afraid of "self-government" and do not always support these efforts of self-determination. This barrier needs to be acknowledged, understood and ultimately overcome if new opportunities are to be realized.

To re-establish appropriate institutions of governance and exercise jurisdiction over its lands, resources and peoples through those institutions of government, every Nation will require an "exit strategy" for getting out from under the most debilitating aspects of the *Indian Act* and to reduce Canada's control over their people's lives. For all Nations that are ready and able to do so, it is necessary to have a plan for rebuilding their own governance structures from the community up, a plan that begins by empowering citizens. This is challenging work. It requires leadership as well as the dedication of resources and time to ensure that the reforms, including the new structures of government and the powers they exercise, are viable. In all of this, community support is vital. While Part 3 of the Toolkit considers how to address these challenges directly in community, this report provides the evidence that each Nation is not alone and that significant progress is being made along the governance continuum.

In many cases, reconciliation negotiations with the Crown, with either the federal government or the government of British Columbia, or both, will be necessary for moving forward. Simply navigating the bureaucracy and the evolving governance-related processes can be a significant part of the challenge. This report therefore considers the requirements of the various processes that have been established to facilitate moving out from under the *Indian Act* with respect to on-reserve governance and/or that consider governance with respect to ancestral lands. In some cases, processes are led, designed and mainly controlled by First Nations. In others, and depending on the scope and geographical application of the proposed governance arrangements, the process is managed by either Canada, through Aboriginal Affairs and Northern Development Canada, or the Province, through the Ministry of Aboriginal Relations and Reconciliation. In some cases, all parties to the negotiations jointly develop the processes with other bodies that have been established to assist.

Finally, the report attempts to identify policy gaps and issues that still need to be resolved between and among Canada, British Columbia and First Nations and, indeed, between and among our Nations. In other words, the report identifies where further work, both political and legal, needs to be done in order to establish the legal and political framework for implementing First Nations governance not just beyond the *Indian Act* and reserve governance, but within ancestral lands, including Aboriginal title lands.

We have come a long way. This journey is reflected in the fact that this report could not exist if the options for governance reform did not exist. However, we still have a lot of work to do to create the legal and political space within Canada to fully implement the inherent right of self-government and realize our collective vision, which is ultimately to make the lives of our people better. We are still very much in the early stages of re-establishing our contemporary institutions of governance and then determining the law-making powers of those institutions and the geographical scope of those powers. After all, there are only seven comprehensive governance arrangements in BC and there are many subject areas of governance for which no sectoral initiatives have been instituted. Much work remains to be done, but there are also opportunities that can be seized right now.

Puglaas (Jody Wilson-Raybould)
Regional Chief
BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS
October 29, 2014

USING THE REPORT

The Governance Report has been designed as a reference tool for navigating issues of governance in relation to Nation building and rebuilding and to be used as a companion document to Parts 2 and 3 of the BCAFN Toolkit. The report is divided into four sections.

Section 1 — Options for Governance Reform is in five chapters. The first chapter provides a brief history of First Nations governance within Canada. The next three chapters set out the broad options currently available for First Nations to exercise governance over their lands, waters and peoples. These are incremental jurisdiction under the *Indian Act*; sectoral governance initiatives; and comprehensive governance arrangements. Where appropriate, the options consider governance over "Lands reserved for Indians," treaty settlement lands, Aboriginal title lands or the broader ancestral lands. Consideration is also given to the exercise of self-government in the absence of agreement or recognition. Finally, we have also provided four useful reference maps showing First Nation language groups in BC, First Nations in BC, groups negotiating modern treaties under the BC treaty-making process, and self-governing First Nations across Canada.

Section 2 — Core Institutions of Governance is in four chapters, plus an Introduction, and considers the institutions that are central to governance, including the structures of a Nation's government, the governing body and the citizens. It also considers questions of legal capacity to govern, and the development of a Nation's constitution.

Section 3 — Powers (Jurisdictions) of the First Nation is the largest and most comprehensive section in the report and addresses the range of law-making powers (jurisdictions) by subject matter. This includes situations where First Nations governments are already exercising law-making powers or may be considering exercising law-making powers. The introduction to this section describes how we came to determine the title for each chapter and how a Nation might go about considering its powers. It also discusses issues concerning the relationship of laws between governments. While each chapter has been written so that it can be read independently of the rest of the report, we recommend that the introduction to this section be read first.

The 33 subject matters are arranged alphabetically and are tabbed for ease of reference. Each chapter has been structured in the same way, using the same main headings. Each chapter has a detailed table of contents that includes any sub-headings. The main headings are as follows:

- ***Background:*** Provides context and basic information for each subject matter, including the constitutional division of powers, a description of any relevant First Nation organization/institutions, the legal and political environment (including matters to consider in any negotiations with the Crown), and any geographical considerations (e.g., on- or off-reserve) and so on. The background in some of the chapters may be substantially longer than in others, given the complexity of the subject matter and the issue involved.

- **Indian Act *Governance:*** Considers "*Indian Act* options" for incremental governance for the subject matter. In some cases, there are no options under the *Indian Act*.

- ***Sectoral Governance Initiatives:*** Considers the subject matter from the perspective of sectoral governance initiatives that First Nations are involved in or are developing. In some chapters, consideration is also given to other initiatives that do not strictly involve the exercise of law-making powers but that are sectoral in nature and relate to activities that in time may have jurisdictional implications. Sectoral governance options are considered in the context of governance over both reserve lands as well as with respect to ancestral lands.

- ***Comprehensive Governance Arrangements:*** Discusses how the subject matter has been addressed in comprehensive governance arrangements and how self-governing Nations are governing. Comprehensive governance arrangements in BC (both inside and outside of modern treaty-making) are examined, namely those of Sechelt, Westbank, Nisga'a, Tsawwassen and Maa-nulth. We have also included the Yale and Tla'amin final agreements, both of which at the time of writing had been ratified but not yet implemented.

- ***Tables:*** Provide pertinent information specific to the subject matter. The first table of each chapter describes the treatment of the subject matter in each of the comprehensive governance arrangements, setting out the provisions in the arrangements that address the particular subject matter. This table also considers the priority of laws. The second table provides information about which First Nations have exercised jurisdiction over the subject matter. It shows which BC First Nations have made laws or bylaws under the *Indian Act* or through sectoral governance initiatives or comprehensive governance arrangements. This table is quite long, given the number of laws/bylaws BC First Nations have made. While we have endeavoured to be as accurate as possible in compiling this table, this information should not be considered definitive and does not constitute a "gazette." Finally, we have sometimes included other tables that provide information concerning related activities referred to in the chapter or that we have found to be relevant to the discussion of the subject matter.

- ***Resources:*** A list of additional resources available to assist First Nations in considering the subject matter further. These are generally divided into three categories: First Nations, provincial and federal. We include addresses of governmental and non-governmental bodies/institutions and associations, along with links to sources of information that readers can access online. Where applicable, each chapter contains citations of federal and/or provincial legislation and court decisions that are relevant to the subject matter.

Section 4 – Financing First Nations Governance considers one of the most challenging aspects of rebuilding First Nations governance — namely, the fiscal relationship with the Crown. This section looks at how to calculate the cost of governance, how it will be paid for, and the need to expand revenue options. It looks at the sources of revenues that First Nations have available and broader questions concerning fiscal relations with Canada and British Columbia, including the treatment of own-source revenues in transfer calculations. The section is divided into four chapters and an introduction.

Much has been written on First Nations governance, and numerous resources on the subject are available. The analysis in this report is drawn from the significant personal experience of the many contributors. In addition, it relies on and provides links to many primary and secondary sources of information, including agreements, laws, reports and studies, as well as to websites and other locations where additional information referred to in the report can be found. In each area of jurisdiction, the report identifies work that is underway or that is needed with Canada and, in some cases, British Columbia, to create an environment for the recognition and implementation of First Nations' jurisdiction. These can be of use to a First Nation on its journey of Nation building or rebuilding. Most of the documents referred to in the report, or links to websites where they can be found, can be accessed through the BCAFN website (www.bcafn.ca/toolkit), which houses a link to an electronic version of this report.

While there may be similarities between First Nations, it is assumed that each First Nation, either individually or in groups, will develop its own form of governance and will assume powers (jurisdiction) appropriate to its needs. The authors of the report were especially mindful that while a number of approaches to addressing governance reform are discussed, in rebuilding appropriate and strong governance, by whatever process, each First Nation will need to consider its own circumstances

and needs, including decision-making systems that reflect its unique culture and traditions, and not simply look to precedents in one Nation as being necessarily relevant to their own. The specific form of governance and governance arrangements that a First Nation adopts will reflect this diversity and the Nation's needs.

Finally, as First Nations governance evolves and new options are developed or existing options are refined, it is important for those involved in governance reform to remain up to date. Accordingly, the BCAFN hopes to regularly update the report to ensure that it remains a timely and useful resource supporting First Nations governance work.

Please note that this report is not a substitute for legal or other professional advice. Seek specific legal or other advice as appropriate. While every effort has been made to ensure the accuracy of the information contained in this report, where legal advice is required, based on specific circumstances and needs, users should consult legal counsel.

Finally, if you come across information in the report that is not accurate or that could be clarified, or if you have material to add, please contact the BCAFN and we will endeavour to include the revisions in our online version or in future published editions.

PART 1 /// SECTION 1

Options for Governance Reform

1.0

OPTIONS FOR GOVERNANCE REFORM

1.1

A BRIEF HISTORY OF EVOLVING FIRST NATIONS GOVERNANCE WITHIN CANADA

INTRODUCTION

The history of Indigenous peoples' governance since the colonization of what is now Canada has been the subject of much debate, discussion and consideration over the years, and has been recorded from varying perspectives in numerous studies, reports, commissions of inquiry, articles and books. In fact, questions about Aboriginal governance are among the most studied public policy issues in Canada. In addition, the place of Indigenous peoples' polities within modern Canada and the source, scope and extent of Indigenous peoples' jurisdiction have been ongoing topics of often protracted and controversial negotiations between the Aboriginal people of Canada (Indian, Metis and Inuit) and the Crown for more than 40 years. These matters have also been and continue to be considered by the domestic courts here in Canada as well as internationally.

Inherent Right to Govern

First Nations have a right to self-determination, including the inherent right of self-government, and all governance reform should be based on this premise. The right to self-government is an Aboriginal right that is recognized and affirmed by section 35 of the *Constitution Act, 1982*. It has been hard fought for by our peoples and is still evolving its expression in modern times.

Today, thankfully, the discussion on the scope and extent of Aboriginal governance has shifted from basic legal questions about whether Aboriginal peoples actually have an inherent right of self-government within Canada to what forms that self-government should take, what powers those governments should exercise, and the relationship between those governments and other governments within federalism. With respect to "Indians" and "First Nations," in order to appreciate where the Nations are now in terms of self-government, it is necessary to understand the history of how governance has evolved. The following brief summary and overview of the major developments on this journey sets the context for *The Governance Report*, and is not intended to be exhaustive or comprehensive; there are plenty of other more detailed publications. Rather, it highlights the key work, events and milestones that have led us to this point and provides some directions (new mechanisms) that might be considered moving forward. All of this is further discussed and elaborated on throughout the report.

DIFFERING LEGAL TRADITIONS

Indigenous Legal Traditions

Any discussion of Aboriginal self-determination, including the right of self-government, must begin with an appreciation of the fact that Indigenous people had and still have their own legal traditions, in the same way that all other peoples of the world have theirs. Prior to colonization, Indigenous Nations were self-governing within their ancestral lands, and Indigenous laws, reflecting Indigenous legal traditions, applied to these lands and the people living on or moving across them.

"Indigenous Legal Traditions have a long rich history in North America, stretching back hundreds if not thousands of years. Living together in societies long before the arrival of the first Europeans, Aboriginal peoples developed complex systems of laws based on social, spiritual and political values expressed through the teachings of knowledgeable and respected individuals and leaders. Enunciated in rich stories, ceremonies, and traditions within Native communities, Indigenous legal system represent the accumulated wisdom and experience of Aboriginal peoples."

Indigenous Legal Traditions, Law Commission of Canada, 2007

Academics and legal scholars have considered what Indigenous law and Indigenous legal traditions mean both historically and today. Anthropologists have described Indigenous legal systems within the context of understanding the social orders that created them, while legal scholars have reflected on the source and scope of Indigenous legal traditions (e.g., sacred law, natural law, deliberative law, positivistic law and customary law) and considered their place within the legal pluralism and multi-juridical legal culture that exists in Canada today. There are, in fact, as many Indigenous legal traditions as there are Indigenous peoples. While there may be commonality in some traditions across Nations, they are by no means the same. In fact, many are very different. For example, in the Indigenous legal traditions of one society, the descent of property (e.g., names, songs, lands) may be matrilineal (along the maternal line), while in others it is patrilineal (along the paternal line). In still others it may not matter at all, because of different legal conceptions about what constitutes "property" and "descent."

It should be noted that the courts in Canada, in considering whether a Nation can prove Aboriginal title, look to pre-existing legal traditions and a Nation's laws as a means for determining factually whether a Nation "occupied" certain territories or enjoys other Aboriginal rights, including the right of self-government (e.g., to make laws in a particular subject matter). The courts have said that "the question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective, and that the Aboriginal perspective focuses on the laws, practices, customs and traditions of the group" (*Delgamuukw*).

Of course, Indigenous legal traditions are much more than simply "evidence" for Aboriginal title and rights cases or speaking to the way Indigenous peoples might have historically organized and controlled land prior to the assertion of Crown sovereignty. Rather, they inform how Indigenous societies are organized today in the wake of other legal traditions that may have been imposed. And it is during this period of transition, as First Nations deconstruct their colonial past, that they are increasingly looking to their own Indigenous legal traditions and laws as a basis for moving forward.

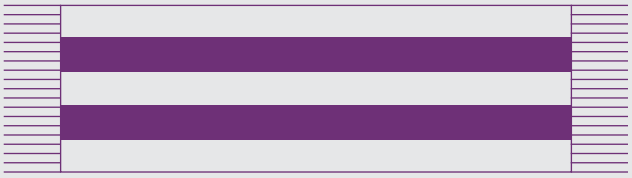
The Impact of Western Legal Traditions

With the coming of the European settlers, new legal traditions were imposed, at times at odds with the Indigenous Nations' pre-existing legal traditions. When the earliest of the newcomers arrived in what is now Canada, they brought with them their own legal traditions and proceeded to colonize in accordance with those traditions. At the same time, they did recognize that the people they encountered had their own and very different rules and laws. This fact was very obvious to all in the early period of contact, and was reflected in some of the earliest treaties between the newcomers and the Indigenous peoples of the Americas, as symbolized by the Two-Row Wampum. However, this situation did not last, and over time Western legal traditions, new laws and the dominance of the settler society gradually overpowered self-government of Aboriginal peoples and, in fact, went as far as to make Indigenous peoples essentially wards of the new state of Canada — a far cry from their initially being recognized, in accordance with Western legal traditions, as sovereign "tribes or nations" of Indians.

The Two-Row Wampum

In some cases, the symbolic expression of treaty-making is reflected in the wampum belt. Wampum is made of white and purple seashells from the Atlantic that are woven into belts. Particular patterns symbolize events, alliances and people. Wampum was used to form relationships, propose marriage, atone for murder or even ransom captives.

Before Confederation, some Nations indicated their assent to treaty by presenting wampum to officials of the Crown. The Two-Row Wampum Belt of the Iroquois symbolizes an agreement of mutual respect and peace between the Iroquois and European newcomers. One row represents the river carrying the laws, customs and traditions of the newcomers in their boat and the other a river carrying the laws, customs and traditions of the Iroquois in their canoe. While the two rivers flow side by side, they shall never cross.



The principles embodied in the belt are essentially a set of rules governing the behaviour of the two groups. The wampum belt tells us that neither group will force their laws, traditions, customs or language on each other, but will coexist peacefully.

By the end of the 19th century, with the increasing European settlement, the situation was changing very quickly in what had become the province of British Columbia in 1871. In most of Canada, by the end of the 19th century, treaties had already been or were being entered into. With few exceptions, this was not to be the case in BC. Nevertheless, "Indians" were moved onto reserves and governed thereafter, for the most part, by Canada under a system of government and administration that has been described as "institutionalized wardship," established and perpetuated under various federal statutes culminating in the *Indian Act* (R.S.C. 1985, c. I-5).

THE COLONIAL LEGACY

The *Indian Act*: A Tool for Assimilation

The *Indian Act*, with its 122 sections, was drafted as a means for the federal government to administer "Indians" and "Lands reserved for the Indians" under the federal power of section 91(24) of the *Constitution Act, 1867*. While it may have been used initially to implement treaties, it was never about self-government or encouraging self-government. On the contrary, this administrative system was only expected to continue until such time as there was full integration of persons defined as "Indians" into the society of the newcomers, at which point they would no longer be "Indians" — in short, until assimilation. This approach included the assumption that with time the limited tracts of land that had been unilaterally set aside as reserves would be surrendered by the Indians themselves or would otherwise no longer be required to be set aside because there were no more *Indian Act* "Indians" left to use it. Canada established a department to govern reserve lands and Indians. It has gone by different names over the years and today is called Aboriginal Affairs and Northern Development Canada (AANDC).

From its inception, the *Indian Act* was intended to apply almost exclusively to governing on-reserve activities — by both "bands" and "Indians" — and as such perpetuated the concept of on-reserve Indians as wards of the state and not living, using or occupying their ancestral lands. Under the *Indian Act*, the accountability linkage between First Nations people and their governments was broken, as decision-making powers rested with Canada and the limited institutions of local governance under the *Indian Act* are more answerable to Canada and specifically to the department responsible for the act, now AANDC. Further, as the *Indian Act* does not contemplate First Nations governance off-reserve, but rather is the imposition of governance over First Nations peoples on-reserve, it has also had a lasting and significant impact on First Nations peoples' relationship to and governance of their traditional territories. Clearly, the *Indian Act* was designed to eliminate, not promote, Indigenous systems of governance, even if amendments to the act in 1951 and 1988 did provide some increased local First Nation control. While today the *Indian Act* does provide for the election of local chiefs and councils and the passage of bylaws of a local nature (albeit with federal oversight), it is clearly not an appropriate vehicle for governance in the modern era for First Nation peoples, or, for that matter, for any people. If this law applied to other Canadians, they would not accept it — and neither should First Nations.

While few First Nations leaders would praise what the *Indian Act* represents in subjugating First Nations people, many people remain uncomfortable with simply repealing it. Some First Nations people, ironically and somewhat perversely, feel that the dysfunctional relationship with Canada has become a "modern" tradition to be preserved and protected. Part of the reason for this is that the *Indian Act* is now associated with "federally guaranteed benefits" or statutory rights, on which some people have become dependent as wards. Therefore, on the one hand the *Indian Act* establishes certain rights and federal responsibilities toward "Indians," but on the other it denies First Nations their right to exist as self-determining peoples and in the process makes them dependent on the state. While leaders often talk about getting rid of the *Indian Act*, and many First Nations are making progress in doing so, in reality many reserve-based communities rely on the federal programs and services provided under it merely to survive. This is why the act is one of the most pernicious mechanisms of social control in Canada today, but also one of the hardest to get rid of. *A Guide to Community Engagement: Navigating Our Way through the Post-Colonial Door* (Part 3 of The Governance Toolkit) discusses the current *Indian Act* reality; Section 1.0 — Social Change and Governance Reform — Moving Towards the Door explores in more depth facts about the status quo and debunks the myths of the *Indian Act* reality.

Getting Beyond the *Indian Act*

In 1969, Canada considered abolishing the *Indian Act* in a proposal set out in the "Statement of the Government of Canada on Indian Policy" (The White Paper, 1969). Contrary to First Nations'

expectation of governance, the proposal was to assimilate First Nations people into the Canadian population with the same status as other ethnic minorities, rather than as distinct groups. The White Paper had no proposal for replacing or transitioning out of the *Indian Act* and no recognition of the right to self-determination, including the right of self-government.

Douglas Treaties

Between 1850 and 1854, James Douglas, as chief factor of Fort Victoria and governor of the colony, entered into 14 land purchases with the Indigenous peoples living on what is now Vancouver Island. The "Douglas Treaties" cover approximately 358 square miles of land around Victoria, Saanich, Sooke, Nanaimo and Port Hardy.

What will replace the *Indian Act* is still a very real question today for those who live under it and as First Nations peoples rebuild their Nations based on principles of self-determination. It is important to recognize that First Nations are starting at a disadvantage and that they will have to continue to dig themselves out of the deep hole of the colonial legacy. As First Nations continue to find ways to empower themselves to undertake this difficult work, they will need to be self-reflective, not blame themselves for their predicament, and always look for ways to move forward.

The unsuitability of the *Indian Act* as a tool for effective governance, combined with the movement to recognize Aboriginal and treaty rights, has led First Nations in British Columbia to become increasingly active in negotiating and establishing new governance arrangements. As a consequence, and, often working in co-operation with other Nations across Canada, there are now a number of options for governance reform that can be viewed along a "governance continuum," moving away from administration under the *Indian Act* towards full self-government and the contemporary expression of Indigenous legal traditions within Canada. In some cases, these options have been developed and negotiated with Canada, and in some cases with the provinces, and others are being developed or contemplated. In some cases, these options apply only to reserve lands, while others apply more broadly. The development of these options can be better understood in the context of how the concept of self-government is evolving and continues to evolve within Canada.

SELF-GOVERNMENT IN MODERN TIMES

A brief historical analysis of the evolution of Aboriginal governance and governance negotiations in Canada generally, and in British Columbia specifically, shows that they have taken place simultaneously at several levels, including the community level. First, there is the national political level, involving constitutional talks and the creation of national policies to negotiate and implement self-government. There have also been significant advances in recognition of self-government through the courts, the Royal Commission on Aboriginal Peoples, and parliamentary committee reports. At the provincial level, there have been efforts to

address the "land question" and regional governance initiatives. Finally, at the community level there have been negotiations leading to specific governance arrangements (some implemented and some awaiting ratification votes), reflecting several different models for implementing First Nations governance. Politically, while the governments of both Canada and British Columbia now recognize self-government as an Aboriginal right, translating political support into legal recognition with appropriate transition from the status quo under the *Indian Act* and over ancestral lands (not just reserve lands) remains a challenge.

Final Report of the Royal Commission on Aboriginal Peoples

In November 1996, the *Final Report of the Royal Commission on Aboriginal Peoples* (RCAP) was published, bringing together six years of research and public consultation on Aboriginal issues in Canada. The Final Report, Volume 2, *Restructuring the Relationship*, Part 1, Chapter 3, "Governance" concerned itself specifically with Aboriginal governance and self-government. In this chapter, the commission considered how Aboriginal, federal and provincial orders of government might evolve in the future, including what forms Aboriginal governments might take and how their development could best be supported by Crown governments. The report concluded, among other things, that "the right of self-determination is vested in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis peoples… By virtue of this right, Aboriginal peoples are entitled to negotiate freely the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs."

The full text of this chapter and the extensive RCAP Report conclusions, as well as the resultant recommendations is available through the government of Canada's online archives at www.collectionscanada.gc.ca.

Constitution Act, 1982 **and Section 35**

Rights of the Aboriginal Peoples of Canada

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

Constitution Act, 1982

In 1982, Canada's new constitution was passed. As a result of extensive lobbying by Aboriginal peoples, it included section 35 as Schedule B to the act, which explicitly recognizes and affirms Aboriginal and treaty rights. During the 1980s, four constitutional conferences involving Canada, the provinces and national Aboriginal organizations were held in an attempt to provide further specifics on the scope of these rights, and there was a particular focus on governance. With the exception of the 1983 conference, which led to the addition of section 35(3) deeming rights in land claims agreements to be treaty rights, these conferences were ultimately unsuccessful, and no further progress was made in defining governance rights for inclusion in section 35.

The Harvard Project on American Indian Economic Development

The necessity for good governance appears to be as true for indigenous nations as it is for others. They, too, benefit from good governance and suffer from its absence. The most comprehensive data on this point comes from work carried out by the Harvard Project on American Indian Economic Development at Harvard University and its sister organization, the Native Nations Institute for Leadership, Management, and Policy at The University of Arizona. Beginning in the late 1980s, Harvard Project researchers set out to determine the necessary conditions for successful economic development among indigenous nations in the United States. The research was driven by the apparent divergence in development fortunes among American Indian nations. Some of those nations were significantly more successful than others at building sustainable economies. Harvard Project researchers wanted to know why.

The answers were intriguing. It turned out that the most reliable predictors of development success on American Indian reservations were not the obvious factors such as natural resource endowments or education or access to capital — although these certainly were helpful. The keys were political, having to do with the powers, organization, and quality of government. Three factors in particular were crucial: ***practical sovereignty*** (real decision-making power in the hands of indigenous nations), ***capable governing institutions*** (an institutional environment that encourages tribal citizens and others to invest time, ideas, energy, and money in the nation's future), and ***cultural match*** (a fit between those governing institutions and indigenous political culture—in short, the institutions had to match indigenous ideas about how authority should be organized and exercised; otherwise, it would lack legitimacy with the people being governed and would lose their trust and allegiance).

Two other factors also played a part in development success: ***a strategic orientation*** (an ability to think, plan, and act in ways that support a long-term vision of the nation's future) and leadership (some set of persons who consistently act in the nation's interest instead of their own and can persuade others to do likewise). Briefly put, the research concluded that, other things being equal, those nations that had taken control of their own affairs and had backed up that control with capable, culturally appropriate, and effective governing institutions did significantly better economically than those that had not. In short, self-governance matters for indigenous peoples as much as it does for others. They have to govern themselves, but they also have to do it well.

Cornell, Curtis, and Jorgensen (2003), *The Concept of Governance and Its Implications for First Nations*, p. 7.

Community-Based Self-Government Negotiations

Despite the inability of the constitutional conferences of the 1980 to further set out the scope and extent of the inherent right of self-government of Aboriginal peoples, the Progressive Conservative government of Brian Mulroney introduced the Community-Based Self-Government (CBSG) policy in April 1986. This policy provided a negotiating forum for First Nations to gain recognition of governance rights and enhanced jurisdiction. More than 100 First Nations initially explored options through this policy for governance outside of the *Indian Act*. By the time the Liberals came into office in 1993, there were approximately 15 communities still actively negotiating "self-government" under CBSG, but no agreements were reached.

Treaty 8

On June 21, 1899, the eighth treaty between First Nations of Northern Alberta, Northwestern Saskatchewan, the Southwest portion of the Northwest Territories, and the Queen of England was signed. It was later followed by Adhesions in the Northeastern portion of British Columbia. This treaty was based upon principles of law, respect, honesty and acceptance, as told by the elders past. Treaty No. 8, encompassing a landmass of approximately 840,000 kilometres, is home to 39 First Nations communities (including eight BC First Nations).

The Charlottetown Accord

The constitutional process culminating in the 1992 Charlottetown Accord tried again to clarify Aboriginal governance rights. This time there was agreement among Aboriginal leaders and the federal and provincial governments on the inclusion in the Constitution of Aboriginal self-governance rights. The rights would have been recognized and, following a period to negotiate their implementation, become "justiciable" in court. Unfortunately, Canadians, including many First Nations people, rejected the Charlottetown Accord in the ensuing referendum.

Canada's Inherent Right Policy

The Liberal Party came to power soon thereafter, pledging a new approach to self-government recognition. Negotiations under the CBSG policy were essentially put on hold, pending development of the Liberal's new policy, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Inherent Right Policy), which came into effect in 1995. This policy still guides Canada in self-government negotiations and is discussed at length in Section 1.4 — Comprehensive Governance Arrangements.

Judicial Recognition

Since the 1982 constitutional provisions recognizing existing Aboriginal and treaty rights were passed, there have been a number of court cases that provide some clarity on the governance rights recognized by section 35. There is now judicial support for the view that self-government is an Aboriginal right, although the extent of the right is unclear, in particular what powers or jurisdictions are included in it. Where governance has been negotiated in the context of modern treaties, the courts have found that these provisions are constitutionally valid (see *Campbell et al. v. AGBC/AG Canada and Nisga'a Nation et al*., 2000 BCSC 1123). Where the courts have considered issues of Aboriginal title and associated rights, decisions have been consistent with the view that self-government is an Aboriginal right, but again have been inconclusive as to the extent and scope of the rights (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010). Most recently, and as discussed in some detail below, while the Tsilhqot'in decision granting the first declaration of Aboriginal title court has provided some guidance on governance the direction is not definitive (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44). Other cases support aspects of the right, such as with respect to elections (see *Bone v. Sioux Valley Indian Band No. 290*, [1996] 3 C.N.L.R. 54; [1996], 107 F.T.R. 133 [F.C.T.D.]). In some cases, the court has found that a specific right of self-government was not proven given the evidence before it, such as regulating high-stakes bingo (*R. v. Pamajewon*, [1996] 2 S.C.R. 821).

Recognition through Commissions of Inquiry and Other Studies and Reports

A number of commissions, inquiries and studies have recommended removing the *Indian Act* in favour of empowering reconstituted self-governing Indigenous Nations within Canada. These include

the *Report of the Royal Commission on Aboriginal Peoples* (1996); the Penner Report, *Indian Self-Government in Canada: Report of the Special Committee* (House of Commons, Special Committee on Indian Self-Government, 1983); the report of the Senate Standing Committee on Aboriginal Peoples, *Forging New Relationships: Aboriginal Governance in Canada* (2000); and *A First Nations — Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments* (2005). All support recognition of the inherent right of self-government as an Aboriginal right.

Self-Determination and Aboriginal Nations
Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination…For an Aboriginal nation to hold the right of self-determination, it does not have to be recognized as such by the federal government or by provincial governments. Nevertheless, as a practical matter, unless other Canadian governments are prepared to acknowledge the existence of Aboriginal nations and to negotiate with them, such nations may find it difficult to exercise their rights effectively. Therefore, in practice there is a need for the federal and provincial governments actively to acknowledge the existence of the various Aboriginal nations in Canada and to engage in serious negotiations designed to implement their rights of self-determination.
Royal Commission on Aboriginal Peoples, Final Report, Volume 2, *Restructuring the Relationship*, Part 1, Chapter 3, "Governance," [Section 2.2 Self-Determination]

International Recognition

In addition to the work undertaken domestically regarding the right to self-determination, including the right of self-government, a parallel and influential discussion has been taking place internationally through the United Nations. Discussions among Indigenous peoples to establish a UN Permanent Forum of Indigenous Peoples began in the 1980s. The United Nations established a working group on Indigenous Peoples, which led to the establishment of the Permanent Forum by the United Nations Economic and Social Council on July 28, 2000. On September 13, 2007, the United Nations General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples*, the result of more than 25 years of work. Support for the Declaration was given by 144 states, who voted in favour of it. On November 12, 2010, Canada, one of the last holdouts, along with the United States, formally endorsed the Declaration. Article 3 of the Declaration states that Indigenous Peoples have the right to self-determination, and Article 4 states that in exercising the right to self-determination Indigenous Peoples have a right to autonomy or self-government. Broadly speaking, the Declaration establishes minimum standards for the "survival, dignity, and well-being of Indigenous peoples of the world." While the Declaration speaks of the right to self-determination, including the right to determine to be self-governing, it in no way diminishes or impairs the rights of states or their sovereignty, including their territorial integrity.

BC's leaders played a pivotal role in developing the Declaration and working with Indigenous people and other supporters around the globe. This monumental international work has been proceeding in parallel with efforts domestically, and specifically in BC, to advance rights of governance through the courts, in negotiations, and simply by implementing rights on the ground.

In addition to the UN Declaration, the International Labour Organization's (ILO) Convention 169, *Indigenous and Tribal Peoples Convention, 1989*, is a legally binding international instrument open to ratification, which deals specifically with the rights of Indigenous and tribal peoples. Today, the convention has been ratified and is in force in 22 countries, though Canada is not among them. Once a country ratifies the Convention, it has one year to align legislation, policies and programs to the Convention before it becomes legally binding. ILO Convention 169 recognizes that Indigenous and tribal peoples' cultures and identities form an integral part of their lives and that their ways of life, customs and traditions, institutions, customary laws, forms of land use and forms of social organization are usually different from those of the dominant population. The Convention recognizes these differences, and aims to ensure that they are protected and taken into account when any measures are being undertaken that are likely to have an impact on these peoples.

United Nations Declaration on the Rights of Indigenous Peoples

On September 13, 2007, the United Nations General Assembly adopted by resolution 61/295 the *United Nations Declaration on the Rights of Indigenous Peoples*, the result of more than 25 years of work. On November 12, 2010, Canada, one of the last holdouts, along with the United States, formally endorsed the declaration. The Declaration and its 46 Articles establishes minimum standards required for the "survival, dignity, and well-being of indigenous peoples of the world."

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 3: UN Declaration

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 4: UN Declaration

International Labor Organization Convention No. 169: *Indigenous and Tribal Peoples Convention, 1989*

In 1989, well before the UN passed its Declaration on the Rights of Indigenous People, the International Labor Organization (ILO) took the step of adopting Convention 169, outlining its support for indigenous people, their culture and traditions, forms of justice and government, and so on.

Article 6 deals with indigenous government and governance institutions:

1. In applying the provisions of this Convention, governments shall:
    - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
    - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
    - (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Attempts at Federal Legislative Reform

Over the years, particularly in recent years, there have been numerous attempts to reform First Nations governance through federal legislation. Some of these efforts have been successful and some have not. When looking at legislative change, it is therefore important to consider the type of legislation, the intention of the government in making it and the stated purposes of the legislation. It is also important to distinguish between legislative reform initiated and supported by First Nations and reform undertaken unilaterally by Canada.

In recent years, what some First Nation leaders have called a "neo-colonial" approach to First Nations governance has been evident through Canada's federal legislative agenda that more often than not is contrary to First Nations' requirements or wishes. In particular, the federal government–led legislative initiatives have sought to "tinker" with the *Indian Act*, but have not necessarily been conducive to substantive change, nor supportive of or consistent with the ongoing governance reform and Nation-rebuilding activities that First Nations have proposed or are presently undertaking. Often, and somewhat ironically, federal government–led legislative initiatives do not reflect or support other work currently being undertaken with First Nations. In such cases, the legislative and policy objectives are not coordinated with other activities and may even contradict these activities. Examples of this type of federal government–led legislation are the *First Nations Financial Transparency Act*, *Safe Drinking Water for First Nations Act*, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* and the *First Nations Control of First Nations Education Act* (introduced but not law as of October 2014). Typically these legislative initiatives have resulted in legislation being introduced, enacted and coming into force without first listening to First Nations perspectives and then properly taking them into account and actually acting upon them. While the intention arguably may be good, the execution is often lacking, given the complexities of the issues and their connectedness, and the degree of policy work necessary when developing legislation. As such, it is unlikely that these legislative initiatives will meet their intended purpose. While they create the impression that progress is being made, in the opinion of many these initiatives do not substantively advance the needs and interests of Canada's First Nations peoples to be self-governing and move out from under the *Indian Act*. Moreover, they take attention away from the work that needs to be undertaken, and use limited federal and First Nation resources — people, time, energy and money that would better be directed to more substantive work to advance reconciliation and rebuilding of First Nations governance.

In June 1984, shortly after the failure of the second of four rounds (1983, 1984, 1985 and 1987) of constitutional conferences to consider self-government, the Liberal government, led by Minister

of Indian and Northern Development, the Honourable John Munro, introduced Bill C-52, *An Act Relating to Self-Government for Indian Nations*. The bill died on the order paper before being fully debated. When the government changed shortly thereafter, the bill was never reintroduced.

One of the most significant and controversial federal legislative initiatives was the proposed *First Nations Governance Act* (Bill C-7, An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts, 2nd Sess, 37th Parl, 2002). This initiative of the Liberal government under Minister Robert Nault, with the policy work led primarily by Indian and Northern Affairs Canada (then INAC, now AANDC), was ultimately rejected by First Nations and not pursued by the government. Most First Nations that rejected the bill did so not because they had any fundamental disagreement with the notion that the *Indian Act* needed to be replaced, but because they believed that the structure of governance proposed under the bill was too prescriptive and not appropriate, and the range of subject matters over which Nations could exercise law-making authority was too narrow. Many First Nations also took issue with the fact that proposals were not optional and did not properly describe the source of the authority to govern. Interestingly, at the same time as the *First Nations Governance Act* was being debated, the Senate was also considering a bill on First Nations governance. The bill had already gone through (and would subsequently go through) a number of iterations in different parliaments, but was never enacted.

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

Article 37: UN Declaration

The most recent bill proposed by the Senate on First Nations governance reform was Bill S-212, *An Act providing for the recognition of self-governing First Nations of Canada* (2012). This bill was the latest in a series championed by Aboriginal members of the Senate, but there was more widespread non-partisan support in the Senate for the bill than from others. Bill S-212 had been developed in partnership with the BCAFN under the direction of the Chiefs-in-Assembly and through the offices of the Regional Chief. The approach set out in the bill provided that a Nation, at its option, would develop its own self-government proposal, including its constitution. Once this had been approved by its citizens, the Nation would be recognized as self-governing by Canada, and the governing body would be empowered to govern over a range of subject matters set out in the bill. This process would not require substantial negotiations with Canada. (This initiative is discussed further in Section 1.4 — Comprehensive Governance Arrangements and briefly below, in "Developing New Mechanisms to Support Governance Reform.") An earlier but substantially different version of the bill was introduced in 1995 as Bill S-10 (Bill S-10, *An Act providing for self-government by the First Nations of Canada*, 1st Sess, 35th Parl, 1995). Bill S-10 was in large part a response to the experiences of Sawridge (Alberta), the community of the late Senator Walter Twinn, which was unable to conclude a self-government agreement with Canada under the CBSG process. Bill S-10 was later followed by Bill S-216, *An Act providing for the Crown's recognition of self-governing First Nations of Canada*, in the 39th Parliament.

Sectoral Governance Initiatives

In addition to the legislated attempts at more comprehensive governance reform, there are a number of examples of successful sectoral governance initiatives addressing aspects of First Nations governance, usually with respect to a particular subject area or jurisdiction that required federal legislation. These have been for the most part First Nations–led. They are discussed in more detail in Section 1.3 — Sectoral Governance Initiatives and are more thoroughly considered as options for governance reform on a subject-by-subject basis in Section 3. It is expected that there will be other sectoral initiatives, particularly if comprehensive reform is not forthcoming.

BC Treaty Negotiations

In British Columbia, where historically there were limited or no treaties, there remains much unfinished business respecting Aboriginal title. Significant progress was made in advancing First Nations governance in the wake of the Oka crisis in Quebec in 1990, as the Charlottetown process was unfolding,

while Canada was developing its inherent right of self-government policy, and with the emergence of a special "made in BC" process to settle the outstanding "land question." The joint federal, provincial and First Nations *British Columbia Claims Task Force Report* (1991) set out a new process to negotiate modern treaties under the auspices of a to-be-created British Columbia Treaty Commission (BCTC). The BCTC has been up and running since 1993. Four treaties (Maa-nulth, Tsawwassen, Yale and Tla'amin) have been completed and there are 40 active negotiating tables involving 73 First Nations (or *Indian Act* Bands). Some First Nations choose to organize at the tribal council or other level. Negotiating comprehensive governance as part of a modern treaty-making process is discussed in more detail in Section 1.4 — Comprehensive Governance Arrangements.)

While modern treaty-making is, at its core, about land rights and questions of unextinguished Aboriginal title, governance is a subject matter for negotiation in the modern treaties being negotiated under this process —with respect to both on-reserve and additional lands that may be recognized as settlement lands as a result of a treaty. The complexity of deconstructing governance on-reserve and the application of the *Indian Act* in the context of settling a modern treaty has proven very difficult, and there are many inconsistencies in federal approaches to self-government, depending on whether or not the negotiations are taking place as part of modern treaty-making. This is tied in many respects to whether or not the self-government provisions are constitutionally protected and where the Crown has different policy objectives in treaty-making, making movement along the governance continuum more complicated. Policy inconsistencies are addressed in this report.

Self-Government Agreements

Negotiations in BC between First Nations and the Crown with respect to reaching agreements on self-government have been conducted either on a bilateral basis with Canada under the CBSG process and its successor, the federal Inherent Right Policy, and restricted to reserve lands, or on a tripartite basis involving First Nations, Canada and British Columbia as part of a treaty-making process that addresses both reserve lands and treaty settlement lands. Canada's preference is to negotiate self-government only as part of the BC treaty process, although in some circumstances it has indicated that it is prepared to negotiate governance outside of treaty-making. In all cases, the subject matter of governance negotiations has involved determining the type of government structure a First Nation will adopt or continue with, its institutions, the powers of the government (sometimes referred to as jurisdiction or authority), the application of federal or provincial laws, and the ongoing intergovernmental relationship between the modern First Nation government and other governments in Canada (including other First Nation governments). Governance provisions in these negotiated agreements also set out which laws have priority in each of the areas of jurisdiction when First Nation and federal or provincial laws conflict.

Seven comprehensive governance arrangements have been negotiated and are being implemented in BC (all of these arrangements are considered in detail throughout this report):

- *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27, 2) (approved by community March 15, 1986, in effect since October 9, 1986)
- *Nisga'a Final Agreement* (signed in 1998, in effect since May 11, 2000)
- *Westbank First Nation Self-Government Agreement* (Royal Assent on May 6, 2004, fully in effect since April 1, 2005)
- *Tsawwassen First Nation Final Agreement* (signed December 6, 2007, in effect since April 3, 2009)
- *Maa-nulth First Nations Final Agreement* (signed April 9,2009, in effect since April 1, 2011)
- *Yale First Nation Final Agreement* (signed April 13, 2013, not yet in effect as of October 2014)
- *Tla'amin First Nation Final Agreement* (signed March 15, 2014, not yet in effect as of October 2014)

The Sechelt arrangements do not include a formal self-government agreement but are brought into effect through federal and provincial enabling legislation and the Sechelt Indian Band Constitution (*Sechelt Band Constitution, Canada Gazette*, Part I, September 12, 1987, p. 3248, as amended November 21, 1987, p. 4416, and July 9, 1988, p. 2707), which was approved by Sechelt members in a referendum.

The Nisga'a arrangements were tripartite, negotiated by the Nisga'a with Canada and British Columbia as part of treaty negotiations conducted outside of the BCTC process. The Nisga'a process included both an agreement in principle and a final agreement and has been implemented by Nisga'a ratification and federal and provincial legislation (*Nisga'a Final Agreement Act* (S.C. 2000, c. 7) and *Nisga'a Final Agreement Act* (S.B.C. 1999, c. 2)).

The Westbank arrangements, which included both an agreement in principle and a final agreement, were negotiated bilaterally with Canada (the province was consulted but was not a party to the agreement). They have been implemented through ratification by Westbank members in a referendum and by Canada, by way of federal legislation: *An Act to give effect to the Westbank First Nation Self-Government Agreement* (S.C. 2004, c. 17).

The Tsawwassen, Maa-nulth, Yale and Tla'amin arrangements were negotiated as part of the BCTC process and included both an agreement in principle and final agreement in accordance with the six stages under the BC treaty-making process. All were ratified in First Nation referendums and through federal and provincial legislation (*Tsawwassen First Nation Final Agreement Act* [S.C. 2008, c. 32], *Tsawwassen First Nation Final Agreement Act* (S.B.C. 2007, c. 39), *Maa-nulth First Nations Final Agreement Act* [S.C. 2009, c. 18], and *Maa-nulth First Nations Final Agreement Act* (S.B.C. 2007, c. 43)) and are currently being implemented. The *Yale First Nation Final Agreement* (S.C. 2013, c. 25) (federal) and *Yale First Nation Final Agreement* Act (S.B.C. 2011, c. 11) (provincial) and the *Tla'amin Final Agreement Act* (S.C. 2014, c. 11) (federal) and *Tla'amin Final Agreement Act* (S.B.C. 2013, c. 2) (provincial) have also been ratified in First Nation referendums and through federal and provincial legislation, and the parties are working to prepare for the effective date of the agreements.

***Indian Act* Governance**

In addition to participating in sectoral initiatives or entering into comprehensive self-government arrangements, and despite the fundamental problems with the *Indian Act* and the relationship it establishes between First Nations and Canada, many Nations are developing, to the extent that they can, governance capacity under the *Indian Act*. Ranging from the *Indian Act* through sectoral governance initiatives to comprehensive governance arrangements, a continuum of governance has been established as Aboriginal peoples move to rebuild their Nations and once again become self-governing.

Exercising Self-Government in the Absence of Agreement or Recognition

Some Nations, based on the strength of their Indigenous legal traditions and as an assertion of their inherent right of self-government, can exercise and are exercising authority, including the authority to make laws, independently of the above-noted mechanisms. In many cases, this option is pursued concurrently with participation in other options for advancing governance reform, particularly where the efforts are directed off-reserve in circumstances where First Nations have not concluded a modern treaty with Canada or where Aboriginal title has not yet been declared. While the exercise of such powers, based solely on the inherent right and in the absence of any agreement with the Crown, are in practice limited, and, to the extent that the authors are aware of this exercise and where it may be an option, examples are included in this report.

It can be difficult to make the option of simply exercising a right of self-government work, because neither the federal nor provincial governments recognize these laws and it is not clear that the courts will enforce them. Finding this out can be very expensive on a number of fronts. Moreover, it is not always clear if those subject to the laws will respect them, including the citizens of the Nation, who may for whatever reason and as unpalatable as it may seem, prefer or argue that their Nation's laws are not valid in the face of federal or provincial laws. Considerable care is therefore needed in creating institutions of government and implementing laws through these institutions based on the inherent right of self-government, because of the legal complexity and the potential conflicts with other governments. However, many First Nation leaders favour this option as a means to draw attention to Indigenous legal traditions and the need for reformed governance and control over a Nation's ancestral lands and its people. It is also an option as First Nations move to extend their capacity to guide and regulate land and resource use, cultural development and other matters of critical importance to them.

Finally, it should be noted that there are different considerations when one is talking about exercising governance on-reserve or off-reserve and when a Nation is acting outside of any agreement or formal recognition of its rights. Indeed, a Nation might be expected to "occupy" its ancestral lands by ensuring that it follows its laws over those lands in accordance with its customs and Indigenous legal traditions. As Nations move along the continuum of governance and rebuild their Nations, these distinctions between "on-" and "off-reserve" and "recognized" or "not-recognized" should become less marked over time. This emerging reality has been underscored by the first declaration of Aboriginal title.

Governance Over Aboriginal Title Lands

Reflecting on the Supreme Court of Canada hearing on November, 7, 2013, and leading up to the June 26, 2014, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 decision, what was perhaps most telling was that the Supreme Court justices, having apparently made up their mind on the larger tract of the proven title area, had moved on to the next big question: "What laws will apply to the title lands so proven?" The answer, of course, is multi-level governance. It will be a combination of laws in accordance with the constitutional division of powers and the rules of federalism as they are evolving. Implementation of the decision will require a combination of Tsilhqot'in Nation government law and provincial and federal law, and the relationship between laws and governments will have to be addressed through reconciliation discussions among the parties.

The 2014 *Tsilhqot'in* Decision
Some 25 years ago, British Columbia issued cutting permits in the heart of a relatively pristine and undisturbed portion of Tsilhqot'in Territory located in central British Columbia. Out of those events grew years of litigation that resulted in the Supreme Court of Canada's *Tsilhqot'in* decision on June 26, 2014. As part of the fight against the cutting permits, the Tsilhqot'in People — a Nation that includes six *Indian Act* bands — sought a declaration of Aboriginal title from the courts over an area of land, which is approximately 10 percent of their territory. In its decision, the Supreme Court of Canada issued a declaration of Aboriginal title over approximately 1,700 square kilometres. The title area was 40–50% of the area the Tsilhqot'in had claimed in the court proceedings.
Tsilhqot'in is the first court declaration of Aboriginal title in Canadian history. In reaching this decision, the Supreme Court of Canada made a number of determinations on core issues regarding Aboriginal title, including:
1) Aboriginal title can exist on a territorial basis over large tracts of land and is not confined to "small spots."
2) Aboriginal titleholders have the right to the benefits associated with the land, which is described as the right to "use it, enjoy it, and profit from its economic development."

3) Title is held collectively for the present generation and all future generations, and "it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it." This does not mean that title must be used in an historic or traditional manner — it may be used in a contemporary or modern way, if that is what the titleholder chooses.
4) If the Crown or a third party (e.g., industry) wants to do something on Aboriginal title land, it needs the consent of the Aboriginal group.
5) If the Aboriginal group does not give consent to the use of the land, the Crown may try to "justify" infringements of Aboriginal title. The Crown must show (a) that it discharged its procedural duty to consult and accommodate; (b) that its actions were backed by a compelling and substantial objective; and (c) that the governmental action is consistent with the fiduciary obligation owed by the Crown to the Aboriginal group.
The *Tsilhqot'in* decision has been described as a "game changer," and the implications are far-reaching. With the decision, the court has clearly sent a strong message that the honour of the Crown is at stake, and that reconciliation between the Crown and Aboriginal groups must be negotiated in good faith.

The 2014 Supreme Court decision in *Tsilhqot'in* leaves open a number of questions regarding how Aboriginal title lands are governed. Clearly, the court relied on the Indigenous legal traditions of the Tsilhqot'in when determining whether the Tsilhqot'in had through their laws occupied the territory prior to 1846, the date that the court has stated was when the Crown declared sovereignty over the lands subject to the claims. Indeed, part of the test for proving Aboriginal title is through occupation by laws. With respect to Indigenous legal traditions, the court also affirmed an understanding of Aboriginal title that is potentially very meaningful to First Nations, emphasizing that the "Aboriginal perspective" of title must be given equal weight to common-law notions of property. Presumably this will be done in accordance with Indigenous legal traditions. However, the effect of the court's reasoning with respect to questions of infringement of title and multi-level governance is that the Province's jurisdiction is not "ousted" over Aboriginal title lands. If legislation is in place that unjustifiably infringes Aboriginal title, then that legislation will be inapplicable as it relates to Aboriginal title lands. However, both the provincial and federal governments can seek to justify infringements of Aboriginal title and indeed can legislate in a general way over title lands that do not infringe title. The court stated that general regulatory legislation — "such as legislation aimed at managing forests in a way that deals with pest invasions or prevents forest fires" — will pass the justification test and perhaps even not result in an infringement in the first place. Presumably the Tsilhqot'in can make laws as well in accordance with their inherent rights as may be confirmed by the court or recognized through negotiations?

Beyond confirming the standard of consent and that the Crown may infringe Aboriginal title, the Supreme Court of Canada did not say much in *Tsilhqot'in* about the applicability of First Nations laws and governance regimes over title lands. There are many questions that will have to be addressed either in the courts or as a result of reconciliation negotiations, including:

- What is the governing body (or bodies) that can exercise the power of the government, how is it constructed and accountable to the collective that enjoys the title, and how is that body recognized by other governments?
- What is the scope of a First Nation's governmental powers and authority, including the power to pass laws, over its title lands, and in what subject areas?
- What will be the relationship between First Nations laws and laws of the both British Columbia and Canada?

The decision clearly puts a spotlight on the importance of First Nations governments and governance in a number of fundamental ways that all Nations will want to consider.

First, the relationship between a First Nation and its Aboriginal title lands is not like the relationship between a First Nation and its reserve lands. Title lands are not held by the Crown, subject to paternalistic federal delegation or oversight, or constrained by the limitations of the *Indian Act*.

As the effective beneficial owners of the land, with responsibilities for protecting the interests of current and future generations in that land, First Nations governments have responsibilities to demonstrate and establish with and for their own people the approaches, processes, and mechanisms for making decisions about how to use and benefit from the lands. While existing modes of governance used by First Nations may have roles to play, it is also clear that First Nations will have to determine and implement the modes of governing their title lands that are responsive to the specific responsibilities that come with being titleholders. Stated another way, title lands must be governed in a manner that reflects the principles, roles and responsibilities of Aboriginal title and this is a core challenge and opportunity for all First Nations.

Second, given the clarification of the standard of consent, First Nations need to establish the clear and appropriate processes, standards and structures for granting or withholding that consent. The implications of failing to do so could be quite significant. For example, if appropriate regimes for the granting of consent are not established, First Nations governments may be open to challenge by their people for not properly governing in relation to their collective title lands. At the same time, failing to achieve clarity around consent regimes and when consent should be given may have consequences for future claims for damages or efforts to challenge projects.

Indigenous Legal Traditions within Confederation

During this period of transition, many First Nations are considering their Indigenous legal traditions and laws as a basis for moving forward and deconstructing their colonial past.

For the purposes of this report, the authors assume that any bylaw, law or ordinance of a First Nation in force today is an example of contemporary Indigenous law, whether that law is understood to be made under ancient traditions or more modern ones. In the process of Nation rebuilding, First Nation peoples are self-determining and their contemporary political organization and social structures and their legal traditions are evolving, as indeed the legal traditions of all societies evolve. Central to this discussion is what the descendants of the pre-colonial Indigenous occupants of the land today consider legitimate political institutions including the legal framework that supports those institutions. Related to this question is whether those systems are recognized politically by other governments within Canada and legally by the courts. Within Canada there exists sufficient pluralism to allow the operation of multiple juridical systems — indeed the *Constitution Act, 1982* and section 35 arguably demand it. However, Indigenous legal traditions cannot be imposed on the collective by those within the collective simply because people are "Indigenous."

In the process of Nation rebuilding and establishing the governance framework that will apply to those Nations, there are a number of very interesting and developing examples of contemporary First Nations legal systems that are evolving, drawing on their own ancient traditions as well as the traditions of the settler society that have been adopted or are considered appropriate by Indigenous populations within Canada today. This reality is reflected throughout the report as it considers the laws that First Nations have made, why they have been made and over what subject matters. While this may be offensive to the staunchest of the so-called "traditionalists," it is nevertheless the "on-the-ground" reality within First Nations they develop strong and appropriate governance to meet today's demanding governmental needs.

Also, to deny change is really to deny the ability of First Nations to effectively govern on the basis of the will of their citizens today. However, the Indigenous worldview is reflected in the ways in which Nations are developing their contemporary institutions of governance and in the manner in which decision-making is structured. Throughout the report, where appropriate, we have illustrated how this is occurring, but we have also been careful not to suggest that if a law or an institution of contemporary Indigenous government is not "Indigenous" enough for some, it is somehow not an Indigenous

law and is not legitimate. From the authors' perspective, any law that is applicable to a group of Indigenous peoples, that is understood by those to whom it is applied, and that is enforceable is an Indigenous law.

Part of the challenge in re-establishing and rebuilding First Nations governance lies in other governments' attempts to circumscribe Indigenous laws, particularly where the jurisdiction is arguably delegated. This has been particularly problematic in negotiations respecting self-government, where Canada requires a First Nation to agree that its system of government will be "democratic" and where the Indigenous legal traditions that are the foundation for establishing a tribal government may not be considered democratic enough in the eyes of the government from whom the First Nation is seeking recognition. This has been an ongoing issue for the Gitxsan Hereditary Chiefs. While legal scholars will argue that the existence of Indigenous legal systems is not conditional on state recognition, practically it is very hard for First Nations, as minorities, to effectively govern without recognition — that is, to compel compliance with their law and legal systems by their own citizens as well as others.

Finally, while there may have been many distinct pre-contact Indigenous legal traditions, as a result of greater contact among groups and meeting the needs of contemporary society a new "pan-Indianism" is emerging in governance, where certain values and ideals generally shared among all tribes become distilled to form a new Indigenous legal order. In this way, concepts such as consensus, the role of elders and youth, protection of legal rights for the natural world, and so on guide contemporary Indigenous law-makers as concepts that may or may not have clear expression in the ancient traditions of the tribe. Similarly, we see Nations working together to solve contemporary governance needs and make policy decisions and coming together through sectoral governance initiatives (lands management or fiscal initiatives, in particular). And while there is room for uniqueness in these systems of modern government, there is also an appreciation that working together and agreeing in certain cases to doing things the same way has benefits, and where groups may have had their own unique systems in the past it is better to have consistency in approaches. For example, it makes sense to have financial reporting done in the same way by all. Where there is the most difference is in the structure of the governing body. There may be less to differentiate between Nations laws with respect to a particular subject matter.

Indeed, in the modern era First Nations tend to draw on examples of how other tribes, regardless of their specific legal traditions or legal systems, are crafting contemporary laws. This cross-pollination in legal development is evidenced in this report and provides discussion as to how various First Nations, actively engaged in governance reform in BC, are drawing on what is often described as best practices or wise practices.

ORGANIZING FOR CHANGE

BC First Nations Taking the Lead

BC First Nations have been taking the lead in implementing the inherent right of self-government in Canada and have been at the forefront of governance evolution. BC leaders were instrumental in protecting rights of governance in section 35 of the *Constitution Act, 1982* and participated directly in the constitutional talks, helping to draft section 35. BC First Nations have also had success in negotiating modern governance arrangements, both sectoral and comprehensive, with the Crown. They have also taken the lead in litigating governance rights as part of major court cases dealing with unextinguished Aboriginal rights and title. In some cases, BC First Nations are simply implementing governance on the ground, letting others potentially challenge the exercise of the right.

Establishment of Regional Political Bodies

To support the political aspirations of First Nations and to organize collectively in modern times, BC First Nations have established three political organizations (commonly referred to as Provincial and Territorial Organizations [PTOs]). The first to be established was the Union of BC Indian Chiefs (UBCIC) (1969). UBCIC came into existence in part in response to the 1969 White Paper. The First Nations Summit, the second province-wide PTO, was established to oversee modern treaty negotiations under the BC treaty-making process and has now evolved into an organization with much broader purposes. Finally, the BC Assembly of First Nations (BCAFN) was formally established in 1985 as the regional arm of the national Assembly of First Nations (AFN), founded in 1969 as the National Indian Brotherhood.

The leadership of the BC PTOs works collectively through a Leadership Council, which has been mandated by all three PTOs through terms of reference that were confirmed upon the recommendation of a specially formed First Nations Task Force (2010). The PTOs are not directly involved in negotiating or deciding matters with respect to an individual Nation's governance arrangements. They are not governments. Rather, they provide forums and mechanisms in and through which to coordinate collective efforts and raise issues of concern to the Nations and, where mandated, represent those interests in a common front.

DEVELOPING NEW MECHANISMS TO SUPPORT GOVERNANCE REFORM

Intergovernmental relations between and among Aboriginal groups and with the Crown continue to evolve and mature in an era of recognition and reconciliation. There is no question that great strides have been made in the evolution of self-government over the past 40 years, as is documented in this report. However, it is equally true that considerable work lies ahead as Nations rebuild and, in the process, develop new and mutually beneficial relations among themselves and with other governments within Canada. Unfortunately, progress has been slow, sporadic and, perhaps of most concern, not evenly spread across First Nations, some having made considerably more progress than others. Indeed, the concern exists on numerous levels as First Nations work to get beyond the hard questions that they must ask themselves and their citizens and as they deconstruct their colonial past and determine their contemporary governance needs. (These issues are comprehensively addressed in *A Guide to Community Engagement: Navigating Our Way Through the Post-Colonial Door*, Part 3 of the BCAFN Governance Toolkit.).

First, progress is hindered by a lack of awareness of the issues, the options and what First Nations are actually doing in moving forward. (This was the primary reason for producing this report.) Second, the lack of progress may stem from the fact that, in some cases, the options that have been developed may not be sufficient or the criteria for participation may be too limited, and that there is a need to revisit those options so that they can be made more widely available to more First Nations. Third, some First Nations may be treated as a priority because of the priorities of non-Aboriginal governments, which are not necessarily those of First Nations. Fourth, the policy framework under which non-Aboriginal governments address various aspects of self-government as part of reconciliation (whether sectoral or comprehensive self-government activities) is not consistent and may operate at cross purposes in trying to meet different policy objectives. As a result, it is not easy for First Nations to incrementally develop governance along a "governance continuum." Finally, despite all the time, money and energy put into supporting First Nations governance, today there is still no efficient mechanism to facilitate the transition to self-government when a First Nation is ready, willing and able.

Consequently, new or improved mechanisms to recognize, support and enable the reinvigoration of First Nations governance, including an appropriate transition from the colonial period, are being considered.

Appropriate Federal and Provincial Reconciliation Frameworks

It has been recommended to Canada, by the AFN and others, that the federal government develop, in partnership with First Nations, a new horizontal federal "reconciliation framework" to guide all federal departments, negotiators and other officials tasked with reconciling with First Nations. Such a reconciliation framework would ensure coordination of federal policy in support of a number of reconciliation options, including those that currently exist and that are considered along the governance continuum in this report, as well as new options. The framework would officially mark the transition from the "colonial era" to the "era of recognition" and would be based on principles of recognition and reconciliation that have been articulated by the courts, in international ordinances, and by commissions of inquiry and other studies and reports, or that have been agreed to in negotiations and supported by legislation. One of the framework's outcomes would be Canada eventually getting rid of its outdated comprehensive claims policy, the premise of which is fundamentally flawed, and moving away from the idea of so-called "final agreements." At its core, the policy is still fundamentally about Aboriginal groups relinquishing, exchanging or otherwise limiting their Aboriginal title and rights in favour of defined treaty rights. From the perspective of many First Nations, they are reconciling, not making "claims," and the process of reconciliation is ongoing, not final. There is, of course, a need for binding intergovernmental agreements to achieve legal and administrative certainty, but while some of these may be constitutionally protected, there is arguably no longer any compelling legal or political reason for the parties to a treaty to define all rights and all responsibilities for all time. Further, it is no longer tenable for the Crown to require a Nation to settle for substantially less core land in a treaty than the extent of its proven or unproven Aboriginal title lands.

For its part, the provincial government in BC considered to some extent the policy rationale for developing an overarching recognition and reconciliation framework when it developed proposed recognition and reconciliation legislation in 2009. While this legislative development was being undertaken as a joint initiative in partnership with the BC Leadership Council, it ran into political and legal hurdles and was eventually abandoned as an approach at that time. However, although the previous proposal may not work today, in particular given the *Tsilhqot'in* decision, the objectives and purpose of the initiative could be revisited. The revisiting could be undertaken through a new legislative proposal or through a clear policy statement of the provincial government that, as with the proposed federal reconciliation framework, would coordinate current approaches to reconciliation, and apply across all of government and where necessary lead to the changes in provincial legislation required to implement recognized Aboriginal title and rights, whether declared by a court or not.

Federal Self-Government Recognition Legislation

Unfortunately, despite all the progress that has been made, there is still no effective, efficient and clear mechanism for a First Nation or group of First Nations to remove themselves, with certainty, from the application of all or part of the *Indian Act* when they are ready willing and able. The only way to be recognized as self-governing in Canada, short of going to court, is as an outcome of protracted and always uncertain negotiations with the Crown, either through the BC treaty-making process or in those other rare occasions when the Nation can convince the Crown to negotiate. This is the case both with respect to simple recognition of a Nation's core governance institution and, more broadly, with respect to and including the extent of its powers (jurisdictions). Where Nations are engaged in some form of self-government negotiations and the negotiations have failed or are failing, the focus and resources needed to negotiate are often taking away from the focus on community engagement and the resources needed to actually rebuild and decolonize within communities.

Consequently, drawing from lessons learned in the United States, and as the Royal Commission on Aboriginal Peoples, the Penner Report, and many others here in Canada have argued, federal self-government recognition legislation would fill this gap. Such a mechanism would also help facilitate the foundational work that communities must often undertake as a "first step" toward assuming and exercising broader powers (jurisdiction) as a self-governing Nation in the future. Many commentators view self-government recognition legislation as a first and necessary step toward resolving the "land question"; one cannot make decisions respecting land unless the governing body making those decisions is legitimate.

Given the need for recognition legislation and in accordance with the direction from the Chiefs-in-Assembly, as noted above, the BCAFN, with the support and resources of the offices of former Senator St. Germain, helped develop Bill S-212, *An Act providing for the recognition of self-governing First Nations of Canada*. The bill was introduced in Parliament on November 1, 2012, and was substantially different from previous iterations of the bill, introduced with the same name in other Parliaments. Unfortunately, the bill died on the order paper, lacking the support of the government despite widespread support in principle from within the Senate and the House of Commons.

The act would have recognized the rights and powers of First Nations and their governments, institutions and other bodies by implementing aspects of the inherent right of self-government by a recognized First Nation on their lands. Recognition was based on the premise that the inherent right of self-government is an existing Aboriginal right within section 35 of the *Constitution Act, 1982*. The key purpose of the act was to support strong and appropriate First Nation governments by enabling First Nations, at their option, to move beyond the *Indian Act* in the exercise of their governance when ready and without the need for negotiations.

A recognized First Nation, self-governing in accordance with its own constitution, would have law-making powers (jurisdiction) over a wide range of subject matters, areas that could be drawn down at the discretion of the First Nation. An important aspect of the bill was that it did not seek to define the Nations' land base or describe how land was to be held legally, but rather focused on how the lands were to be governed — that is, regardless of how the lands are held, a Nation's governance arrangements would apply to those lands (the governance arrangements would be recognized as applying to existing or future reserve lands or to lands over which Aboriginal title is declared or as the situation required). Another important aspect of the bill was that it provided for a new fiscal relationship with Canada based on principles of comparability in funding of government with other governments in Canada.

In the proposed process of recognition, a First Nation or group of First Nations (e.g., "bands") would develop a proposal — their plan for self-government. The proposal would include the name of the Nation, a "constitution" for the Nation, the process the Nation was going to use to approve its self-government plan, and the lands covered. Through an independent "verifier," the citizens of the Nation would then consider the proposal and, if they approved it, the government of Canada would be required to recognize the former First Nation or Nations as self-governing. "Free, prior and informed consent" to moving into a post-*Indian Act*, post-"wardship" world would be achieved through the processes of developing the proposal (including the constitution) and of ratification.

How each First Nation or Nations decided to organize politically as a recognized self-governing Nation would be their choice. In the transition from "band" governance under the *Indian Act* to self-government, for example, a recognized First Nation could include a number of former "bands" (e.g., through an amalgamation, in which they become one, or a confederation or federation, where each community exists as a separate entity but for certain purposes can delegate law-making power to the confederation or federation). Other structures would be recognized as well. Finally, as any proposed self-government recognition legislation must be, the bill was "opt-in." No First Nation can be forced into self-government.

Not surprisingly, the bill was complicated and there were challenges in drafting it, as there would be in drafting any further iteration in the future. It is not easy to legislate the transition and reconcile or fit the "square peg" of the *Indian Act* system into the "round hole" of recognized self-governance. In any case, based on past experience, there would be a need for significant community engagement for any First Nation to actually get to the point of being ready to be recognized under optional self-government recognition legislation. The hard work is always back home in communities (e.g., developing a constitution and other institutions of government, deciding what to actually govern and simply developing "faith" in the system that will replace one in which people have little faith). Even though such legislation would be optional, inevitably citizens would at first be afraid of change, and strong leadership would be required. To make recognition legislation a reality will require considerable and sustained effort and political dedication from all quarters.

Future Constitutional Reform

At the time that the Constitution was repatriated from England in 1982, some legal advisors to the provinces played down the significance of section 35, arguing that any continuing Aboriginal rights were limited and that their clients need not worry about the implications of the section. To these people, section 35 was an "empty box" that could only be populated at the will of the Crown. In other words, there really were no inherent rights at all, and the constitutional division of powers had been exhausted and Aboriginal peoples were not in the mix. For those who had fought so vigorously for section 35 and for the Charter amendments, it was, of course, anything but an "empty box." More than 30 years on, and many court cases later, they have been proven right. It is the legal reality in Canada that Aboriginal peoples have the inherent right of self-government and that these rights survived as, to quote the court, "one of the unwritten 'underlined values' of the Constitution outside the powers distributed to Parliament and the legislatures in 1867."

They are not absolute rights, of course, but they are still very real. The fact that the inherent right of self-government exists within Canada reflects what is unique and special about the very idea of Canada, a country where there is room for different legal traditions and compromise, where there is a "full box" of section 35 rights and where the job now is to ensure that those rights find their expression through a respectful process of reconciliation. One way to achieve this would be through further constitutional amendments, that would give further expression to the governance powers of Aboriginal peoples and how they coexist with the powers of the federal, provincial and territorial governments, based on what we have learned about implementing the inherent right since 1982.

The power of self-government and the way to get there would have been more clearly articulated had the Charlottetown Accord passed in 1992. Politically, there has been little appetite since then for further constitutional reform with respect to Aboriginal peoples, or any area for that matter. However, at some point, as a country, Canada will be ready to face this challenge. When that happens, Aboriginal governance questions will necessarily be front and centre.

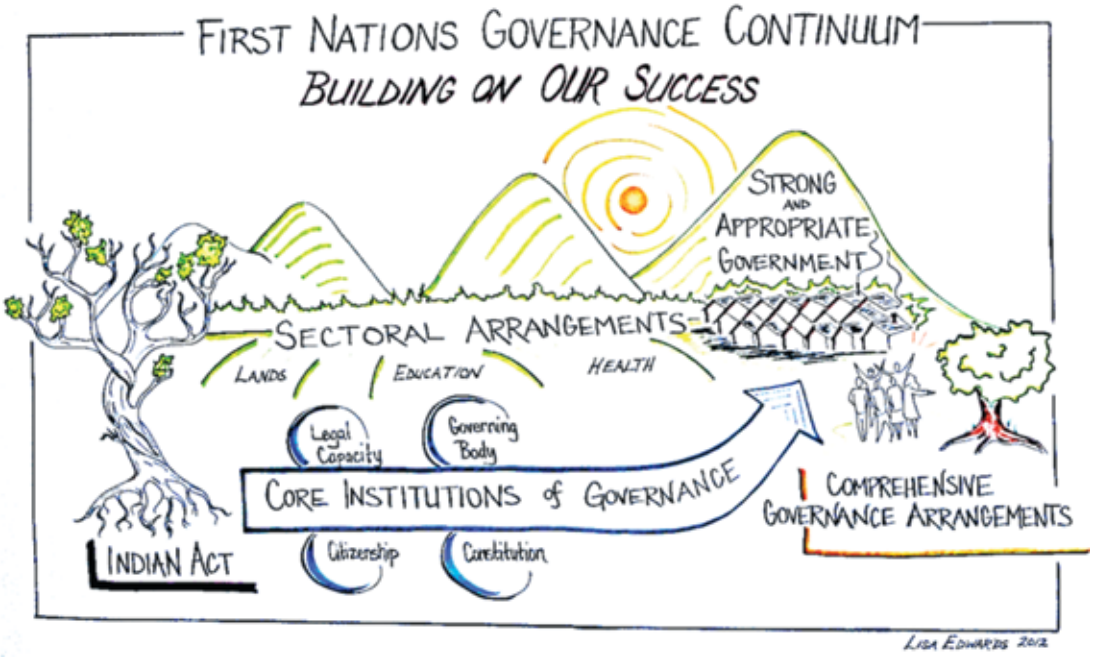
THE GOVERNANCE CONTINUUM

Currently, about 200 First Nations across Canada are actually involved in some form of negotiations or processes with Canada that will lead to governance arrangements beyond the *Indian Act*. Many of these Nations are in BC. As discussed throughout this report, there is a considerable policy disconnect between when federal policy is brought to the table in negotiating self-government as part of a treaty and when it is not, and consequently between sectoral and comprehensive arrangements. This is due in part to a lack of coordination nationally, but also to different policy objectives being brought to the table depending on the circumstance of the governance arrangements. For the purposes of this report, the options for governance reform are considered for a range of subject matters and jurisdictions are categorized as follows:

1. **Indian Act *governance*** — Incremental governance under the *Indian Act*, including leaving the act for purposes of custom election codes and membership codes, and incremental exercise of powers through bylaw-making powers under section 81 and 83, and so on.

2. ***Sectoral governance initiatives*** — including:
   - Land code development under the *Framework Agreement on First Nation Land Management*, 1996 (Framework Agreement)
   - Commercial land development under the *First Nations Commercial and Industrial Development Act* (S.C. 2005, c. 53) (FNCIDA)
   - Control of education under the *Education Jurisdiction Framework Agreement* (5 July 2006) (Education Agreement)
   - Property taxation, financial management and public financing under the *First Nations Fiscal Management Act* (S.C. 2005, c. 9) (FNFMA)
   - Control of oil and gas and financial management and control of "Indian moneys" under the *First Nations Oil and Gas and Moneys Management Act* (S.C. 2005, c. 48) (FNOGMMA)

3. ***Comprehensive governance arrangements*** — both inside and outside of modern treaty-making.



1.2

INDIAN ACT GOVERNANCE

BACKGROUND

For many First Nations, rebuilding governance and moving away from federal control into a post-colonial world has started with using the *Indian Act* itself. While the act is obviously not the right tool and was never intended as a means for First Nations to implement their inherent right of self-government, there are a number of opportunities to use the *Indian Act* strategically — that is, to build First Nations governance and jurisdiction using the *Indian Act* as a stepping-stone to eventual self-government and as an exercise of self-determination. The first approach is to use the *Indian Act* for its own removal in particular areas. This can be done for membership codes and for council elections. This practical approach, though limited, can be viewed as an interim step to self-government, whether sectoral or comprehensive, along the "governance continuum."

There are advantages and disadvantages to this approach. One advantage of this approach is that it is not as challenging, either politically or legally, a beginning to the process of social change as moving into sectoral or comprehensive governance arrangements. This may be important for a First Nation where the community is leery of simply doing away with the *Indian Act* or does not trust that change will be good for them. It also does not require as much of the Nation's internal capacity and resources. Further, it can build confidence within the community and among the citizens that change is possible and preferred. In this way, it is a good first step. Relatively quick progress is possible, as for the most part it does not involve complex negotiations with Canada. However, the disadvantage of this approach is that all of the steps that can be taken under the *Indian Act* are still ultimately subject to ministerial approval and therefore uncertainty. This is particularly true if federal policies change or, indeed, the legislation changes. In short, in all respects, governance under the *Indian Act* is still subject to AANDC's parameters and is not true self-government.

A Guide To Community Engagement (Part 3 of the Toolkit) speaks specifically to the challenges of moving away from governance under the *Indian Act*; specifically, Section 1.0 — Social Change and Governance Reform — Moving Towards the Door looks at debunking the myths about the *Indian Act* and the status quo, and provides tools to aid leadership and the governing body in educating First Nations citizens and engaging citizens in conversations about options for governance reform available to their communities.

GOVERNANCE OPTIONS

Membership Codes

An important first step in taking back control over one of the most fundamental aspects of Nationhood involves citizenship. The *Indian Act* has provisions that remove *Indian Act* "membership" rules if a First Nation develops its own membership code and that code is ratified by its members. Taking advantage of this opportunity, many communities (approximately 232 in Canada as of 2014) have developed their own membership codes. The process for developing a membership code is discussed in Section 3.6 — Citizenship. While the term "membership" is used in the *Indian Act*, First Nations generally prefer to use the terms "citizenship" and "citizens" of their Nations. Community conversations about this terminology are a part of the process that First Nations are going through to deconstruct the *Indian Act* reality. Developing a membership code under the *Indian Act* is in this way an incremental step to having a broader discussion on citizenship and what this means and who is entitled to belong to the Nation. (This concept is discussed further in Section 2 — Core Institutions of Governance.) Please note that throughout this report, unless the context specifically requires otherwise, we will refer to "citizenship" or "citizens" rather than "membership" or "members."

Election Codes

A second way to use the *Indian Act* for its own removal is in the area of elections. The *Indian Act* sets out election and election appeal rules. However, these apply only if the Minister makes an order to that effect under section 74 of the *Indian Act*. This is how most First Nations have been brought under the act. AANDC's policy provides that if a First Nation establishes its own election rules and these are ratified in a referendum of its members, the ministerial order under section 74 will be removed, and thereafter the First Nation's elections, election appeals, council procedures and other matters will be determined by the First Nation election code or law and related First Nation bylaws and policies. In BC, 112 First Nations have done this as of 2014. (This option for core governance reform is discussed in more detail in Section 3.8 — Elections.)

***Incremental Governance under the* Indian Act**

For many First Nations, moving away from federal control has started with using the *Indian Act* itself. BC First Nations have been leaders across Canada in developing governance capacity through bylaw development. Using the *Indian Act* bylaw-making powers, 163 First Nations in BC have collectively made 1,900 bylaws deemed "in force" by AANDC, with another 87 in the review stage as of 2014.

Bylaw-Making

In addition, the *Indian Act* also provides council with some delegated law-making powers.

Many First Nations communities are making bylaws under section 81 of the *Indian Act*, which allows a First Nation to regulate and control certain activities on-reserve, such as residency, zoning, trespassing, construction, disorderly conduct and other listed matters. For the most part, these powers do not adequately reflect the jurisdiction needed by First Nations to govern effectively, and consequently this provision is unacceptable in the long term as a means to appropriate governance. In addition, given the delegated nature of the authority, as well as the Minister's ability to approve or disallow bylaws, the power to make them is qualified and paternalistic and often not practical if the Minister will not allow them. For example, the Minister routinely disallows bylaws relating to child

welfare, fish and health. These are all areas that, in theory, the act permits. Nonetheless, bylaws made under section 81 of the *Indian Act* are enforceable and are one way to begin exercising decision-making authority on-reserve. (These bylaw-making powers and examples of where Nations have used them are discussed in the relevant subject chapters in Section 3.)

Bill C-428: An Act to amend the Indian Act (publication of by-laws) and to provide for its replacement (2014)

Bill C-428 was introduced on June 4, 2012 as a private members bill by Conservative MP Rob Clarke from Desnethe-Missinippi-Churchill River in Saskatchewan. The bill was passed by the House of Commons on November 20, 2013 and as of October 2014 was proceeding through the Senate.

The majority of provisions in the bill can be described as minor, repealing certain outdated provisions of the *Indian Act*. However, by repealing Section 82 of the *Indian Act*, this legislation would take away the Minister of Indian Affairs and Northern Development's power of disallowance, meaning, First Nations' by-laws would no longer need to be forwarded to the Minister for approval. This is a significant change. The bill further amends the *Indian Act* to require band councils to publish a copy of every by-law made by the council under this Act on an Internet site, in the *First Nations Gazette* or in a newspaper that has general circulation on the reserve of the band, whichever the council considers appropriate in the circumstances.

Finally, the Act would require the Minister to report annually to the House of Commons committee responsible for Aboriginal affairs on the work undertaken by his or her department in collaboration with First Nations and other interested parties to develop new legislation to replace the *Indian Act*.

In addition to section 81, section 83 of the *Indian Act* recognizes bylaw-making power regarding First Nation collection of property taxes. As of April 2014, there were 62 First Nations in BC collecting property tax under section 83 of the *Indian Act*. (This incremental power is addressed in Section 3.29 — Taxation.) These communities now raise much needed revenues for local purposes and to support economic development and community enhancement. The *Indian Act* lists the circumstances under which a First Nation can make section 83 bylaws and, once again, requires Ministerial review and approval. The First Nations Tax Commission provides advice and assistance to First Nations developing bylaws under section 83 and implementing tax systems.

Another section of the *Indian Act* that recognizes First Nation bylaw-making power is section 85, which allows a First Nation to pass bylaws prohibiting the sale and manufacture of intoxicants and regulating the possession of intoxicants on reserve. Consent of First Nation electors is required, but this is one of the few circumstances where there is no necessity for Ministerial approval. (This option is considered in the discussion of intoxicants in Section 3.17 — Intoxicants.)

Where the *Indian Act* provides for bylaw-making authority in a particular subject matter, it is discussed in the chapter in Section 3 addressing that jurisdiction. For each jurisdiction, we have included a table listing the bylaws that BC First Nations have made. When available, electronic links to those bylaws are also provided. Where electronic links are not provided, to obtain a copy of any First Nations bylaws currently in force, contact the individual First Nation or AANDC's Vancouver regional office. At present, AANDC Band Governance Officers in Lands and Trust Services are the most direct route to this information.

AANDC offers workshops on bylaw-making and provides copies of sample *Indian Act* bylaws for some bylaw-making powers. Given its powers to disallow a bylaw, AANDC will also review bylaws before they are enacted and provide advice to the First Nations making them. AANDC has a repository where bylaws are stored, although its accuracy is not guaranteed and it is not a legal registry of laws. Consequently, First Nations making bylaws should keep original and certified copies of their bylaws in a safe place (e.g., fire- and water-proof), as well as them electronically on a server with remote back-up accessible on a website. Recent legislative initiatives are looking to establish under federal law a national online registry of laws or a "gazette" for *Indian Act* bylaws and other laws, building on the existing *First Nations Gazette* published online by the First Nations Tax Commission in partnership with the Native Law Centre at the University of Saskatchewan.

The exercise of bylaw-making authority under the *Indian Act* provisions, while limited, has helped many First Nations begin on the path toward self-government as an exercise in self-determination. While the bylaw-making powers under the *Indian Act* may be less than satisfactory in the long run, they nevertheless provide an incremental step toward self-government. Many of the elements of governance that could be advanced by drawing down powers through the *Indian Act* could eventually find their way into a Nation's constitution or inform negotiations with Canada when the time comes to implement comprehensive governance arrangements based on the inherent right. Indeed, communities that are now self-governing, either in accordance with sectoral governance initiatives or comprehensively, were often leaders in using the *Indian Act* bylaw-making powers before becoming self-governing. BC First Nations have been leaders in Canada in developing governance capacity through *Indian Act* bylaw development. Using the *Indian Act* bylaw-making powers, 163 First Nations in BC collectively have over 1,900 bylaws listed by AANDC as "in force" and another 87 are pending as of 2014. Moving forward, it is important that communities can build on positive examples and best practices and share their experiences. Once made, laws are by their very nature public, and sharing wise practices in bylaw development can be a very cost-effective way to get ideas, particularly where the bylaw being developed is very technical or where the policy considerations are similar or the same across First Nations.

SECTION 88 AND THE PRIORITY OF LAWS

Finally, when looking at governance under the *Indian Act*, it is important to consider the potential role and application of provincial laws and jurisdiction. In 1951, section 88 of the *Indian Act* was added and, as amended, now states:

> 88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

In effect, section 88 is intended to extend provincial laws of general application that otherwise would not apply because they would intrude on Canada's powers in section 91(24) of the Constitution, namely "Indians, and Lands reserved for the Indians." In effect, section 88 incorporates by reference and makes applicable as federal law, provincial laws of general application.

Section 88 is a complicated section that effectively allows provincial law to apply and address matters unless they are dealt with under the *Indian Act*, a regulation, or a bylaw made by a First Nation. In practice, this can result in many challenges, including the application of provincial laws that a First Nation does not want to apply.

Not surprisingly, there are a range of perspectives on the operation of section 88 in practice, what it really means, and its implications for First Nations governance both on- and off-reserve. At the core of these questions is what the relationship will be between the laws of Canada, the laws of a province and the laws of a First Nation government; when different laws will apply; and which may have priority. These complexities have been heightened by the *Tsilhqot'in* decision. In *Tsilhqot'in*, the court made general statements that provincial laws, including laws of general application, can apply to infringe Aboriginal title and rights, and more generally that provincial jurisdiction is not "ousted" where Aboriginal title exists. At the same time, the court indicated that the doctrine of inter-jurisdictional immunity was not an appropriate doctrine to apply in analyzing the relationship between

federal, provincial and First Nations jurisdiction in the Aboriginal title context (see Section 1.4 for more information on the doctrine of inter-jurisdictional immunity).

Further, in *Tsilhqot'in*, the court effectively was silent, and left to another day issues of the application of First Nations laws and government powers over their title lands. This is notwithstanding that previous decisions of the Supreme Court of Canada have determined that Aboriginal title has what one may call a "jurisdictional aspect." (This is because Aboriginal peoples have decision-making authority over Aboriginal title lands that is inherent and governmental in nature.) The court appears to favour finding ways to permit various levels of government (federal and provincial and now, one must presume, First Nations) to make laws in the same subject area notwithstanding the strict constitutional division of power between the federal and provincial governments set out in sections 91 and 92 of the *Constitution Act, 1867*. The effect of this is to raise questions — which we do not fully know the answers to at this point — about what the role and purpose of section 88 will be, going forward.

The division of powers question is of central importance to evolving First Nations governance and will need to be clarified in the coming years, both in the courts and through negotiations. What seems certain, however, is that the strict division of powers, as we have come to know them and through which section 88 is generally interpreted, is giving way to what we can call "multi-level governance," creating opportunities for governance reform.

From a First Nations perspective, the bottom line is that in addition to establishing and determining core institutions of governance, there is a need to consider what powers of governance are required and to find ways to occupy that space and determine what powers Canada and the provinces should have. The complexity of the interrelationship between law-making authority and the application of laws is considered throughout this report from the perspective of each subject matter under discussion.

1.3

SECTORAL GOVERNANCE INITIATIVES

WHAT THEY ARE

Outside of the *Indian Act*, but short of comprehensive governance arrangements, there are opportunities for Nations to exercise jurisdiction through what we have called sectoral governance initiatives. These optional initiatives are made possible by federal and, in some circumstances, provincial legislation, which recognizes that First Nations have the power to govern, regulate and manage certain kinds of activities, primarily on reserve lands. A First Nation makes a choice to come under a sectoral governance initiative. In some cases, these initiatives are supported by an agreement between a group of First Nations and Canada and, if applicable, BC. In most cases, they are national in scope, although some are regional.

Sectoral governance initiatives

Outside of the *Indian Act*, but short of comprehensive governance arrangements, there are opportunities for Nations to exercise jurisdiction through optional sectoral governance

Given that there is currently only a limited number of opportunities and forums for negotiating comprehensive governance arrangements (in BC, this is primarily restricted to negotiating governance as part of a modern treaty under the BC treaty-making process — see Section 1.4), sectoral governance initiatives provide an excellent opportunity to advance a Nation's governance in specific subject areas without waiting for "full" self-government — if indeed that is even a possibility. Some Nations may not consider themselves actually ready or their community to be willing to tackle full self-government at this time, even if the opportunity existed. In such cases, sectoral governance initiatives can be a manageable and very effective way to move beyond the *Indian Act*, issue-by-issue and on an "as-needed" basis.

Typically, it has been individual First Nations or groups of First Nations that have championed sectoral governance initiatives in response to specific problems or issues that they were facing — for instance, the inability to attract investment on-reserve and the slow pace at which business was conducted on-reserve under the *Indian Act*. Motivated Nations, on their own initiative and often led by dynamic leaders, undertook the necessary groundwork, including the initial policy development, for governance reform, negotiated agreements with the Crown where appropriate and then lobbied for any required federal and/or provincial enabling legislation. Today, sectoral governance initiatives are advancing First Nations governance in areas such as lands and land management (including the commercial leasing of lands), oil and gas regulation and administration, financial management, taxation and education.

In addition to sectoral governance initiatives that recognize and/or delegate law-making powers to First Nations, First Nations have advocated for and advanced other sectoral initiatives, such as in the area of health, that address the subject matter only from an administrative standpoint (e.g., Canada and/or the Province retain exclusive or shared law-making authority). However, through these initiatives, First Nations or their duly constituted institutions have taken on significant policy development and administrative responsibility for the relevant subject area. We have therefore included these initiatives as sectoral governance, although technically jurisdiction is not being transferred, delegated or recognized.

The advantages of sectoral governance initiatives include the exercise of self-governance broader than incremental authority under the *Indian Act*. Moreover, under sectoral initiatives that address the *Indian Act* and other federal statutes, a First Nation is no longer subject to federal ministerial approvals and oversights. Also, although there are typically conditions to meet and rules to follow,

it is relatively easy for a Nation to implement these initiatives. There are pre-established templates and models as well as institutional support for these initiatives from First Nation evolving institutions and organizations.

It should be noted that while the sectoral governance that exists today is significant, there are still relatively few sectoral governance initiatives for First Nations to draw on in pursuing their own sectoral jurisdictional priorities. This can be seen as a disadvantage for Nations wishing to explore specific areas of jurisdiction where no sectoral initiatives exist or have even been considered. However, like incremental authority under the *Indian Act*, sectoral governance initiatives are a good way to move forward and develop capacity.

It must also be noted that because sectoral initiatives have often developed independently of each other and outside of comprehensive governance arrangements, the initiatives have not been coordinated. Consequently, there are sometimes inconsistent or differently stated jurisdictions and overlaps, which can lead to some confusion and potential challenges in interoperation or in implementation. This is most pronounced where a Nation may be exercising a range of jurisdictions under different sectoral initiatives. For example, sectoral governance initiatives often touch on other aspects of governance that are not necessarily part and parcel (legally called the "pith and substance") of that jurisdiction. This is arguably most pronounced with respect to financial management. All sectoral initiatives address financial management to some extent and in different ways, even if financial management is not the primary jurisdiction being addressed. This is because, in part, while these initiatives focus on specific jurisdictions and subject matters (e.g., lands, taxation, and education), they do not focus on what we call in this report "core governance" (e.g., selection of the governing body, law-enactment procedures, financial and political accountability). Issues of comparability and coordination between sectoral governance initiatives with respect to the treatments of specific jurisdictions are discussed further in Section 3 — Powers (Jurisdictions) of the First Nation.

Moreover, in some cases, as is considered further throughout this report, sectoral initiatives and systems of governance/law-making authority established under those initiatives are not easily transferable to governance arrangements, if at all, as contemplated by Canada and BC under a modern treaty or as reflected in the existing modern treaty precedents in BC. This reflects the fact that federal and provincial mandates for supporting sectoral governance initiatives and negotiating modern treaties have often been developed independently of one another and with different policy objectives and considerations. Often, and unfortunately, these objectives can work at cross-purposes. For example, federal sectoral initiatives respecting land management consider the lands to be held as section 91(24) lands (reserves), while in the BC modern treaty context they are not. Or, with respect to property taxation, under the BC treaty model, the Province plays an increased role in the taxation system, whereas under the sectoral governance initiative it is national First Nations institutions that play this role.

Legally, these differences can be explained, in part, by the fact that under comprehensive arrangements, the governance provisions, or at least some of them, can be constitutionally protected. But there are other more compelling, if not really justified, public policy reasons for the difference as well. A land claim is, after all, a "settlement," and accordingly the Crown's primary objective in the settlement is legal certainty over a particular landmass. However, for a sectoral governance initiative led by First Nations, federal policy objectives to support the initiative are often quite different, being primarily about social and economic conditions, and are not seen first and foremost as part of a negotiated and final settlement. They are simply about reforming governance and achieving the economic and social outcomes that improved governance brings.

The lack of coordination both between and among sectoral governance initiatives and comprehensive governance arrangements are serious and need to be resolved. They need to be resolved to ensure that where Nations do make progress on the "governance continuum" they are not "dead-ended"

or forced to undo what they have already done in order to continue to move forward — in particular, where the governance reforms are working and results are as intended. Having to step back in order to move forward in rebuilding governance as part of the broader exercise of reconciliation with the Crown makes little sense. It is not cost-effective, practical or in the interest of ensuring strong and appropriate governance.

Indeed, in BC, sectoral governance initiatives are increasingly being seen by First Nation leaders as the preferred option for several reasons, — including the difficulty of reforming governance and ensuring appropriate governance both on- and off-reserve through the BC treaty-making process as part of comprehensive governance arrangements, and the federal government's general unwillingness to negotiate comprehensive governance arrangements outside of that process.

Interestingly, while to date sectoral governance initiatives have for the most part only addressed alternatives to on-reserve governance issues and primarily involve the federal government, this is changing. As part of a broader process of reconciliation to address questions of unextinguished Aboriginal title and rights off-reserve, new sectoral governance initiatives are emerging. Sectoral governance initiatives that address governance matters off-reserve, involving individual First Nations or groups of First Nations and primarily the BC government, are expanding and becoming more commonplace. This is in part a result of the inability or unwillingness of all parties to achieve comprehensive arrangements under a land claim settlement made through the BC treaty-making process, but also, more importantly, the necessity to address multi-level governance now within the ancestral lands of First Nations, particularly where there may be a declaration of Aboriginal title or an assumption of Aboriginal title. In this evolving legal and political environment in which Aboriginal title is being implemented, and as First Nations increasingly exercise governmental powers off-reserve (whether currently recognized by other governments or not), sectoral governance initiatives addressing what is often referred to as "shared decision-making" are an important development. First Nations expect that there will be further sectoral governance initiatives in the future, depending on needs and priorities. These initiatives could conceivably assist in addressing governance both on-reserve and for Aboriginal title lands that may be recognized or declared in the future within a Nation's ancestral lands and beyond.

While this may be contemplated, what must always be kept in mind is that First Nations support for a sectoral governance initiative is not a guarantee that it will proceed. Sectoral governance initiatives inevitably require political will, with the federal government, and in some cases the provincial government, as a negotiating partner. As such, they are subject to government plans and priorities and the resources available within the government to support them. Also, these initiatives are ultimately dependent on the federal and, in some cases, provincial governments, subject to parliamentary process and the passing of any enabling legislation that may be required. Given this political reality, First Nations leading such initiatives, typically look for all party support for any enabling legislation that is needed.

The sectoral governance initiatives, led by First Nations, described below are more fully described under the relevant jurisdictions in Section 3 of this report.

Land and Resource Management On-Reserve

There are three sectoral governance initiatives that address aspects of land and resource management on-reserve:

- the *Framework Agreement on First Nation Land Management* and the associated *First Nations Land Management Act* (S.C. 1999, c. 24)
- the *First Nations Commercial and Industrial Development Act* (S.C. 2005, c. 53)
- the *First Nations Oil and Gas and Moneys Management Act* (S.C. 2005, c. 48).

The *Framework Agreement on First Nation Land Management* (Framework Agreement) initiative was led by the 14 First Nations that were the original signatories to the agreement, along with Canada, in 1996. Canada ratified the Framework Agreement with the passage of the *First Nations Land Management Act* (FNLMA) in 1999. The Framework Agreement facilitates the development and ratification by a First Nation of its own land code for governance over all or some of its reserve lands. Making a land code in accordance with the Framework Agreement legally removes the land management provisions of the *Indian Act* (approximately 25 percent of the *Indian Act*) and thereby eliminates the involvement of the Minister of Aboriginal Affairs and Northern Development Canada from matters related to the lands covered by the code. Lands and land management are thereafter governed through the First Nation's land code and its other laws, not the *Indian Act*. To date, 32 First Nations in BC have passed land codes under the Framework Agreement and the FNLMA. As of June 2014, an additional 22 First Nations in BC are in the developmental stage and 18 are on a waiting list for development. Throughout the rest of Canada, there are 19 other signatories, 39 in development and 34 on the waiting list. In total, 164 First Nations (approximately a quarter of the total number in Canada) are involved with the land management framework at this time. In BC, almost a third of First Nations communities have undertaken this initiative.

The Framework Agreement requires that a First Nation include a number of governance measures not strictly related to land management in its land code. This is in part because some of the core governance aspects, such as financial management, are not covered under the *Indian Act* and need to be in place to implement a land management regime.

The *First Nations Commercial and Industrial Development Act* (FNCIDA) came into force on April 1, 2006, and seeks to fill regulatory gaps in land management on-reserve under the *Indian Act* without requiring a First Nation to develop a land code or fully implement a system of land laws and land management on its reserves. Many First Nations with lands well suited for economic development have increasingly ambitious plans to use them for complex commercial and industrial development projects. However, these efforts are often hindered by the lack of adequate regulations for commercial and industrial development on reserve land under the *Indian Act*. Regulatory gaps result in legal uncertainty and can discourage private investment, frustrating the expansion of economic development on reserves. FNCIDA removes these. Through FNCIDA, federal regulations that reflect the provincial regulations required to support complex commercial developments are made for First Nations. Because of the technical nature of these regulations, their adoption is not as significant an issue as using standards comparable to those throughout the province.

FNCIDA was a First Nations–led legislative initiative and was developed by five partnering First Nations: Squamish Nation of British Columbia, Fort McKay First Nation and Tsuu T'ina Nation of Alberta, Carry the Kettle First Nation of Saskatchewan, and Fort William First Nation of Ontario. To date, the regulations developed under this regime are for the Fort McKay First Nation (*Fort McKay First Nation Oil Sands Regulations* [SOR/2007-79]), Fort William First Nation (*Fort William First Nation Sawmill Regulations* [SOR/2011-86]), and the Haisla Nation (*Haisla Nation Liquefied Natural Gas Facility Regulations* [SOR/2012-293]).

The *First Nations Oil and Gas and Moneys Management Act* (FNOGMMA) came into force in 2005 and was the result of an initiative led by First Nations with oil and gas interests on their reserve lands, predominately from Alberta. The act provides that a First Nation can make a code with respect to oil and gas and thereby remove itself from the application of the *Indian Oil and Gas Act* (R.S.C. 1985, c. I-7), which is the oil and gas equivalent of the *Indian Act*. It also supports, a First Nation in taking control of its "Indian moneys" (moneys that are otherwise controlled and administered by AANDC) with an associated financial management policy (see below), either as a part of an oil and gas regime or independently. In March 2014, the Kawacatoose First Nation in Saskatchewan became the first to opt into the FNOGMMA program.

Land and Resource Management Off-Reserve

While the federal and provincial governments prefer to address comprehensive governance arrangements under the BC treaty process, there are emerging opportunities for developing governance arrangements for land and resource management off-reserve and within a Nation's broader ancestral lands. The current sectoral initiatives applicable off-reserve typically involve the province and are expressed through arrangements such as reconciliation or protocol agreements, which provide some degree of co-management of lands and resources, and strategic engagement agreements, which address, to varying degrees of success, consultation and accommodation. As touched upon above, the need for these types of agreements has recently been accelerated as a result of the advances made in court on the implications of unextinguished Aboriginal title and the necessity for the Crown to consult, accommodate and often seek consent, before resource development within a Nation's ancestral lands can occur. Agreements can mitigate the risk or chances of litigation and the overturning or qualification of provincial decisions.

It is reasonable to assume that these opportunities should be expanded in the wake of the first declaration of Aboriginal title issued by a Canadian court (in the *Tsilhqot'in* case). Both the federal and provincial governments will need to reconsider their approaches to reconciliation with respect to the scope and extent of the land base over which First Nations have interests, as well as the multi-level governance over those lands and the balance of a Nation's ancestral lands. Examples of sectoral governance initiatives off-reserve that have been negotiated despite the BC treaty-making process and that address specific subject areas are more fully discussed in the resource and land-use planning chapters in Section 3.

Reconciliation Agreements

The First Nations Leadership Council and the provincial government signed the New Relationship Accord in 2005. In 2009, the first reconciliation agreement was signed between the Haida Nation and BC, the *Kunst'aa guu — Kunst'aayah Reconciliation Protocol*, 2009 (*Haida Gwaii Reconciliation Act*, S.B.C. 2010, c. 17). In this reconciliation agreement, the Parties, building on the spirit of the New Relationship Accord, acknowledge that they hold differing views regarding sovereignty, title, ownership and jurisdiction over Haida Gwaii and the Parties commit to seek a more productive relationship notwithstanding this divergence of viewpoints. The agreement supports true shared decision-making.

Reconciliation Agreements

To date, reconciliation agreements have been signed with the following communities:

- Coastal First Nations: 'Gitga'at First Nation, Haisla First Nation, Heiltsuk Nation, Kitasoo Indian Band, Metlakatla First Nation, Nuxalk Nation, and Wuikinuxv Nation (*Coastal First Nations Reconciliation Protocol* — 2009)(Amended in 2010, and 2011)
- Gitanyow Hereditary Chiefs (*Gitanyow Huwilp Recognition and Reconciliation Agreement* — 2012)
- Council of Haida Nation (*Haida Reconciliation Protocol* — 2009)
- Musqueam First Nation (*Musqueam Reconciliation, Settlement and Benefits Agreement* — 2009)
- Nanwakolas Council: Da'naxda'xw Awaetlala Nation, Gwa'sala-'Nakwaxda'xw First Nation, K'omoks First Nation, Mamalilikulla-Qwe-Qwa'sot'em First Nation, and Tlowitsis First Nation (*Nanwakolas Reconciliation Protocol* — 2011)
- Secwépemc Nation: Adams Lake Indian Band, Skeetchestn Indian Band, Splatsin Band, and Tk'emlúps te Secwepemc (*Secwe'pemc Reconciliation Framework Agreement* — Amendment 2014)
- Tseycum First Nation (*Tseycum First Nation West Saanich Road Reconciliation Agreement* — 2012)

Though BC did not intend to enter reconciliation agreements with all First Nations in BC, the *Kunst'aa guu — Kunst'aayah Reconciliation Protocol* did spark interest and since it's signing BC has entered into reconciliation agreements with a number of other BC First Nations. Another noteworthy reconciliation agreement is the *Coastal First Nations Reconciliation Protocol*, 2009, a community-based agreement between the province and Gitga'at First Nation, Haisla Nation, Heiltsuk Nation, Kitasoo Indian Band, Metlakatla First Nation and Wuikinuxw Nation. This protocol seeks to build a sustainable economy and to establish a process for shared decisions over land and resource use. The province views these agreements as potentially much broader in their scope than SEAs. In practice, however, many of the reconciliation agreements or protocols are negotiated to address land and resource decision-making and governance off-reserve and, as stated above, have been variable in terms of their success in addressing issues of consultation and accommodation. Reconciliation agreements, also titled reconciliation protocols or reconciliation frameworks, may or may not be tied politically or legally to the BC treaty-making process (some involve Nations participating in treaty-making and others do not).

Strategic Engagement Agreements

As arrangements between the Crown and First Nations in the treaty context can extend to matters beyond the lands that the Nation will govern (former reserve lands and additional settlement lands), it is possible to negotiate additional arrangements for the broader territories of the proper title holder(s). There are opportunities for Nations to enter into co-management or shared decision-making arrangements with BC in advance of or perhaps instead of treaty under what are referred to as Strategic Engagement Agreements (SEAs). For First Nations in the treaty process, SEAs can be used to create decision-making mechanisms that can be put in place after a treaty is reached. For First Nations not in the treaty process, SEAs can be a way to be more involved in decision-making and relationship-building on a government-to-government level.

Strategic Engagement Agreements

SEAs are currently in place for:

- Kaska Dene Council (*Kaska Dena Council Strategic Engagement Agreement* — 2012)
- Ktunaxa Kinbasket Treaty Council (*Ktunaxa Kinbasket Strategic Engagement Agreement* — 2013)
- Nanwakolas Council (*Nanwakolas Strategic Engagement Agreement* — 2012)(Amendment 2014)
- Stó:lo First Nations: Aitchelitz, Chawathil, Cheam, Leq'a:mel, Scowlitz, Shxw'ow'hamel, Shxwha:y, Skawahlook, Skowkale, Soowahlie, Squiala, Sumas, Ts'elxweyeqw Tribes, Tzeachten and Yakweakwioose (*Stó:lo Strategic Engagement Agreement* — 2014)
- Taku River Tlingit First Nation (*Whóoshtin yan too.aat / Taku River Tlingit Land and Resource Management and Shared Decision Making Agreement* — 2011)
- Tahltan Central Council (*Tahltan Nation Shared Decision Making Agreement* — 2013)
- Tsilhqot'in National Government (*Tsilhqot'in Stewardship Agreement: A Strategic Engagement Agreement for Shared Decision Making Respecting Land and Resource Management* — 2014)

According to BC, SEAs are used to "establish mutually agreed upon procedures for consultation and accommodation." These arrangements can arise in the context of treaty negotiations, where the parties to the negotiations have reached an impasse or where the likelihood of reaching agreement in the short term is unrealistic. They provide for a Nation to begin to exercise authority or jurisdiction beyond its existing reserve lands in advance of a treaty and they have also been viewed, like Treaty Related Measures, as a way to promote good governance and co-operative relationships and assist Nations in preparing to finalize and implement treaties. Details of some of these arrangements are discussed in other parts of this report.

It is important to note that the degree to which such arrangements address governance beyond existing reserves is evolving. In limited cases, BC now recognizes the power (jurisdiction) of Nations to make laws (jurisdiction) and to participate in true joint decision-making with respect to land, resource use and other decisions regarding the land and people. In other cases, the arrangements are more limited with respect to governance and extend only to establishing enhanced consultation and dispute resolution processes.

Education

In 1973, the AFN published a report entitled *Indian Control over Indian Education*. Since then, First Nations across Canada, including those in BC, have been looking to improve the education outcomes of First Nations children. It is widely agreed that this requires finding new ways to govern education beyond the outdated framework provided by the *Indian Act*. In 2006, a BC regional sectoral initiative — the *Education Jurisdiction Framework Agreement* (Education Agreement) was signed by the First Nations Education Steering Committee, and the provincial and federal governments. In accordance with this agreement, both governments passed legislation that will enable First Nations to opt out of the *Indian Act* and govern education under their own jurisdiction if they choose to. The exercise of this jurisdiction will be supported by a First Nations–controlled and –governed Community Education Authority. As of 2014, more than 68 communities in BC have indicated that they want to be part of the new educational arrangements being implemented under the Education Agreement and the associated federal and provincial legislation. The Education Agreement is unique to BC and provides an opportunity for communities to assume jurisdiction over education. At this time, however, there are no First Nations that govern education in accordance with the Education Agreement, given the ongoing issue between First Nations and the federal government regarding offsets that Canada requires to its federal transfer from First Nations own-source revenues. (See Section 4 — Financing First Nations Government.)

In addition to the BC regional sectoral governance initiative with respect to education, there is also a unique administrative arrangement between Canada, the provincial government and BC First Nations (as represented by the First Nations Education Steering Committee [FNESC]) with respect to school services that are provided under federal jurisdiction (under the *Indian Act*). The *Tripartite Education Framework Agreement* (TEFA) was introduced after lengthy negotiations that followed a 2010 federal government announcement introducing a new approach to BC First Nations education funding, based on the capacity of First Nations to deliver support services and establish partnerships with the Province. TEFA is a five-year agreement that exists outside of any BC sectoral governance initiatives in education.

TEFA supports core and second level service delivery to First Nations schools in BC as well as a number of key collective programs and services for First Nations education, building on the foundation established by First Nations working together for almost two decades. While TEFA does not fully meet FNESC's goals, it does provide some additional funding and is narrowing the financial gap between First Nations schools and public schools. (These initiatives are discussed further in Section 3.7 — Education.)

In 2014, the federal government introduced Bill C-33, the *First Nations Control over First Nations Education Act*, which ostensibly was intended to replace the current provisions in the *Indian Act* respecting the education of Indian children. The bill was also tied to new resources for Indian education. While the bill provided a "carve-out" for those First Nations in BC who receive services under TEFA, the act would apply to First Nations that have not opted into TEFA or that were not self-governing. Also, the bill mentions that TEFA expires in 2017 and does not explicitly contemplate the renewal of TEFA or those under TEFA being exempt from the legislation beyond 2017. In essence, under Bill C-33, the education system that we have developed for First Nations in BC would have

changed, whether or not First Nations concurred. (This federal legislative initiative is discussed in more detail in Section 3.7 — Education.)

Health

Although it is not technically a sectoral governance initiative (as defined for the purposes of this report) in that it does not transfer law-making authority, the BC First Nations health initiative is very significant. It is quite conceivable that it will lead to recognition of First Nations jurisdiction over health. In 2007, the chiefs in BC resolved to establish a province-wide Health Council, followed by a province-wide First Nations Health Authority, in accordance with the British Columbia *Tripartite Framework Agreement on First Nations Health Governance*, an agreement between the First Nations Health Society (as endorsed by the First Nations Health Council), the provincial government and Health Canada.

In accordance with the agreement, starting in October 2013 there was a procedure for the full transfer of administrative responsibility from Health Canada to the First Nations Health Authority. With this responsibility came a budget for those health care programs and services formerly provided by Health Canada. A health transfer of this magnitude is a first in Canada and represents the single largest transfer respecting health to any Aboriginal entity ever. Over time, the First Nations Heath Authority will not just be responsible for not delivering former Health Canada programs and services; it will also develop its own programs and services, to be delivered under regional policy established in accordance with the evolving governance framework for the authority. How the regional BC health initiative will evolve from an exercise of self-administration and be coordinated with developing First Nations self-government (both in terms of First Nations powers and the powers of the First Nations Health Authority) will need to be determined, with appropriate consideration given to any transitioning issues. (This initiative, and jurisdiction over health, is discussed more fully in Section 3.15 — Health.)

Financial Management

As discussed above, there are several sectoral governance initiatives that address financial management either directly or indirectly, and if a Nation is involved in more than one sectoral governance initiative, this can create some confusion as to what rules apply and when. Indirectly, financial management is addressed through the *Framework Agreement on First Nation Land Management* (Framework Agreement) and the FNLMA. A First Nation making a land code under the Framework Agreement and the FNLMA will develop financial management rules for inclusion in its code in accordance with the Framework Agreement. The financial management rules under a land code only address revenues from on-reserve lands and natural resource activities and do not apply generally to all revenues of a First Nation. However, this is not to say that a First Nation would not adopt the same financial management rules under different governance initiatives and, indeed, would be advised to do so to ensure consistency. Similarly, it is expected that there will be financial rules in place for communities assuming jurisdiction over education. Further, with respect to Aboriginal title lands, Nations are considering how financial management over revenues derived from those lands and the underlying assets are governed and managed.

Directly related to financial management, another BC First Nations-led initiative, the *First Nations Fiscal Management Act* (S.C. 2005, c. 9) (FNFMA) (formerly *First Nations Fiscal and Statistical Management Act*), includes optional law-making powers and provisions for First Nations to make laws respecting financial management. The act provides jurisdiction beyond the *Indian Act* to make financial management laws. Under this legislation, the financial management rules apply to all revenues administered by a First Nation. It also provides opportunities for First Nations communities to collectively borrow moneys for public purposes under the FNFMA through the First Nations Finance Authority (FNFA), using a variety of the First Nations revenue sources. Having access to the capital market to issue debentures (government bonds) for meeting government financing needs is

important for any government, including First Nations, wherever they may be on the governance continuum but particularly when they are self-governing. With an investment grade credit rating (A3), the FNFA issued its inaugural bond in 2014, in the amount of $90 million, to meet the financing needs of its current borrowing members. The issue was well received in the marketplace and was oversubscribed as a new, ethical and interesting product.

The FNOGMMA also provides an opportunity for Nations to pass financial management rules in order to take control of their "Indian moneys" (revenues and capital accounts that are under the control of AANDC). The parts of the act dealing with management of moneys and jurisdiction are separate, and a First Nation can opt to come under the act for the purposes of controlling its Indian moneys irrespective of whether it assumes jurisdiction over oil and gas. (These and all sectoral governance arrangements respecting financial administration are further described in Section 3.11 — Financial Administration, with related issues discussed in Section 4 — Financing First Nations Governance.)

Taxation

A very important aspect of governance is, of course, how running the institutions of government and the programs and services delivered by them are going to be paid for. Tax revenues make up an important part of most government financing, and there have been a number of sectoral governance initiatives addressing the revenue-raising powers of First Nations. First Nations taxes may include property tax, sales tax, income tax and certain provincial-type commodity taxes. In addition to the property tax bylaw powers found in the *Indian Act*, the FNFMA provides First Nations with the power to raise local revenues through the enactment of local revenue laws that include property tax and business activity taxes. First Nations tax powers over the sale of goods and services are provided for in the *First Nations Goods and Services Tax Act* (S.C. 2003, c. 15, s. 67). In order to facilitate First Nations' exercising of taxation powers under sectoral governance initiatives, BC has also entered into arrangements with First Nations related to provincial sales taxes and taxes on fuel and tobacco. In addition, BC has enacted the *Indian Self Government Enabling Act* (R.S.B.C. 1996, c. 219) to facilitate the collection by First Nations of property taxes from non-Indian occupants of reserve lands and First Nations' exercising of property tax powers under both the *Indian Act* and the FNFMA.

The tax powers of a First Nation government under these sectoral arrangements apply primarily within its reserves and operate concurrently with, and do not automatically displace, federal or provincial tax powers. Agreements are thus needed to ensure that taxpayers are not double-taxed. Canada and British Columbia enter into arrangements with First Nations governments to provide for part or all of Canada's and/or BC's taxes to be transferred or cease to apply when replaced by a similar First Nation tax. Following the first declaration of Aboriginal title in BC, questions will need to be answered regarding tax laws and policies applying to those lands, both with respect to the jurisdiction and authorities of the Nation whose title has been recognized, as well as the powers of other taxing authorities (whether federal or provincial, including local/municipal governments).

WHAT THEY ARE NOT

First Nations–led sectoral governance initiatives should not be confused with Crown-initiated sectoral governance reform. Although the federal government, and where necessary AANDC or other federal departments, must necessarily be involved with and support sectoral governance initiatives led by First Nations, the Crown and the bureaucracy can have, and often has, its own agenda with respect to First Nations governance reform. This agenda can be partisan, reflecting party politics that exist within Parliament, or it can come from within the bureaucracy, usually but not necessarily through AANDC. Sorting this all out is a part of the ongoing dance between implementing the inherent right on the one hand, and working within the existing federal machinery of government and the evolving legal landscape and perspectives on the other.

Consequently, and in addition to the sectoral governance initiatives that were led by First Nations, the federal government has from time to time introduced legislation to address aspects of reserve governance that go beyond or replace sections of the *Indian Act* in accordance with government priorities and not necessarily those of First Nations. For the most part, these acts have been controversial, both within Parliament and with First Nations. This is particularly true given that the policy development underpinning this governance reform was usually limited and not undertaken jointly with First Nations. Rather, it was typically developed from within AANDC, acting on government priorities and assumptions, with limited consultation, about what needs to be done. In spite of any good intentions, legislation of this nature is view by First Nations as paternalistic, in the sense that it seeks to redefine First Nations governance for First Nations. However, some First Nations do benefit from some of the legislation that has been introduced or enacted, even when it has for the most part been criticized as ill-conceived and poorly executed. Regardless, when in force, these legislative initiatives apply to "bands" and "Indians" under the *Indian Act* and need to be considered and taken seriously.

Legislation that purports to govern over First Nations people and not enable them to govern themselves runs the risk of being challenged in court as infringing on the right of self-government protected by section 35 of the *Constitution Act, 1982*. It also runs the risk of being challenged on the basis that the Crown did not adequately consult with First Nations in the development of the legislation. Such legislation does not apply to First Nations that, in accordance with a self-government agreement, are self-governing.

Federal legislation that has been developed in the manner described above and that is in force as of 2014 includes the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20), the First Nations Financial Transparency Act (S.C. 2013, c.7), and the *Safe Drinking Water for First Nations Act* (S.C. 2013, c. 21). Outside of the BC sectoral governance initiative in education, these federally led initiatives are discussed more fully in the relevant chapter in Section 3, either as an aspect of *Indian Act* governance or as an aspect of a sectoral governance initiative where the act confers some degree of First Nations law-making power or authority. For example, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* provides that a First Nation can make its own law and in so doing ensure that the default rules established under the act do not apply. While this legislation is not intended to be the final word on self-government (it is all without prejudice), it nevertheless changes the rules today and the manner in which reserves are governed and administered pre–self-government. As such, the implications for the present and the transition to self-government must be considered.

National Centre for First Nations Governance Toolkit — Best Practices	
In 2009, the National Centre for First Nations Governance (NCFNG) released a *Governance Best Practices Report,* which profiles best practices in each of the "seventeen principles of effective governance" set out in their *Governance Toolkit* (also released in 2009). The seventeen principles of effective governance identified by the NCFNG are:	
People	1. Strategic Vision 2. Meaningful Information Sharing 3. Participation in Decision Making
The Land	4. Territorial Integrity 5. Economic Realization 6. Respect for the Spirit of the Land
Laws & Jurisdiction	7. Expansion of Jurisdiction 8. Rule of Law
Institutions	9. Transparency and Fairness 10. Results Based Organizations 11. Cultural Alignment of Institutions 12. Effective Inter-governmental Relations
Resources	13. Human Resource Capacity 14. Financial Management Capacity 15. Performance Evaluation 16. Accountability and Reporting 17. Diversity of Revenue Sources
These profiles provide a brief overview of processes and procedures that, in practice, have shown to produce effective governance. The Report provides examples of best practices in governance from twenty-four Nations and Organizations across Canada, a number of which are from British Columbia.	
The BC Nations and Organizations profiled in this Report include	• Tsleil-Waututh First Nation (Strategic Vision) • Haida Nation (Territorial Integrity) • Osoyoos Indian Band (Economic Realization) • Hupacasath First Nation (Economic Realization) • Haisla First Nation (Respect for the Spirit of the Land) • Tsawwassen First Nation (Expansion of Jurisdiction) • Nisga'a Lisims Government (Rule of Law) • Westbank First Nation (Transparency and Fairness) • Tla'amin First Nation (Effective Inter-governmental Relations) • Squamish and Lil'Wat First Nations (Effective Inter-governmental Relations) • BC First Nations Public Service Initiative (Human Resource Capacity) • Ktunaxa Nation (Diversity of Revenue Sources) • Squiala First Nation (Meaningful Information Sharing)

1.4

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

BACKGROUND

In due course, most, if not all, First Nations want to exercise broad self-government powers beyond the *Indian Act* and sectoral governance arrangements, in many cases building on the governance work already undertaken through *Indian Act* or sectoral initiatives.

While First Nations believe very strongly that the inherent right of self-government exists and does not require approval other than from their own citizens of its form and structure, there are risks in proceeding on this basis without formal recognition or a court ruling supporting this position. Simply asserting jurisdiction and enacting laws regarding a subject matter may be empowering and a preferred option. However, while both the federal and provincial governments recognize politically that there is an inherent right of self-government, comprehensive governance arrangements must be negotiated before either government will recognize the right of a specific Nation. In the absence of a clear and effective legal mechanism for recognition of self-government without negotiations, and short of securing a declaration from a court that First Nations have the inherent right of self-government over a broad range of subject matters, it is considered prudent for legal certainty — certainly by Canada and British Columbia — that First Nations negotiate self-government arrangements with the Crown. These comprehensive governance arrangements set out the basic rights of self-government and establish the core institutions of government, along with the power of the government over particular subject matters (lands, resources, health, education, financial management, etc.).

Comprehensive governance arrangements

First Nations want to exercise broad self-government powers beyond the *Indian Act* and sectoral governance arrangements, building on the governance work already undertaken. Comprehensive governance arrangements set out the basic rights of self-government and establish the core institutions of government along with the power of the government over particular subject matters (lands, resources, health, education, financial management, etc.).

Over the past decades, a number of First Nations across Canada have gained valuable experience in successfully negotiating comprehensive governance arrangements and are now implementing aspects of the inherent right. For the majority, however, there is still considerable work ahead. In BC, 7 Nations representing 14 former *Indian Act* bands are today recognized as self-governing. Throughout the rest of Canada there are 20 self-government agreements involving 35 communities. In all cases, these governance arrangements are both legitimate and approved by the citizens of the Nation as well as being recognized under federal and, in most cases, provincial statute. All these Nations have clear legal capacity to govern (make laws and enforce them). There is legal certainty that unless the Nation has deviated from the arrangements reached, its core institutions and laws made by those institutions over areas of recognized jurisdiction are unlikely to be successfully challenged in court. Everyone can rely upon these laws. This is very important for effective government.

ADVANTAGES AND DISADVANTAGES

In addition to the overarching legal certainty, one of the biggest advantages of negotiating a comprehensive governance arrangement is that these arrangements provide the broadest of jurisdictions of all the options currently available, notwithstanding what the courts may or may not ultimately declare. At this point, the range of jurisdictions addressed in comprehensive arrangements actually goes farther than the courts have declared an aspect of the inherent right of self-government. That is, they deal with subject matters that go beyond meeting the more restrictive legal test of being “integral to the distinctive culture” of an Aboriginal people. Regardless of the ongoing discussion on any potential legal limitations on First Nations governance powers, it is reasonable to assume that a First Nation government’s powers would be adaptive to its society’s current needs and demands. Further, there is a compelling argument that any “new” powers are incidental to powers that were at one point in time

integral to the distinctive culture of the Aboriginal group. Ironically, there are some who would seek to narrowly interpret the courts' decisions to justify or fundamentally limit the inherent right. This is counterintuitive to the needs of contemporary Aboriginal society and the needs of its government. In other words, contemporary Aboriginal governments need contemporary powers of self-government that are not limited by atavistic notions of pre-contact Aboriginal societies. Examples of jurisdictions where governments typically need to make laws to meet the needs of modern society, but where the evidence might not support a claim that it is a part of the inherent right, include the issuing of debentures on the international bond market, regulation of commercial and residential tenancy arrangements between third parties, traffic and transportation, and taxation.

With respect to the key area of lands and land management, comprehensive governance arrangements provide ownership and priority of law-making authority over land, along with broad powers of governance associated with being the owner of the land. In the most complete of the comprehensive arrangements, almost the entire *Indian Act* no longer applies. Accordingly, there is no longer any ministerial sign-off or approval when the First Nation exercises its law-making powers. In all arrangements, however, the *Indian Act* does in fact apply in a limited way. For example, all arrangements provide that Canada still determines who is a registered "Indian," notwithstanding that the Nation has jurisdiction over citizenship. In some arrangements, the *Indian Act* continues to apply to a greater extent than in others for a variety of policy reasons. For example, to ensure a smooth transition and balanced workload, the act might apply for a particular subject matter until such time as the First Nation assumes power (jurisdiction) for that subject matter (e.g., wills and estates, education). In another case, the act might simply continue to apply for certain subject matters, such as with respect to taxation and some residual bylaw-making powers. This may be because the parties to the negotiations could not reach an agreement on an issue, so it was left for another day, or the issue being considered was not sufficiently important to impede progress (e.g., the residual bylaw-making powers being greater than the powers Canada or British Columbia would currently be prepared to recognize in a self-government agreement). Generally speaking, though, the *Indian Act* no longer applies, and this is very powerful. It allows Nations to get on with the business of government within the scope of their governance arrangements. The onus is on other governments and third parties to challenge the exercise of jurisdiction, rather than the other way around. Finally, comprehensive governance arrangements can be constitutionally protected.

The disadvantage of comprehensive governance arrangements is the potential for First Nations to make trade-offs (e.g., phasing out tax exemptions) in order to achieve arrangements and recognition from Canada and, where applicable, British Columbia. This is particularly the case where comprehensive governance arrangements are negotiated within the context of BC treaty negotiations. Also, considerable time and money are needed to negotiate comprehensive arrangements, particularly when governance is being addressed along with all the other issues that are contemplated in a modern treaty. Finally, one of the biggest issues deterring Nations from entering into comprehensive governance arrangements is the amount of work needed to gain community support for such a significant move beyond the *Indian Act*. Some Nations are waiting to see how comprehensive governance arrangements work for other Nations before taking what is often characterized as a "leap of faith."

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 10: UN Declaration

GEOGRAPHICAL SCOPE

In some cases, and depending on the type of comprehensive governance arrangements entered into, self-government can apply to either existing reserve lands and additions to reserve lands in the future, or, in the case of modern treaties, to settlement lands (including former reserves under the current model). In the latter case, the arrangements are typically constitutionally protected, and in the former, they are not. While negotiating comprehensive governance arrangements is not restricted to treaty negotiations under the BC treaty process, this is currently the preferred approach for Canada and British Columbia, as issues of certainty to title in land can be addressed at the same time as governance rights and can be constitutionally protected.

With the 2014 *Tsilhqot'in* court decision (as discussed in Section 1.1 — A Brief History of Evolving First Nations Governance within Canada), there is now a compelling and urgent need to also consider comprehensive governance arrangements with respect to Aboriginal title lands, where the Nation whose Aboriginal title is declared desires to be recognized as self-governing over those title lands. Presumably reconciliation talks between the Nation and the Crown will sort out the range and division of powers and the associated conflict of laws rules between all orders of government with jurisdiction over Aboriginal title lands.

However, it is important for all parties to understand that questions of multi-level governance will not be resolved in the context of so-called "land claim" negotiations. A Nation will not file a "land claim" when they already have a declaration of title that recognizes the proprietary interest in the land as well as the "jurisdictional" component. In other words, the lands in question have already been declared Aboriginal title lands and there is therefore no "claim" per se. Specific discussions will need to take place for the jurisdictions described in Section 3 — Powers (Jurisdiction) of the First Nation.

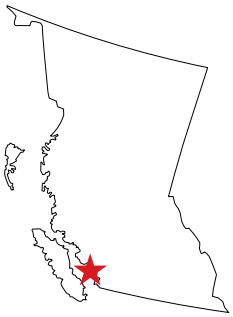
The direction that reconciliation talks take will inevitably be influenced by the current approaches to negotiating comprehensive governance arrangements, as discussed later in this section, in terms of both the processes and the positions/interests parties bring to the table. However, this should in no way be viewed as definitive of what processes or arrangements might ultimately be developed or negotiated when resolving questions of governance with respect to declared Aboriginal title lands. This is discussed further, later in this section, when we look at new mechanisms that are being considered to speed up and resolve questions of multi-level governance involving First Nations, for both existing reserve lands and ancestral lands, including Aboriginal title lands.

CANADA'S INHERENT RIGHT POLICY

Both Canada and British Columbia have developed approaches to negotiating self-government with First Nations. As reserves are primarily a federal responsibility, it is Canada that has taken the lead in governance reform on-reserve, although in the context of modern treaty negotiations policy development and negotiating mandates are often heavily influenced by provincial interests.

As stated previously, Canada's approach to negotiating comprehensive governance arrangements is set out in its Inherent Right Policy, adopted in 1995. While the official policy has not been updated, there have been numerous cabinet directives on subject matters contained in the policy or to address issues not included in the policy that arise during the course of negotiations with First Nations. At present, the Inherent Right Policy and associated cabinet directives govern self-government in the context of both modern treaty negotiations and non-treaty self-government negotiations, including for those Nations with historical treaties. The question now is whether this policy applies to Aboriginal title lands. If it does not apply to title lands, then presumably it would provide some guidance as to Canada's intentions with respect to future inter-governmental relationships, assuming consistency in the federal approach to governance on-reserve post–*Indian Act* and governance over treaty settlement lands. Namely, First Nations jurisdiction would be recognized and would extend over Aboriginal title lands as it would over reserve and/or settlement lands.

Canada has two programs relevant to negotiating governance arrangements that are tied to determining with whom and to what degree it will negotiate and provide money to assist in negotiating or preparing to negotiate governance. These are the Self-Government Negotiating Support Program and "The Gathering Strength: Reorientation of Self-Government Program." However, Canada continues to refine how it chooses to engage in negotiations with First Nations and provide capacity funding for governance-related work.



Sechelt First Nation

The Sechelt (Shíshálh) First Nation is located on BC's Sunshine Coast. The name shishálh, from the language of sháshishálem, refers to the entire population descended from the four sub-groups that officially amalgamated in 1925. They include xénichen at the head of Jervis Inlet), ts ´únay (at Deserted Bay), téwánkw (in Sechelt, Salmon and Narrow Inlets), and sxixus. In 1986 the Shíshálh Nation became the first recognized modern self-governing Nation in BC [*Sechelt Indian Band Self-Government Act*, S.C. 1986, c.27]. Sechelt had a population of 1,356 members at October 2014 living on Sechelt reserve lands.

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5555 Sunshine Coast Highway Sechelt
BC V0N 3A0
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www.secheltnation.ca

Canada released its own Governance Capacity Planning Tool in 2011. It includes preparation, inventory of information and existing tools, needs identification, prioritization, development plan, and reporting. Plans completed with the Governance Capacity Planning Tool can be used to support proposals for capacity-development funding from AANDC. In addition, AANDC acknowledges that many First Nation communities have already completed governance assessments or comprehensive community plans, including the work some BC First Nations have undertaken using Part 2 of the BCAFN Governance Toolkit, *The Governance Self-Assessment*. In some cases, these assessments and plans can also be used to apply for capacity-development funding from AANDC or to request engagement in comprehensive governance negotiations with Canada.

The following includes some of the key points in Canada's approach to negotiating self-government as set out in its Inherent Right Policy:

Scope of Negotiations

It is important to note that in its Inherent Right Policy, Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982* and that the inherent right of self-government may be enforceable through the courts. Canada also acknowledges that there are different views about the nature, scope and content of the inherent right. As a result, Canada's central objective is to reach arrangements as to how self-government is to be implemented by a specific First Nation, as opposed to seeking a strict legal definition of the scope and extent of the inherent right of self-government. This serves First Nations' purposes in gaining practical results, while recognizing that their view of the inherent right may be significantly broader than Canada's. In the future, the courts may further refine the understanding of the inherent right of self-government, as Nations continue work to implement the inherent right through their Nation-building activities.

It is essential for First Nations to include a section 35 non-derogation clause in any self-government agreement that is not constitutionally protected. These clauses ensure that nothing in a self-government agreement or in any legislation that is passed to implement it can be interpreted as abrogating or derogating from any Aboriginal rights recognized and affirmed by section 35 of the *Constitution Act, 1982*. This will permit the First Nation to continue to benefit from constitutionally protected Aboriginal rights of self-government as the understanding of those rights evolves. Under its Inherent Right Policy, Canada is prepared to protect rights contained in self-government agreements as constitutionally protected rights under section 35 of the *Constitution Act, 1982*. In practice, this has not yet occurred outside a modern treaty arrangement. Constitutional protection is important, as it ensures that other governments cannot legislate or otherwise impair the right of a Nation to govern within the scope of its recognized powers.

Subject Matters for Negotiations

Canada's Inherent Right Policy acknowledges that in order to give practical effect to the inherent right of self-government, First Nations governments and institutions require the jurisdiction or authority to act in a number of specific subject areas. However, Canada views the scope of First Nations core jurisdiction or authority as extending only to matters that are internal to their people as distinct cultures and essential to the operation of a government or institution. This policy on core powers that can be constitutionally protected in some ways parallels how the courts have set the test for what is required to prove an aspect of the inherent right of self-government — namely, that the area of governance must be "integral to the distinctive culture." These matters are in many ways similar to the powers that the provinces have, although the federal government insists in many cases that First Nations laws be subject to standards and rules found in provincial laws and programs.

Canada sees the core subjects for negotiation as including all, some or parts of the following:

- establishment of governing structures, internal constitutions, elections, leadership selection processes
- membership
- marriage
- adoption and child welfare
- Aboriginal language, culture and religion
- education
- health
- social services
- administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws
- policing
- property rights, including succession and estates
- land management, including zoning, service fees, land tenure and access, and expropriation of Aboriginal land by Aboriginal governments for their own public purposes
- natural resources management
- agriculture
- hunting, fishing and trapping on Aboriginal lands
- taxation, including direct taxes and property taxes of members
- transfer and management of moneys and group assets
- management of public works and infrastructure
- housing
- local transportation
- licensing, regulation and operation of businesses located on Aboriginal lands.

In some of these areas, Canada may require the harmonization of First Nations laws with federal or provincial laws, while in others, a more general recognition of jurisdiction or authority is sufficient.

Canada maintains that a number of other areas of jurisdiction go beyond those matters that are integral to a First Nation's culture or that are strictly internal to an Aboriginal group, but nevertheless can also be negotiated. To the extent it has jurisdiction in these areas, Canada may be prepared to negotiate aspects of First Nation jurisdiction or authority in the following areas, with more conditions than in the core areas:

- divorce
- labour/training
- administration of justice issues, including matters related to the administration and enforcement of laws of other jurisdictions that might include certain criminal laws
- penitentiaries and parole
- environmental protection, assessment and pollution prevention
- fisheries co-management
- migratory birds co-management
- gaming
- emergency preparedness

Westbank First Nation

Westbank is located in the central Okanagan in BC's southern interior. They are Sylix-speaking people and a part of the Okanagan Nation. Westbank First Nation and Canada signed the *Westbank First Nation Self-Government Agreement* on October 3, 2003 and the Agreement came into effect April 1, 2005. This was the second stand-alone self-government agreement in BC. As of October 2014 the population of Westbank members was 827, with approximately 9,000 others living on West bank reserve lands.

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WESTBANK FIRST NATION

Subject Matters Currently Non-Negotiable (by Canada)

In its approach to negotiating self-government, Canada also identifies a number of subject matters concerning which Canada believes there are no compelling reasons for First Nation governments or institutions to exercise law-making authority. They are grouped under two headings: (1) powers related to Canadian sovereignty, defence and external relations; and (2) other national interest powers.

In these areas, Canada requires that the federal government retain its law-making authority. These include:

1. ***Powers related to Canadian sovereignty, defence and external relations***
   - international/diplomatic relations and foreign policy
   - national defence and security
   - security of national borders
   - international treaty-making
   - immigration, naturalization and aliens
   - international trade, including tariffs and import/export controls

2. ***Other national interest powers***
   - management and regulation of the national economy, including:
     – regulation of the national business framework, and fiscal and monetary policy
     – a central bank and the banking system
     – bankruptcy and insolvency
     – trade and competition policy
     – intellectual property
     – incorporation of federal corporations
     – currency
   - maintenance of national law and order and substantive criminal law, including:
     – offences and penalties under the *Criminal Code* and other criminal laws
     – emergencies and the "peace, order and good government" power
     – protection of the health and safety of all Canadians
   - federal undertakings and other powers, including:
     – broadcasting and telecommunications
     – aeronautics
     – navigation and shipping
     – maintenance of national transportation systems
     – postal service
     – census and statistics.

For the most part, non-negotiable items in the first category are areas that most First Nations accept as reasonable limitations, as they see their governments as existing within Canada. Further, these are matters that the UN Declaration on the Rights of Indigenous Peoples does not suggest that an Indigenous peoples existing within a nation state could exercise, as they speak to the core of a state's sovereignty. Indeed, if exercised by Indigenous peoples, these jurisdictions could arguably affect that state's sovereignty, in violation of article 46 of the UN Declaration.

With respect to the second category, it is not so clear. These subject areas, as distinct from the first group of non-negotiable items, do include areas of jurisdiction that some First Nations see as important to have recognized law-making power over or, at a minimum, delegated authority or administrative responsibility — in particular with respect to some *Criminal Code* and justice–related

matters, intellectual property and census and statistics. While law-making power in these areas is not currently the subject of negotiations, Canada is willing to consider administrative arrangements with a First Nation where it might be feasible and appropriate.

Harmonization of Laws and Provincial Involvement

Canada's policy stresses the need for a First Nation's jurisdictions to work in harmony with the jurisdictions of other governments. Canada believes it is in the interests of both Aboriginal and non-Aboriginal governments to develop co-operative arrangements that will ensure the harmonious relationship of laws and proper functioning of the federation. The relationship between laws and how jurisdictions operate either independently or concurrently can quickly become very complex.

The complexity has increased in recent years as the concept of "inter-jurisdictional immunity" is being diminished through the courts and the strict division of powers (as listed in section 91 and 92 in the *Constitution Act, 1982*) between governments is being broken down in favour of multi-level governance. This means one government can make laws in another government's area of constitutional responsibility. This evolution is very important for First Nations that are assuming their own space within section 35, to govern in spaces that may have been previously occupied by other governments. Further, it is important where the powers of First Nations are not consistently described across agreements and within legislation. In all cases, the law-making powers of all governments need to be reconciled with one another, and must work together to support strong and appropriate governance in the best interests of those governed. Questions of inter-jurisdictional immunity, multi-level governance and the relationship between First Nations' laws and other governments' laws is discussed in the introduction to Section 3 — Powers (Jurisdictions) or the First Nation and throughout the discussions of the various jurisdictions.

Given that a number of jurisdictions or authorities that may be the subject of negotiations normally fall within provincial jurisdiction, or may have an impact beyond a First Nation's lands in question, Canada may require the province to be a party to the negotiations and to any resulting agreement. This is already generally the case, as the Inherent Right Policy is clear that it is only in very exceptional circumstances — for example, if a province refused to come to a tripartite table — that Canada would consider exclusively bilateral negotiations. Because of the perceived legal risks to proceeding without provincial involvement in a self-government negotiation, negotiations that have occurred without the province have been limited to matters within what were considered exclusive federal jurisdiction and which did not result in the self-government agreement being constitutionally protected. Given the evolving law with respect to multi-level governance and the blurring of jurisdictional lines, Canada may no longer be so inclined to proceed on this basis and may require provincial involvement.

Assuming that Canada will participate in negotiations and that they would do so bilaterally, the decision as to whether to proceed bilaterally and restrict negotiations to matters that in accordance with the constitutional division of powers are exclusively federal (e.g., lands, governance, family property, estate succession, citizenship) or to include provinces and address a broader range of subjects (e.g., child custody and family relations, education, social services, administration of justice) will be one for each Nation to make, based on its circumstances and self-government development timetable. This is a contentious issue for First Nations and may become even more so in the future, particularly where the arrangement only applies on-reserve. In these cases, the province arguably has little or no right to participate, given that for years the conventional wisdom has been that the primary relationship is between First Nations and the federal Crown, as reflected in the fact that "Indians, and Lands reserved for the Indians" is exclusively a federal jurisdiction under section 91(24) of the Constitution.

Ratifying a Self-Government Agreement

Canada's policy is to obtain federal cabinet approval for both agreements in principle and final self-government agreements with First Nations. The First Nation ratifies the self-government agreement in a way that clearly demonstrates that the First Nation government's requirements for ratification have been met. Part of the reason for this requirement is that under the *Indian Act*, Canada has a "fiduciary relationship" with the "band" and its "members," which in some cases extends to "fiduciary obligations" — for instance, with respect to land management decisions made by the Crown in the name of the First Nation or a citizen of the Nation. Before releasing the Nation from this paternalistic relationship (the antithesis of self-government), legally the Crown seeks to assure itself that the wards agree — which is somewhat perverse given that, politically, the government recognizes that the inherent right of self-government exists. Of course, from a First Nations perspective, ratifying the agreement is critical to ensuring legitimacy and essential where the community supports the systems of governance and powers being taken over.

In accordance with federal policy, the process of ratification by the First Nation needs to ensure that:

- all members have an opportunity to participate
- all of the relevant information is available to members
- the procedures for ratification are transparent and recognized as binding, and
- the ratification mechanism complies with legal requirements respecting the transfer of assets.

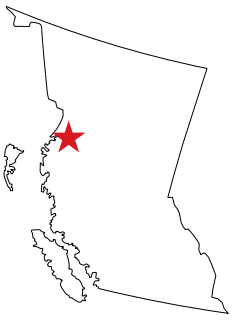
To give a self-government agreement legal effect, whether it is part of a treaty or a separate self-government agreement, and to ensure that the *Indian Act* or other legislation that would otherwise apply to the First Nation or its citizens no longer applies, federal legislation is necessary. This is undertaken after the First Nation has ratified the self-government agreement. Finally, as with all Canadian legislation, Royal Assent is required from the Crown, though in modern-day Canada this is a formality.

Developing a Proposal to Negotiate a Comprehensive Self-Government Agreement

Canada has developed *A Guide for the Submission of Stand-Alone Self-Government Proposals*. Proposals are submitted to the Regional Office (to the attention of the Regional Director General [RDG]). The region reviews the proposal, develops an assessment report based on the criteria set out in the guide, and prepares options and a recommendation for the RDG to accept or reject the proposal. The submission package (consisting of the proposal and the region's assessment, options and recommendation) is then submitted to the Assessment and Historical Research Directorate (AHRD) at AANDC Headquarters in Gatineau for further review. In collaboration with the Negotiations Branch and Directorate, Financial Management and Strategic Services and the Operational Policy Development Directorate, AHRD reviews the submission package and prepares a recommendation from the Director of AHRD. The Director of AHRD then presents the proposal to AANDC's Steering Committee on Self Government and Comprehensive Claims (SCSGCC), chaired by the Senior Assistant Deputy Minister of Treaties and Aboriginal Government, for consideration and recommendation.

The Senior Assistant Deputy Minister submits the SCSGCC's recommendation to the Minister responsible for the department, legally referenced as Indian Affairs and Northern Development Canada, who decides whether to enter into negotiations or not. The First Nation is then advised of the Minister's decision. If the Minister agrees to commence discussions on self-government, the First Nation is provided with information on how to move forward to the discussions stage (if required) or negotiations.

Proposals are assessed for their prospects of success. For Canada, the key to this assessment is evidence of a vision shared by the First Nation and Canada on implementing self-government. This can be measured in a number of different ways, which are described in the guide to submitting a proposal.



Nisga'a Nation

The Nisga'a Nation is located in northeastern BC. The Nisga'a Treaty came into effect on May 11, 2000 [*Nisga'a Final Agreement*, 9 February 1999]. The Nisga'a Treaty was the first modern-day treaty in BC and the 14th agreement to be signed in Canada since 1976. The Nisga'a Lisims Government is the governing body of the four villages that comprise the Nation (Gingolx, Gitwinksihlkw, Laxgalts'ap and New Aiyansh) and three urban offices (Prince Rupert/Port Edward, Terrace and Vancouver). The estimated combined population of the Nisga'a Nation at October 2014 was 5,985.

Nisga'a Lisims Government
PO Box 231, 2000 Lisims Dr.
New Aiyansh, BC V0J 1A0
Phone: 250-633-3000
Toll-free: 1-866-633-0888
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www.nisgaanation.ca

The proposal should include the following:

1. *Introduction of Self-Government Proposal:* Canada is looking for a detailed submission of the proposed self-government project to assist in the determination of the community's vision of self-government and any changes in governance that may occur as a result of the self-government initiative.

2. *Background Information:* Information related to the First Nation(s) included in the proposal, including the location of community or communities, population(s), the number of members living on-reserve and off-reserve, and whether there has been a previous request to enter self-government negotiations with the federal government.

3. *Community Involvement:* Evidence of community support from both on- and off-reserve members and commitment to self-government negotiations, as indicated by a commitment by the leaders to begin substantive negotiations and assume the jurisdictions being sought; evidence of community support for self-government negotiations and that their representatives have community support (e.g., First Nations should provide a Band Council Resolution; other groups should provide a resolution passed by the general assembly of their organization).

4. *Preparedness to Negotiate:* Evidence of readiness to start substantive self-government negotiations, as indicated by a description of the proposed negotiation process being sought; governing structures and accountability mechanisms, including an evaluation plan to assess the progress of negotiations; a description of jurisdictions the group(s) would like to negotiate; an identification of other substantive and procedural matters; a description of how the community or communities would be kept informed as negotiations progress in support of ratification of the final agreement; the degree to which the group or groups have assumed responsibilities under existing programs or authorities and sectoral governance arrangements, such as the *First Nations Land Management Act*, *First Nations Fiscal Management Act*, *First Nations Commercial and Industrial Development Act* and *First Nations Oil and Gas and Moneys Management Act*; past and present financial management practices; financial situation of the group or groups, including the past several annual audits; the stability and extent of existing political and institutional structures; other current key activities (e.g., claims, economic development projects).

5. *Financial Considerations:* Canada looks at the merits of the proposal, as indicated by the complexity of the proposal; the size and aggregation of groups; economies of scale; jurisdictions to be assumed; achievable results and milestones; the federal government's fiscal framework and existing resources; availability of other funds, including financial contributions from First Nation group or groups.

6. *Provincial Roles:* Canada is looking for evidence of provincial representation, as indicated by, where applicable, the willingness of the province to confirm its participation as demonstrated by a letter from the Minister responsible for Aboriginal Affairs in the province; and, where applicable, the willingness of the First Nation group or groups to involve the province.

7. *Inherent Right Policy:* An evaluation by Headquarters (in consultation with the concerned Negotiations Branch and Directorate, Financial Management and Strategic Services and the Operational Policy Development Directorate and the region) of the feasibility of the self-government proposal in relation to the Inherent Right Policy.

More detail about the development of proposals is available online at www.aadnc-aandc.gc.ca and through regional offices.

TREATY NEGOTIATIONS UNDER THE BRITISH COLUMBIA TREATY PROCESS

Establishment of the Process

The BC treaty-making process and the British Columbia Treaty Commission (BCTC) were established in 1993 by agreement (*British Columbia Treaty Commission Agreement* [21 September 1992]) among Canada, British Columbia and the First Nations Summit as a means to address the "Indian Land Question" and resolve long-outstanding land claims. Treaty negotiations are guided by this agreement and *The Report of the British Columbia Claims Task Force* (1991), which is the blueprint for the made-in-BC treaty process. The Treaty Commission and the six-stage treaty process were designed to support negotiations and facilitate fair and durable treaties.

The process includes self-government as a matter that can be included in treaties. Canada and British Columbia prefer that First Nations in BC negotiate governance arrangements as part of treaty settlements and have been reluctant to negotiate comprehensive governance outside treaty negotiations, although they can still choose to do so. The scope and extent of governance powers under treaty are guided by government mandates, which in Canada's case are based on the Inherent Right Policy. However, in some areas Canada's approach to governance negotiations and positions taken at negotiating tables in the context of treaty-making is different from its approach to and positions taken in comprehensive governance negotiations outside treaty; notwithstanding that in theory the same policy guides Canada in both processes. The matter is further complicated as Canada's approach to negotiating sectoral governance arrangements, also guided by the Inherent Right Policy, is different at times from the approach taken under treaty. All options should be available whether the context is treaty-making or otherwise.

Modern Treaty-Making in BC

The BC treaty-making process and the BC Treaty Commission (BCTC) were established as a means to address the "Indian Land Question" and resolve long-outstanding land claims. Treaty negotiations are guided by the *Report of the British Columbia Claims Task Force* (1991), which is the blueprint for the made-in-BC treaty process.

The BC treaty process was envisioned in the BC Claims Task Force Report to be a voluntary process of political negotiations among First Nations, Canada and British Columbia. This is how it was designed. The rationale at the time was that while section 35 of the *Constitution Act, 1982* recognized existing rights, these still needed to be defined and their extent and content decided by negotiation or litigation. Therefore, before commencing treaty negotiations, a First Nation did not have to prove or make a case for its existing Aboriginal rights and title but simply had to demonstrate that it had the mandate to negotiate on behalf of a group of Aboriginal people, had a defined territory and had the capacity and organization to negotiate. Although treaty negotiations were initially characterized as being political, they are arguably more than this, given that they ultimately seek to address and clarify legal rights based on recognition and reconciliation.

While the objectives of treaty negotiations have not changed since the BC Claims Task Force Report, the legal landscape, of course, has. Since 1991, First Nations have continued to litigate as well as negotiate. In many respects, the decisions of the court have overtaken the treaty process and begun to define the relationship and what is required for reconciliation. First Nations have therefore demanded that the treaty process as well as federal and provincial negotiating mandates be aligned with the directions of the court. As discussed in Section 1.1 — A Brief History of Evolving First Nations Governance within Canada, the impact of the first declaration of Aboriginal title by the court with respect to the Tsilhqot'in has yet to be fully seen, but we can speculate and assume that it will have a significant impact on the BC treaty-making process — not least with respect to the fact that the Crown and First Nations will find it increasingly hard to negotiate and reach agreement where there is any uncertainly that the Nation that is "claiming" title actually is, in fact, the proper Aboriginal title holder.

Federal Comprehensive Claims Policy

In addition to the Inherent Right Policy, Canada's current mandate and its approach to settling the land question, and therefore BC treaty negotiations, is guided by the so-called federal Comprehensive Claims Policy (CCP). The CCP is, in fact, a series of public policy statements and documents now spanning several decades and initially adopted after the 1973 Supreme Court decision in *Calder*, which left open the possibility that Aboriginal title might still exist in BC, where there were no historic treaties (which further decisions have, of course, confirmed). The CCP includes specific directives of cabinet, which may or may not be public (usually they are not public), supporting the public policy documents. In addition, before any agreement is entered into, Canada's negotiators and ultimately the Minister require a specific mandate from cabinet for entering into that agreement. The most recent review of the policy resulting in significant changes was in 1986, although some updates occurred in 1993. The CCP has come under significant criticism by First Nations for being inconsistent with the numerous court decisions respecting Aboriginal title and rights and the honour of the Crown. Indeed, since 1982, more than 40 Supreme Court of Canada decisions have provided guidance on the nature and content of Aboriginal rights, including Aboriginal title to land (particularly now, in light of the 2014 *Tsilhqot'in* decision), and on the Crown's obligations with respect to such rights. Development of policies that adequately respond to these court decisions has been slow, or non-existent, and often out of step with political statements made by the federal government. When First Nations refer to the "mandates" of the federal government being too limited or inflexible to resolve claims, including governance-related matters, it is typically this body of policy that they are referring to.

In 2013, the AFN, in co-operation with federal officials from the Prime Minister's Office, the Privy Council Office and AANDC, established a joint Senior Oversight Committee (SOC) tasked with looking to reform Canada's Comprehensive Claims policy. The intention was to fundamentally change Canada's approach and for Canada to move away from the concept of a "claims settlement" where reconciliation is an outcome of overly prescriptive "claims" negotiations and where the outcome of those negotiations is always uncertain (agreement may or may not be reached). Rather, the approach favoured is one based on recognition of Aboriginal title and rights, followed by a range of reconciliation options. These options, not limited to modern treaty-making, would ensure co-operative and ongoing intergovernmental relations and help to ensure strong and appropriate governance, with respect to both existing reserves and ancestral lands, including Aboriginal title lands. In an environment where the courts have already recognized Aboriginal rights, including Aboriginal title, approaches that are not flexible enough to achieve reconciliation are not prudent and are counter-productive to ensuring strong intergovernmental relations. In addition, as noted in Section 1.2 — Sectoral Governance Initiatives, Canada's policy for treaty-making is often quite different from its approach to sectoral governance initiatives. Under a new policy based on principles of recognition, it is envisioned that Canada would establish an overarching federal "reconciliation framework" that would cut across all of government and inform all federal departments and the policies within those departments. The policy would address implementation of the inherent right of self-government and speak to questions of multi-level governance. This work is ongoing.

Provincial Treaty Mandates

British Columbia, of course, comes to the negotiating table with its own mandates. Perhaps not surprisingly, there is concern among First Nations about the principles that guide the provincial government's involvement in treaty-making, as there is with the federal approach. However, it should be recognized that British Columbia has been quicker to respond to the need for new approaches to reconciliation and to address matters of Aboriginal title and rights as a matter of course, rather than simply holding out for a "land claim" settlement that suits it.

Tsawwassen First Nation

Tsawwassen First Nation is located on the Strait of Georgia, within the Salish Sea, near the Tsawwassen ferry terminal, approximately 25 km south of Vancouver. The Tsawwassen First Nation treaty came into effect on April 3, 2009 [*Tsawwassen First Nation Final Agreement*, 6 December 2007]. Tsawwassen is the first urban treaty in the history of BC and the first modern treaty negotiated under the British Columbia Treaty process. The population of Tsawwassen citizens at October 2014 was 352 with approximately 550 non-citizens living on Tsawwassen settlement lands.

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www.tsawwassen firstnation.com

Maa-nulth First Nations

The Maa-nulth First Nations consists of five First Nations located along the westcoast of Vancouver Island: Ucluelet First Nation, Huu-ay-aht First Nations, Toquaht Nation, the Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations and Uchucklesaht Tribe. The Maa-nulth First Nations are a part of the Nuu-chah-nulth Tribal Council. The Maa-nulth First Nations Treaty came into effect April 1, 2011 and was the third modern-day treaty in BC and the second under the BC Treaty Process [*Maa-nulth First Nations Final Agreement*, 9 April 2009]. Maa-nulth First Nations' combined population as of October 2014, 2010 was 2,264.

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Specifically, with respect to comprehensive governance arrangements to be negotiated as part of treaty, the Province of British Columbia is represented by the Ministry of Aboriginal Relations and Reconciliation (MARR). MARR is the lead for the Province's participation in final agreement and advanced agreement-in-principle negotiations, interim measures and other agreements.

The official position of MARR is that treaty negotiations in BC are needed to:

- meet legal obligations to clearly define the rights and responsibilities of both the Province and First Nations. They provide a cooperative way to resolve issues and help avoid future conflict in the courts;
- address these economic and social injustices by providing First Nations with the authority to manage their own affairs and become less dependent on government support; and,
- bring certainty to land and resource rights, treaties will maximize opportunities for economic development and job creation for all British Columbians.

While this may be MARR's official rationale, supported by all of government, its high-level objectives are not necessarily addressed in the position taken by the province at individual treaty tables, the negotiating mandates of First Nations, and what has actually been agreed to in modern treaties.

Notwithstanding the challenges of negotiating treaties and the mandates of the Crown, the main objectives of the treaty process remain the same: the recognition of Aboriginal rights and title and reconciliation with the Crown. This will provide certainty of ownership and jurisdiction over the land and resources within First Nations ancestral lands. It will be achieved in part by ensuring appropriate powers of governance for First Nations and not just over existing reserve lands. There are, of course, other objectives for First Nations, depending on their individual circumstances.

While trade-offs are inevitable in treaty negotiations, the governance arrangements recognized in a treaty can be broader than those under sectoral initiatives or comprehensive governance arrangements outside treaty, which for the most part are restricted to existing reserve lands.

Procedures for Negotiating a Treaty

The British Columbia Treaty Commission is the independent body responsible for facilitating treaty negotiations. The BCTC does not negotiate treaties: that is done by the three parties at each negotiation table. The BCTC's primary role is to oversee the negotiation process to make sure that the parties are being effective and making progress in negotiations. In carrying out the recommendations of the BC Claims Task Force, the Treaty Commission has three roles in the treaty-making process: facilitation, funding and public information and education. The six-stage process for negotiating a treaty is described below.

Stage 1: Statement of Intent to Negotiate
A First Nation files a statement of intent (SOI) with the BCTC to negotiate a treaty with Canada and British Columbia. The SOI must identify the First Nation's governing body for treaty purposes and the people that body represents, and it must show that the governing body has a mandate from those people to enter the process. The SOI must describe the geographic area of the First Nations distinct traditional territory and identify any overlaps with the territories of other First Nations.

Stage 2: Readiness to Negotiate
The Treaty Commission must convene an initial meeting of the three parties within 45 days of accepting the SOI. For most First Nations, this will be the first occasion on which they sit down at a treaty table with representatives of Canada and British Columbia. This meeting allows the BCTC and the parties to exchange information, consider the criteria for determining the parties' readiness to

negotiate and generally identify issues of concern. The meeting usually takes place in the territory of the First Nation. The three parties must demonstrate that they have a commitment to negotiate, a qualified negotiator, sufficient resources, a mandate, a process to develop that mandate, and ratification procedures. The First Nation must have begun to address any shared territory/overlaps. The governments of Canada and BC must have a formal means of consulting with third parties, including local governments and interest groups. When the three parties have everything in place, the BCTC will declare the table ready to begin negotiating a framework agreement.

Stage 3: Negotiation of a Framework Agreement

The framework agreement is, in effect, the "table of contents" of a comprehensive treaty. The three parties agree on the subjects to be negotiated and an estimated timeframe for Stage 4 agreement in principle negotiations. Canada and British Columbia engage in public consultation at the regional and local levels. A municipal representative typically sits on the provincial negotiation team at each treaty table.

Stage 4: Negotiation of An Agreement In Principle

This is where substantive treaty negotiations begin. The three parties examine in detail the elements outlined in their framework agreement. The goal is to reach agreement on each of the topics that will form the basis of the treaty. These agreements will identify and define a range of rights and obligations, including existing and future interests in land, sea and resources; structures and authorities of government; relationship of laws; regulatory processes; amending processes; dispute resolution; financial component; and fiscal relations. The agreement in principle also lays the groundwork for implementation of the treaty.

Stage 5: Negotiation to Finalize a Treaty

The treaty formalizes the new relationship among the parties and embodies the agreements reached in the agreement in principle. Technical and legal issues are resolved at this stage. The treaty is signed and formally ratified at the conclusion of Stage 5.

Stage 6: Implementation of the Treaty

Long-term implementation plans are tailored to specific agreements. The plans to implement the treaty are put into effect or phased in as agreed. With time, all aspects of the treaty will be realized and, with continuing goodwill, commitment and effort by all parties, the new relationship will come to maturity.

The BCTC website contains additional information on the commission's policies and procedures for each of the six stages, including criteria for each stage of the process and sample documents.

Huu-ay-aht First Nations

Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations

Toquaht Nation

Ucluelet First Nation

Uchucklesaht Tribe

The Common Table

In BC, Nations have come together as a "Common Table" to engage with Canada and British Columbia on key issues in the treaty process, to identify obstacles, address barriers and promote the speedy conclusion of fair and viable agreements based on recognition and reconciliation of Aboriginal rights and title. Six key topics have been identified for discussion at the Common Table:

1) Recognition/certainty, including overlapping claims/shared territories
2) Constitutional status of lands
3) Governance
4) Co-management throughout traditional territories, including structures for shared decision-making
5) Fiscal relations, including own-source revenue and taxation
6) Fisheries

Preconditions to Negotiating a Treaty

According to the BCTC, provisions for self-government in a treaty will vary from treaty to treaty, but all are guided by the following principles, not all of which are agreed to by First Nations:

- Self-government will be exercised within the existing Canadian Constitution. Aboriginal peoples will continue to be citizens of Canada and residents of the province or territory where they live, but they may exercise varying degrees of jurisdiction and authority.
- The *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, will apply fully to Aboriginal governments, as it does to all other governments in Canada.
- First Nations will have the ability to make laws pertaining to treaty land and the provision of public services to their people, including health care, education and social services.
- Some local laws, such as zoning and transportation, will apply to all residents on treaty lands, but the majority of Aboriginal laws will apply only to First Nations citizens. Federal, provincial, territorial and Aboriginal laws must work in harmony.
- First Nations will be required to consult with local residents on decisions that directly affect them (e.g., health, school and police boards).

Yale First Nation

Yale First Nation is located in the Fraser Canyon and is an independent First Nation of Halkomelem speaking peoples. The Yale First Nation treaty is targeted to come into effect on April 1, 2016 [*Yale First Nation Final Agreement*]. Yale had a population of 163 at October 2014.

Yale First Nation
31300A Yate Street
Yale, BC V0K 2S0
Phone: 604-863-2443
Toll-free: 888-301-9253
Fax: 604-863-2467
www.yalefirstnation.ca

First Nations that have gone into the treaty process have done so without any preconditions, save those that are included in their framework agreement in stage 3. Consequently, they take issue when Canada or British Columbia implies that by entering into treaty negotiations, First Nations have conceded certain positions or principles on governance. In other words, for First Nations, when they engage in comprehensive governance negotiations at the level of treaty-making, everything is on the table for negotiation.

Current Status of Treaty Negotiations in BC

The BC treaty-making process is open to all BC First Nations. As of October 2014, there are 40 active negotiating tables involving 73 First Nations (or *Indian Act* Bands)(some First Nations choose to organize at the tribal council or other level) and four completed treaties: Maa-nulth, Tla'amin [Sliammon], Tsawassen and Yale (representing 8 former *Indian Act* bands). The Yale and Tla'amin treaties had been ratified at the time of writing but were not yet in effect (see Map on page 65 — Treaty Negotiations in British Columbia.

As we are often reminded by the BCTC, treaty negotiations in BC are arguably the most complex negotiations ever undertaken in Canada and the most complex treaty negotiations involving Indigenous peoples ever undertaken in the world. It is not surprising, given the scope and difficulty of the issues, that progress has been slow, notwithstanding the advances that have been made in the courts and in other processes outside of modern treaty-making. Many First Nations within the process have become frustrated and are anxious to see progress in treaty negotiations. Much money and time has been expended. In this regard, some treaty tables are looking to implement aspects of their treaty in advance of finalizing the entire treaty. Interim governance arrangements are a way to assist communities in moving forward.

Interim Measures

Treaty-Related Measures

Canada's treaty-related measures (TRM) initiative is unique to BC treaty negotiations and is one of the federal government's primary tools for "Interim Measures," agreements that are entered into before the conclusion of a treaty and that support the objectives of negotiations, including protecting land and resources for settlement. According to Canada, the key objectives of the TRM initiative are to advance the progress of negotiations, promote good governance and co-operative relationships

for First Nations, and assist First Nations in preparing to implement their treaties. First Nations treaty negotiators can propose TRMs through Canada's negotiating teams, and the proposal is then processed within AANDC.

Incremental Treaty Agreements

There are also opportunities for First Nations to negotiate what are referred to as incremental treaty agreements (ITAs) with British Columbia. These typically involve land transfers or funds and are designed to provide the Nation with certainty and economic opportunity and are further seen as an indication that both the negotiating community or communities and the provincial government remain committed to the treaty process. All ITAs involve Nations that are in Stage 4 (Agreement in Principle) of the treaty process. Fourteen such agreements have been negotiated as of October 2014. The first ITA was signed by the Tla-o-qui-aht First Nation and British Columbia (*Tla-o-qui-aht First Nations Incremental Treaty Agreement* [13 November 2008]). The process accelerated in 2013, with British Columbia signing 11 ITAs, but no further agreements have been signed as of October 2014.

Incremental Treaty Agreements

Incremental Treaty Agreements are legally binding pre-treaty agreements negotiated between British Columbia and a First Nation or a group of Nations. They are designed to benefit both parties in advance of a final agreement (Stage 6). These agreements cover particular issues between the parties.

There are currently 14 incremental treaty agreements:

- Dididaht First Nation (2013)
- Kaska Dena Council (2013)
- Kitselas First Nation (2013)
- Kitsumkalum First Nation (2013)
- Klahoose First Nation (2009)
- Ktunaxa Kinbasket Treaty Council (2013)
- Malahat Nation (2013)
- Nazko First Nation (2012)
- Pacheedaht First Nation (2013)
- Sc'ianew Nation (2013)
- Snaw-naw-as Nation (2013)
- Songhees Nation (2013)
- Tla-o-qui-aht First Nations (2008, amended 2012)
- T'souke Nation (2013)

Tla'amin Nation

The Tla'amin (Sliammon) Nation is located north of Powell River along the Sunshine Coast. The Tla'amin ancestral lands stretches an area over approximately 400 square kilometers along the northern part of the Sunshine Coast, extending both sides of the Straight of Georgia within the Salish Sea. Culturally the Tla'amin people are a part of the Coast Salish. The Tla'amin Treaty comes into effect on April 2, 2016 [*Tla'amin Final Agreement*]. The population of Tla'amin at October 2014 was 1,051.

Sliammon First Nation
6686 Sliammon Rd
Powell River, BC V8A 0B8
Phone: 604-483-9646
Fax: 604-483-9769
www.sliammonfirstnation.com

Financial Support for BC Treaty Negotiations

The BCTC allocates negotiation support funding to First Nations so that they can prepare for and carry out negotiations on a more even footing with the governments of Canada and British Columbia. For every $100 of negotiation support funding, $80 is a loan from Canada, $12 is a contribution from Canada and $8 is a contribution from BC. The BCTC's funding duties include receiving and considering funding requests from First Nations (including obtaining evidence of community approval for a funding request), approving the budgets filed by First Nations in support of their work plans, allocating funds to First Nations in accordance with funding criteria, and reviewing annual audit reports and other accounting reports from First Nations that receive negotiation support funding.

According to the BCTC's 2014 annual report, since opening its doors in May 1993 it has allocated approximately $617 million in negotiation support funding to more than 50 First Nations, $493 million in the form of loans and $134 million in the form of non-repayable contributions. For more information, see the BCTC 2014 annual report at www.bctreaty.net.

NATIONS THAT ARE SELF-GOVERNING IN ACCORDANCE WITH COMPREHENSIVE GOVERNANCE ARRANGEMENTS

Self-Government Agreements in BC

In BC, seven comprehensive governance arrangements have been negotiated:

- *Sechelt (1986)* — negotiated before the federal approach to implementing and negotiating the inherent right had been adopted
- *Nisga'a (1995)* — negotiated as part of the Nisga'a Treaty with Canada and BC under the federal comprehensive claims and Inherent Right Policy
- *Westbank (2005)* — negotiated bilaterally with Canada under the Inherent Right Policy
- *Tsawwassen (2009)* — negotiated with Canada and BC as part of a modern treaty through the BC treaty-making process
- *Maa-nulth (2010)* — negotiated with Canada and BC as part of a modern treaty through the BC treaty-making process
- *Yale (2013)* — negotiated with Canada and BC as part of a modern treaty through the BC treaty-making process
- *Tla'amin (2014)* — negotiated with Canada and BC as part of a modern treaty through the BC treaty-making process.

As of October 2014, Yale and Tla'amin had been ratified by both the First Nation and the federal and provincial governments, but were not yet in effect.

Each chapter in Section 3 — Powers (Jurisdictions) of the First Nation addresses a particular jurisdiction and includes a table showing the treatment of that jurisdiction under each of these arrangements.

Self-Government Agreements across Canada

In addition to the First Nations that have reached governance arrangements in BC, either inside or outside the treaty process, there are 20 other governance agreements in Canada. These agreements, which are either included within the terms of a treaty itself or have been negotiated as side arrangements outside the treaty are listed below. See Map on page 66 — Post-1975 Treaties and Self-Government Agreements.

- *James Bay and Northern Quebec Agreement* (11 November 1975)
- *Northeastern Quebec Agreement* (31 January 1978)
- *Yukon Umbrella Agreement* (self-government by separate agreements — 11 communities, each with their own Final Agreements negotiated in accordance with the Umbrella Final Agreement, shown below with the year they came into effect)"
  - Vuntut Gwitchin First Nation (1995)
  - Champagne and Aishihik First Nations (1995)
  - Teslin Tlingit Council (1995)
  - First Nation of Nacho Nyak Dun (1995)
  - Selkirk First Nation (1997)
  - Little Salmon/Carmacks First Nation (1997)
  - Tr'ondek Hwech'in First Nation (1998)
  - Ta'an Kwach'an Council (2002)
  - Kluane First Nation (2004)
  - Kwanlin Dun First Nation (2005)
  - Carcross/Tagish First Nation (2006)

- *Gwitch'in Comprehensive Land Claim Agreement* (self-government by separate agreement) (22 April 1992)
- Sahtu Dene Comprehensive Land Claim Agreement (self-government by separate agreement) (6 September 1993) and the related Délįnę Final Self-Government Agreement (13 March 2014)
  Labrador Inuit Land Claims Agreement (self-government included) (22 January 2005)
- *Tlicho Land Claims and Self-Government Agreement* (25 August 2003)
- *Nunavik Inuit Land Claims Agreement* (1 December 2006)
- *Eeyou Marine Region Land Claims Agreement* (29 November 2011)
- *Sioux Valley Dakota Nation Governance Agreement* (4 March 2013)

It should be noted that not all modern land claims agreements address governance. The 1984 Inuvialuit Final Agreement has no explicit self-government provision, although arguably the Inuvialuit Land Administration is an institution of self-government. Sometimes the treaties provide for the negotiation of governance arrangements that will not form part of the treaties. This is the case for the Yukon and the Gwitchin and Sahtu Dene. This technique was adopted to avoid constitutional protection of the governance provisions in land claims that were negotiated after section 35 of the *Constitution Act, 1982* came into force but before Canada changed its policy with respect to constitutional protection of self-government. In the Northwest Territories, for a long time Canada's policy was to establish public governments rather than territorial-based First Nation governments. It is only relatively recently that Canada has agreed to negotiate governance as part of treaties or land claims. The Tlicho were the first to get a treaty that included self-government. Other Aboriginal groups are now pursuing governance agreements.

RESOURCES

First Nations

Coastal First Nations
United Kingdom Building
Suite 1660, 409 Granville Street
Vancouver, BC V6C 1T2
Phone: 604-696-9889
Fax 604-696-9887
www.coastalfirstnations.ca

- *Reconciliation Protocol between the Coastal First Nations and Her Majesty the Queen in Right of British Columbia* (10 December 2009): www2.gov.bc.ca/gov/DownloadAsset?assetId=65D0CE9AEA1B4C3DA033DEC0FA51D6CC&filename=reconciliation_coastal_haisla_amendment.pdf

Huu-ay-aht First Nations
3483 Third Avenue
Port Alberni, BC V9Y 4E4
Phone: 250-728-3414
Toll-free: 1-888-644-4555
Fax: 250-728-1222
www.huuayaht.org

Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations
General Delivery
Kyuquot, BC V0P 1J0
Phone: 250-332-5259
Fax: 250-332-5210

Maa-nulth First Nations
3075, 3rd Avenue
Port Alberni, BC V9Y 2A4
Phone: 250-724-1802
Fax: 250-724-1852
Email: info@maanulth.ca
www.maanulth.ca

- *Maa-nulth First Nations Final Agreement* (9 April 2009): www.maanulth.ca/downloads/treaty/2010_maa-nulth_final_agreement_english.pdf

Nisga'a Lisims Government
PO Box 231
2000 Lisims Drive
New Aiyansh, BC V0J 1A0
Phone: 250-633-3000
Toll-free: 1-866-633-0888
Fax: 250-633-2367
www.nisgaanation.ca

- *Nisga'a Final Agreement* (9 February 1999): http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/EB/prb992-e.htm

Sechelt Indian Band
PO Box 740, 5555 Sunshine Coast Highway
Sechelt, BC V0N 3A0
Phone: 604.885.2273
www.secheltnation.ca

- *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)

Toquaht Nation
PO Box 759
1971 Peninsula Road
Ucluelet, BC V0R 3A0
Phone: 250-726-4230
Toll-free: 1-877-726-4230
www.toquaht.ca

Tsawwassen First Nation
1926 Tsawwassen Drive
Tsawwassen, BC V4M 4G2
Phone: 604-943-2112
Toll-free: 1-888-943-2112
Fax: 604-943-9226
Email: info@tsawwassenfirstnation.com
www.tsawwassenfirstnation.com

- *Tsawwassen First Nation Final Agreement* (6 December 2007): http://dsp-psd.pwgsc.gc.ca/collections/collection_2010/ainc-inac/R3-129-1-2010-eng.pdf

Uchucklesaht Tribe
PO Box 1118
Port Alberni, BC V9Y 7L9
Phone: 250-724-1832
Fax: 250-724-1806

Ucluelet First Nation
PO Box 699
Ucluelet, BC V0R 3A0
Phone: 250-726-7342
Fax: 250-726-7552
www.ufn.ca

Westbank First Nation
Suite 301, 515 Hwy 97 South
Kelowna, BC V1Z 3J2
Phone: 250-769-4999
Fax: 250-769-4377
Email: mail@wfn.ca
www.wfn.ca

- *Westbank First Nation Self-Government Agreement* (3 October 2003): http://dsp-psd.pwgsc.gc.ca/Collection/R2-285-2003E.pdf

First Nations Summit
Suite 1200, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-926-9903
Fax: 604-926-9923
Toll-free: 1-866-990-9939
www.fns.bc.ca

- The First Nations Summit's mandate is to represent the interests of First Nations that have agreed to participate in treaty negotiations. The Summit's role is not to negotiate treaties on behalf of First Nations, but to support local First Nations negotiations. In doing so, the Summit also recognizes that not all First Nations in the province have chosen to participate in the treaty process. The Summit respects each First Nation's right to determine its own course. The 1991 *Report of the British Columbia Claims Task Force* lays the foundation for the treaty process in BC.

Land Claims Agreements Coalition
488 Gladstone Avenue
Ottawa, ON K1R 5N8
Tel: 613-237-3613
Fax: 613-237-3845
Email: black@consilium.ca
www.landclaimscoalition.ca

- As stated on its website, the Land Claims Agreements Coalition (LCAC) works to ensure that comprehensive land claims and associated self-government agreements are respected, honoured and fully implemented in order to achieve their objectives.
- The membership of the LCAC includes the following modern treaty governments and organizations in Canada:
  - Council of Yukon First Nations (representing nine land claim organizations in the Yukon) (www.cyfn.ca)
  - Grand Council of the Crees (Eeyou Istchee) (www.gcc.ca)
  - Gwich'in Tribal Council (www.gwichin.nt.ca)
  - Inuvialuit Regional Corporation (www.idc.inuvialuit.com)
  - Kwanlin Dun First Nation (www.kwanlindun.com)
  - Maa-nulth First Nations (www.maanulth.ca)
  - Makivik Corporation (www.makivik.org)
  - Naskapi Nation of Kawawachikamach (www.naskapi.ca)
  - Nisga'a Nation (www.nisgaanation.ca)
  - Nunatsiavut Government (www.nunatsiavut.com)
  - Nunavut Tunngavik Inc. (www.tunngavik.com)
  - Sahtu Secretariat Inc.
  - Tlicho Government (www.tlicho.ca)
  - Tsawwassen First Nation (www.tsawwassenfirstnation.com)
  - Vuntut Gwitchin First Nation (www.vgfn.ca)

British Columbia Treaty Commission
Suite 700, 1111 Melville Street
Vancouver, BC V6E 3V6
Phone: 604-482-9200
Fax: 604-482-9222
Toll-free: 1-800-665-8330

Email: info@bctreaty.net
www.bctreaty.net

- The BCTC website has a great deal of information on the process of negotiating a treaty and on the status of negotiations in BC.
- *The Report of the British Columbia Claims Task Force* (1991)
- *British Columbia Treaty Commission Agreement* (21 September 1992): www.bctreaty.net/files/pdf_documents/092192_bc-treaty-commission-agreement.pdf

Provincial

Government of British Columbia —
Ministry of Aboriginal Relations and Reconciliation
PO Box 9100 Stn Prov Govt
2957 Jutland Road
Victoria, BC V8W 9B1
Phone: 604-660-2421 (Vancouver)
Phone: 250-387-6121 (Victoria)
Toll-free: 1-800-663-7867 (outside Vancouver and Victoria)
Toll-free: 1-800-880-1022 (information line)
Email: ABRInfo@gov.bc.ca
www.gov.bc.ca/arr

- *Tla-o-qui-aht First Nations Incremental Treaty Agreement* (13 November 2008): www.gov.bc.ca/arr/treaty/down/tla_o_qui_aht_ita_final_for_signing_premier_nov0608.pdf
- *Klahoose First Nation Incremental Treaty Agreement* (5 March 2009): www.gov.bc.ca/arr/treaty/down/klahoose_ita_final.pdf

Federal

Aboriginal Affairs and
Northern Development Canada
British Columbia Region
Suite 600, 1138 Melville Street
Vancouver, BC V6E 4S3
Phone: 604-775-5100
Toll-free: 1-800-567-9604
Fax: 604-775-7149
TTY: 1-866-553-0554
Email: Infopubs@inac-ainc.gc.ca
www.ainc-inac.gc.ca

- Statement of the Government of Canada on Indian policy (The White Paper, 1969): www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191

PART 1 /// SECTION 1

Maps

First Peoples' Language Map *of* British Columbia

The First Peoples' Language Map of British Columbia is provided by the First Peoples' Cultural Council, a provincial Crown corporation dedicated to the revitalization of B.C.'s First Nations languages, arts, cultures and heritage. For more information, visit: www.fpcc.ca.

Tutchone
Den k'e
Łingít
Danezāgé'
Dene K'e (Uᑌᒃᓱᒃ)
Fort Nelson
Tāłtān
Lingít
Anishnaubemowin
Dane-Zaa (Cᖁᔨᓀ)
Tse'khene
Nisga'a
Fort St John
ᓀᐦᐃᔭᐘᐏᓐ (Nēhiyawēwin)
Wetalh
Gitsenimx
Smithers
Prince Rupert
Nedut'en / Witsuwit'en
Sm̓algyax
Prince George
Dakelh (CB᙮)
Xaad Kil / Xaaydaa Kil
X̄a"islak̓ala / X̄enaksialak̓ala
Quesnel
Nuxalk
Bella Coola
Ski:xs
Hailhzaqvla
Williams Lake
Tsilhqot'in
Oowekyala / 'Uik̓ala
Secwepemctsín
Golden
Kwak̓wala
Port Hardy
Kamloops
Stát'imcets
Éy7á7juuthem
Merritt
Nsyilxcən
Kelowna
Nłe?kepmxcin
Ktunaxa
Cranbrook
Nicola
Nelson
She shashishalhem
Nuučaaṇuɬ
Pəntl'ác
Vancouver
Osoyoos
Sḵwx̱wú7mesh sníchim
Lhéchelesem
Huĺq'umi'num' / Halq'eméylem / həńq̓əmiń əṁ
Nqlispéliščn
Diitiid?aatx̣
Victoria
SENĆOŦEN / Malchosen / Lkwungen / Semiahmoo / T'Sou-ke
Nəxʷsƛayəmúcən

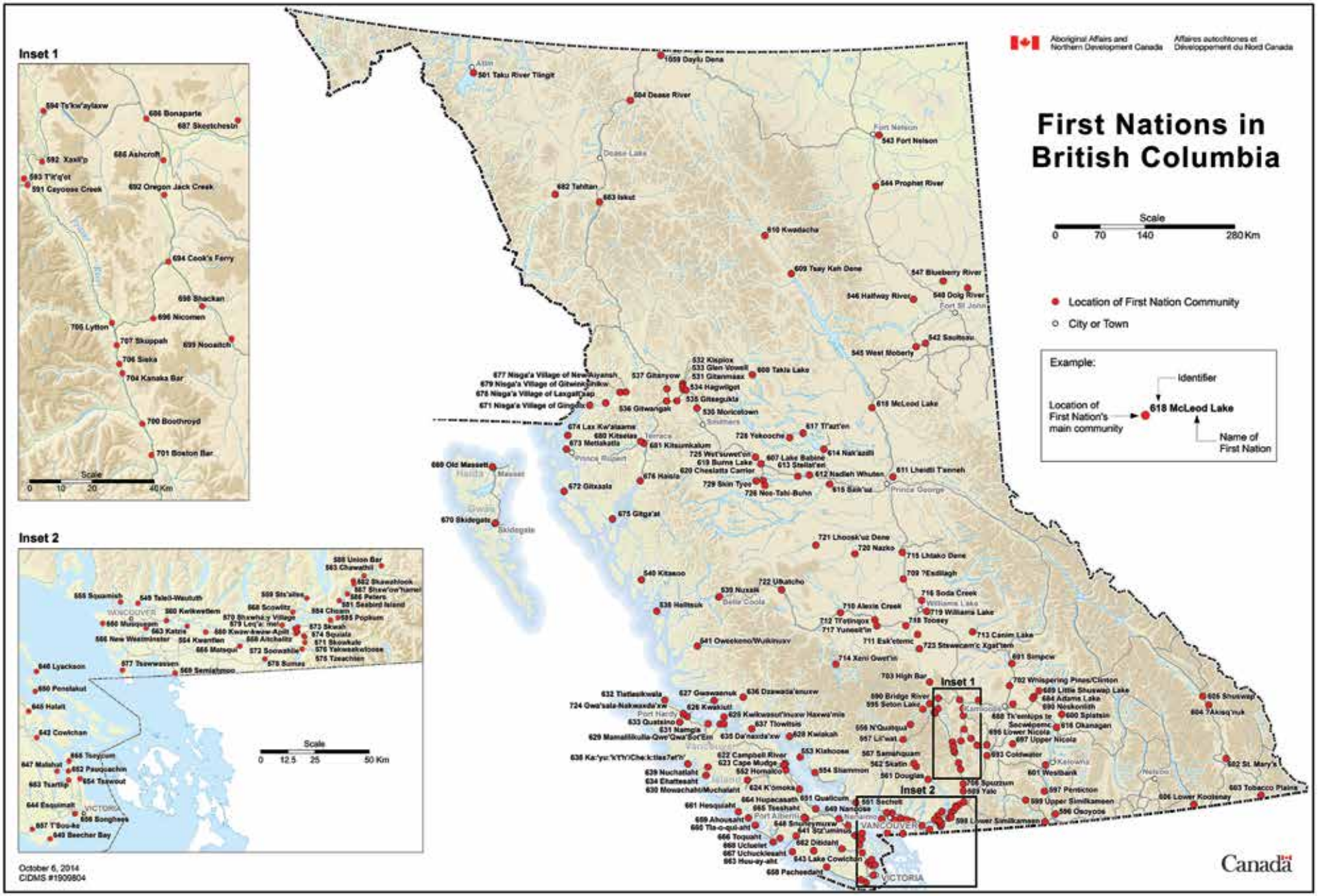
Languages
- **Languages** *(only spoken in communities indicated)*
- **Neighbouring languages**
- **Sleeping Languages** *(No fluent speakers left)*
- Cities & Towns

For more information on B.C. First Nations languages, please see the First Peoples' Cultural Council website at www.fpcc.ca, or visit www.firstvoices.com for games and learning materials.

View the interactive online version of this map at

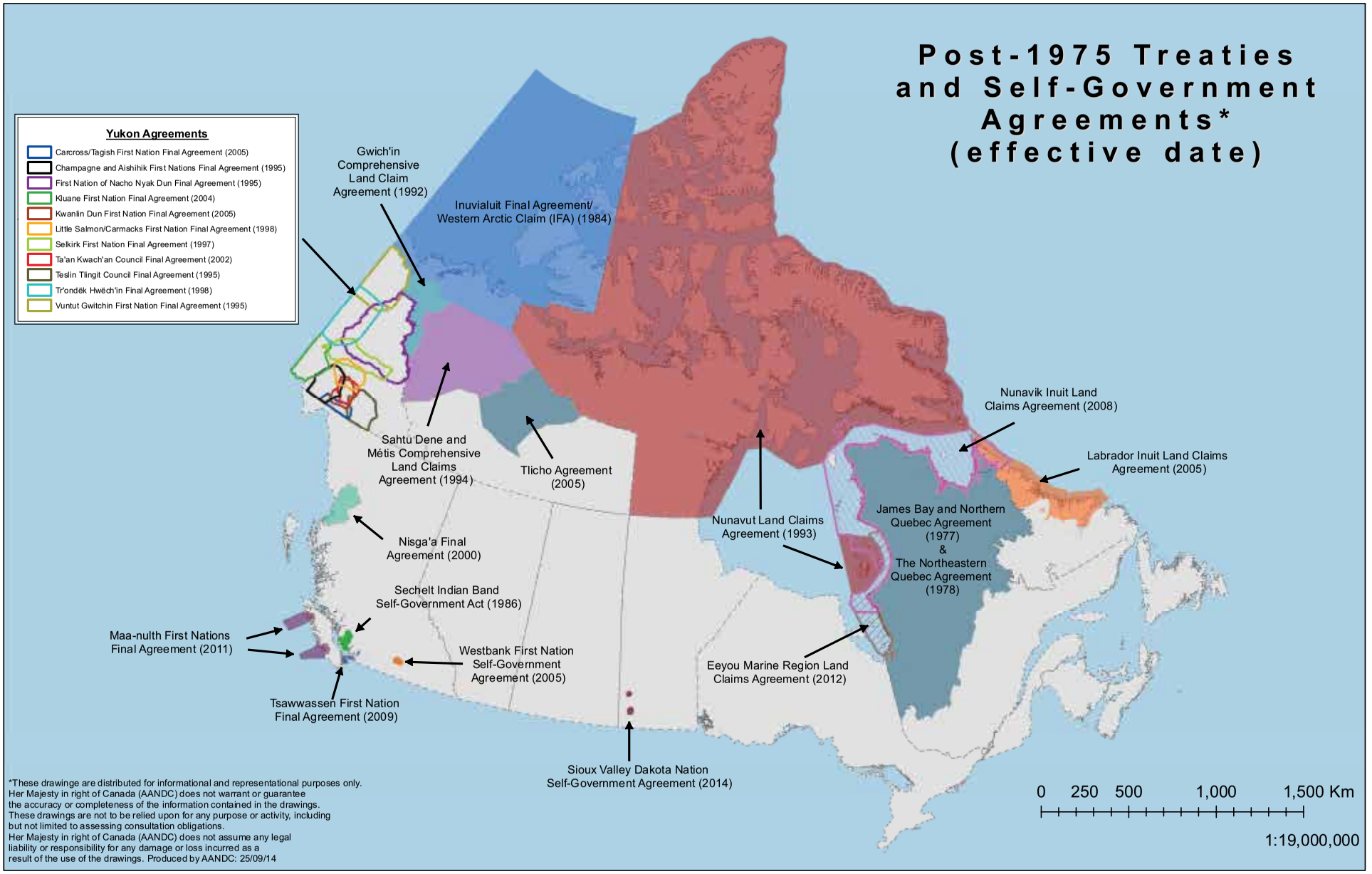
maps.fpcc.ca

FIRST PEOPLES' CULTURAL COUNCIL


First Nations in British Columbia
Aboriginal Affairs and Northern Development Canada
Affaires autochtones et Développement du Nord Canada
Scale
0 70 140 280 Km
Location of First Nation Community
City or Town
Example:
Identifier
Location of First Nation's main community
618 McLeod Lake
Name of First Nation
Inset 1
Scale
0 10 20 40 Km
Inset 2
Scale
0 12.5 25 50 Km
Canada
October 6, 2014
CIDMS #1909804


Canada
BRITISH COLUMBIA
Treaty Negotiations in British Columbia
Scale
km
0 50 100 200 300
STATEMENTS OF INTENT TO NEGOTIATE TREATIES ACCEPTED BY THE BRITISH COLUMBIA TREATY COMMISSION AS OF OCTOBER 2014
1 Acho Dene Koe First Nation
2 Allied Tribes of Lax Kw'alaams
3 Carcross/Tagish First Nation
4 Carrier Sekani Tribal Council
5 Champagne and Aishihik First Nations
6 Cheslatta Carrier Nation
7 Council of the Haida Nation
8 Da'naxda'xw Awaetlatla Nation
9 Ditidaht First Nation
10 Esk'etemc First Nation
11 Gitanyow Hereditary Chiefs
12 Gitxsan Hereditary Chiefs
13 Gwa'Sala-'Nakwaxda'xw Nation
14 Haisla Nation
15 Heiltsuk Nation
16 Homalco Indian Band
17 a) Hul'qumi'num Treaty Group (Core)
b) Hul'qumi'num Treaty Group (Marine)
18 Hupacasath First Nation
19 In-SHUCK-ch Nation
20 Kaska Dena Council
21 Katzie Indian Band
22 Klahoose Indian Band
23 K'ómoks First Nation
24 Ktunaxa Kinbasket Treaty Council
25 Kwakiutl Nation
26 Laich-Kwil-Tach Council of Chiefs
27 Lake Babine Nation
28 Lheidli T'enneh Band
29 Liard First Nation
30 McLeod Lake Indian Band
31 Musqueam Nation
32 'Namgis Nation
33 Nazko First Nation
34 Northern Shuswap Tribal Council
35 Nuu-chah-nulth Tribal Council
36 Pacheedaht Band
37 Quatsino First Nation
38 Ross River Dena Council
39 Sechelt Indian Band
40 Snuneymuxw First Nation
41 Squamish Nation
42 Stó:lō Xwexwilmexw Treaty Association
43 Taku River Tlingit First Nation
44 Te'mexw Treaty Association (Bands)
45 Teslin Tlingit Council
46 Tla'amin Nation
47 Tla-o-qui-aht First Nation
48 Tlatlasikwala Nation
49 Tlowitsis First Nation
50 Tsay Keh Dene Band
51 Tsimshian First Nations
52 Tsleil-Waututh Nation
53 Wei Wai Kum/Kwiakah First Nations
54 Westbank First Nation
55 Wet'suwet'en Nation
56 Wuikinuxv Nation
57 Yale First Nation
58 Yekooche First Nation
Approximate boundaries of traditional territories
Final Agreements Completed and In Effect
A Nisga'a Nation ("Nass Area" shown)
B Tsawwassen First Nation
C Maa-nulth First Nations
Produced by the Community Infrastructure Directorate under the Information Sharing Protocol for Treaties and Aboriginal Government, Aboriginal Affairs and Northern Development Canada, and the Ministry of Aboriginal Relations and Reconciliation.
Lower Mainland Detail
Scale
km
0 25 50 100
The lines on this map represent the approximate boundaries of traditional territories described in First Nation Statements of Intent to negotiate treaties which have been submitted to, and accepted by the B.C. Treaty Commission. They are illustrative only and may be updated in the future. Additional Statements of Intent may be received. Publication of this map does not imply that the First Nations, the Province of British Columbia, or the Government of Canada have agreed to the boundaries shown.
YUKON
N.W.T.
ALBERTA
ALASKA (U.S.A.)
PACIFIC OCEAN
DIXON ENTRANCE
HECATE STRAIT
QUEEN CHARLOTTE SOUND
UNITED STATES
Lower Post
Atlin
Dease Lake
Telegraph Creek
Muncho Lake
Fort Nelson
Stewart
Prince Rupert
Masset
Skidegate
Terrace
Smithers
Hazelton
Kemano
Bella Coola
Port Hardy
Fort St. John
Dawson Creek
Mackenzie
Ware
PRINCE GEORGE
Quesnel
Williams Lake
Clinton
KAMLOOPS
Lytton
Merritt
KELOWNA
Vernon
Revelstoke
Golden
Kaslo
Kimberley
Fernie
Cranbrook
Nelson
Castlegar
Creston
Princeton
Penticton
Oliver
Trail
Hope
Campbell River
Courtenay
Gold River
Powell River
NANAIMO
Duncan
VICTORIA
VANCOUVER
Whistler
Squamish
Princeton
Hope
VANCOUVER
UNITED STATES

Affaires autochtones et Développement du Nord Canada | Aboriginal Affairs and Northern Development Canada



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Canada

PART 1 /// SECTION 2

Core Institutions of Governance

2.0

CORE INSTITUTIONS OF GOVERNANCE INTRODUCTION

2.0

INTRODUCTION

BACKGROUND

When rebuilding First Nations governance, it is conceptually very helpful to make the distinction, even if it seems somewhat artificial and is not always black and white, between the "core institutions" of governance and the matters over which the Nation actually governs, its "jurisdictions." The core institutions of governance are those practices, bodies and structures that together constitute government. They include the governing body or bodies, the rules and conventions that set out how laws are made, and the essential structures and procedures through which the government operates and conducts its business. It is through and in accordance with the core institutions that the powers of government are established, exercised and controlled — in other words, the exercise of jurisdiction. Understanding the distinction between "core institutions" and "jurisdiction" is important, particularly when engaging the community, because it is easy for people to become focused on the subject matters that are or may be governed, as opposed to how the Nation is governed and makes decisions.

Core institutions of governance are those practices, bodies and structures that together constitute government. They include the governing body or bodies, the rules and conventions that set out how laws are made, and the essential structures and procedures through which the government operates and conducts its business.

Establishing core institutions of governance is essential, because all other aspects of governance depend on them. For each power or jurisdiction a Nation takes on, it will be the core institutions of the government that are responsible for seeking feedback from citizens and enacting laws and enforcing them. A Nation's government may also manage the delivery of programs and services in accordance with its laws. Many of the current initiatives available to communities to assume expanded jurisdiction or authority beyond the *Indian Act* do not consider the core institutions of governance but assume that they exist, in most cases delegated under the *Indian Act*. Nevertheless, sorting out the core institutions of First Nations governments should be looked at as a necessary prerequisite to assuming jurisdiction, regardless of how extensive that jurisdiction is. While there will ultimately be questions about the viability of First Nations governments with respect to the range and scope of jurisdictions they wish to exercise, there will always be a need to have in place core governance institutions that are functional, legitimate, appropriate and, consequently, strong.

TRADITIONAL GOVERNANCE

Historically, First Nations before contact had their own distinct institutions of core governance that reflected the diverse cultures and traditions of the people. In many cases, these still exist today. However, the impact of institutions imposed by the settler society has been significant. So, too, has the imposition of pan-Indian notions of governance that reflect a generalized view of how Indigenous governments were structured.

Traditional institutions of governance vary among First Nations societies, a reflection of different cultural practices, conventions and norms. They include chieftainships (hereditary or otherwise), secret societies, extended families, clans, councils, feasts, potlatches and gatherings, to name but a few. A Nation's "legal code" was often expressed through myth, legend, song and dance, which told stories, recounted the past and provided rules for what was expected of those who lived in the community. Decision-making and record-keeping were typically oral, with the use in some First Nations societies of witnesses in big houses/longhouses, at potlatches, or other gatherings where work was done. All these practices and institutions, along with other institutions of social order, collectively formed traditional methods of governance for First Nations.

"Governance" as defined in Indigenous languages	
Ayuukhl:	Laws of the Nisga'a. (Edna A. Nyce, Nisga'a)
hawith p'utak – haiith ha-houthii:	Our Hereditary Chiefs' laws and government systems. The word "hish-uk-ish-tsawaak" — we are all related, we are all one — is included in these words. (Cliff Atleo Sr., Nuu chah nulth)
Snowoyelh:	Describes our responsibilities to each other, the land, water, and other beings. These are our laws that were passed to us from our ancestors and we are obliged to pass them to future generations. (Tyrone NcNeil, Sto:lo)
Ah ake keelah:	Taking care of everything. (Hereditary Chief Robert Joseph, Kwakwaka'wakw)
N'ta'kmen:	Natural way of living — looking after the water for our animals, trees, land, and so on. (Lois Joseph, Lil'wat)
hghunni a tsin la:	A word said after deliberation and decision. (Grand Chief Edward John, Tl'azt'en)
Tk'wen en 7iplem & tk'wem 7iple:	The rules that govern the people. (Mona Jules, Secwepemc)

These traditional methods are sometimes referred to by legal and academic scholars as being derived from and a part of "Indigenous legal traditions," an area of law within Canada that is developing as First Nations seek to understand their own legal traditions as distinct from others, and then to establish and strengthen their institutions of governance within Canada. In doing so, they give contemporary meaning and expression to what Indigenous legal traditions look like in practice today.

IMPACT OF WESTERN LEGAL TRADITIONS ON GOVERNANCE

With the arrival of Western legal traditions and all the attendant political and legal institutions of settler society, the traditional First Nations institutions of governance were either replaced or sidelined as new institutions of governance were superimposed. At times, First Nations institutions of governance clashed with those of the settlers and were simply not understood, as evidenced by the fact that the *Indian Act* at one point forbade potlatching and sundances, both important institutions of governance for some First Nations. Among the settler institutions that became part of First Nations peoples lives after contact was an alien form of government based on a parliamentary system, with a Department of Indian Affairs, a Minister of Indian Affairs, and the associated bureaucracies, including the "Indian Agent." With the power of the Crown and the state behind them, these institutions sought to supplant Indigenous legal traditions and the powers of traditional institutions over First Nations peoples and their lands. Under the *Indian Act*, the system of chief and council was established as part of this imposed mode of governance, despite the lack of perceived linkages to customary governing bodies. These new governing bodies were and still are subordinate to the institutions of the state and are not "First Nations" institutions, despite the fact that they represent First Nations citizens. Today, after decades of living with this imposed system, the primary institutions of government that are most familiar to the majority of people, because they affect their day-to-day lives, are still the *Indian Act* chief and council, along with Parliament, the Minister, and Aboriginal Affairs and Northern Development Canada (AANDC). Ironically, some First Nations people may view this as a new "tradition."

Despite the power of the state behind the *Indian Act* system, traditional institutions of governance and Indigenous legal systems have survived. In many communities they still exist and are actively practised, often challenging the authority of the *Indian Act* governments. The resiliency of First Nations institutions has been, in no small part, a result of people keeping their values alive by actively continuing collective decision-making based on their customs and traditional practices. While the actual institutions may be "*Indian Act*" in practice, the convention may be to follow more traditional norms of collective behaviour. In some cases, however, while traditional processes would dictate how people behave, or ought to behave, others may, for any number of reasons, seek to follow the letter of the *Indian Act*, thereby creating conflict.

Looking forward, then, the challenge is how best to design contemporary institutions of government that reflect First Nations visions and values and that may supersede some of the existing institutions as Nations rebuild. First Nations will be re-establishing appropriate core institutions of governance or may opt to remove some (e.g., federal ones), perhaps reshaping existing institutions or creating new ones. This is one of the first and most basic tasks that Nations are undertaking as they move beyond the colonial experience. It is also the most liberating.

Of course, First Nations are not working from a "blank slate," as there will be Indigenous legal traditions for each Nation that existed pre-contact. There will also be the legal, political or social realities of the imposed institutions that cannot be ignored. Notwithstanding the fact that there are internationally recognized rights to self-determination and constitutionally protected rights, these rights, by their very construction and source, presuppose that the state's institutions of government (e.g., the Canadian Constitution, Parliament, etc.) still prevail and establish the institutional framework within which Nations are rebuilding (i.e., within Canada). There is significant latitude within this framework to rebuild domestic Nations, and the options to do so continue to evolve. This report focuses on the continuum of available options for rebuilding First Nations institutions within Canada.

What a Nation's core institutions of government are going to look like — starting with the governing body or bodies — and whether there is a need to develop a constitution are issues that any Nation will consider during a rebuilding process that follows years of colonial rule. In accordance with evolving Indigenous legal traditions, some Nations will draw from their traditional institutions, and others will draw from their experiences in exercising government under the *Indian Act*. Influences can come from any number of sources, both Aboriginal and non-Aboriginal. In all cases, however, principles of good governance should always be kept in mind when designing institutions. Ultimately, the structure of government institutions will become "new" traditions, reflecting the Nation's society and its need for social order today, and supported by its citizens.

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 5: UN Declaration

In designing or developing core institutions of government as part of the evolving Indigenous legal tradition, each Nation will need to ask itself some basic yet fundamental questions, including how to balance the answers to the questions themselves. These include:

1. To what extent should contemporary core institutions of governance reflect our understanding of our culture and traditions? And how do we determine what is a collective understanding of our culture and our traditions?

2. What types of institutions are needed to support the types of law-making powers that the Nation may desire?

3. How understandable should systems be to external audiences?

4. How much citizen participation is wanted in government institutions, and what form should it take?

5. Do citizens want to separate the functions of their government (e.g., legislative/executive/judicial)?

6. What will decision-making processes, including law-making processes, look like?

7. How will any changes to the institutional framework be ratified?

Often, the core institution that establishes the governing body and sets out other institutions is a "constitution" (usually written but in some cases unwritten and in other cases a combination of both). These subject areas are covered further in Part 3 — *A Guide to Community Engagement*.

Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

Article 20: UN Declaration

PRINCIPLES OF GOOD GOVERNANCE

The core institutions should reflect, both in their development and in their form, what are generally understood to be principles of good governance for Indigenous Nations. The following principles have been developed on the basis of experience and what others have said:

1. *Cultural fit* — ensures that institutions reflect the societal norms and traditions of the community they serve

2. *Political accountability* — includes rules to ensure that the governing body and other bodies with law-making power and decision-making authority are accountable to the community they serve (e.g., democratically elected, or otherwise)

3. *Independent oversight* — ensures that decisions of the governing body and other bodies are reviewed by an independent body or bodies, and that administrative decisions can be appealed

4. *Professional public service* — ensures the availability of human resources to implement governance processes and deliver programs and services

5. *Protection of assets* — includes systems for the management of the Nation's assets (both land-based and financial).

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 34: UN Declaration

Section 2 — Core Institutions of Governance considers first the legal status and capacity of the First Nation and its institutions of governance. This is followed by a discussion about citizens and the institution of citizenship. Next, the section considers the governing body or bodies as a core institution of governance. This section also includes some questions often raised by citizens when discussing how the governing body is structured and operates. Finally, the last chapter in the section looks at developing a constitution, usually a written document increasingly relied upon by First Nations to establish and regulate their core institutions and to ensure good governance that reflects the Nations values and traditions.

Looking beyond *The Governance Report*, the tools in *The Governance Self-Assessment* (Part 2 of the Toolkit) are designed to assist the current governing body and administration in considering the effectiveness of existing institutions in achieving good governance and where other institutions may be required or developed. Regardless of where a Nation is along the governance continuum, the self-assessment can assist it in building or maintaining good governance.

A Guide to Community Engagement (Part 3 of the Toolkit) provides some useful tools to assist the community in understanding the current reality with respect to First Nations governance and the existing institutions under the *Indian Act*, and where the Nation may seek to go in reforming its institutions as part of a Nation-rebuilding exercise.

Unfortunately, there is no sectoral governance initiative that currently permits a First Nation to develop its own constitution and, in so doing, removes the application of those sections of the *Indian Act* that deal with core governance, and have it recognized by Canada and legally enforceable (outside of going to court or negotiating comprehensive governance arrangements with the Crown). Some

Nations have expressed a desire to approach Canada to develop a process that will enable them to reclaim control of their core institutions of governance without having to negotiate comprehensive governance arrangements (either as part of a treaty or not) and therefore without having to address the more extensive and often more complicated question of jurisdictional arrangements.

World Bank Governance Indicators

World Bank Definition of Governance: The World Bank defines Governance as:

> "...the traditions and institutions by which authority in a country is exercised. This includes (a) the process by which governments are selected, monitored and replaced; (b) the capacity of the government to effectively formulate and implement sound policies; and (c) the respect of citizens and the state for the institutions that govern economic and social interactions among them."

Worldwide Governance Indicators: The World Bank "Worldwide Governance Indicators" project reports aggregate and individual governance indicators over the period 1996–2009 for 213 economies, for six dimensions of governance. The six dimensions are:

"The Process by which governments are selected, monitored and replaced"

1) Voice and Accountability
2) Political Stability and Absence of Violence/Terrorism

"The Capacity of the government to effectively formulate and implement sound policies"

3) Government Effectiveness
4) Regulatory Quality

"The Respect of citizens and the state for the institutions that govern economic and social interactions among them"

5) Rule of Law
6) Control of Corruption

The Concept of Governance and its Implications for First Nations: A Report to the British Columbia Regional Vice-Chief, Assembly of First Nations (Cornell, Curtis, and Jorgensen, 2003)	
In 2003, the BC Regional Chief commissioned the Native Nations Institute for Leadership, Management and Policy at the University of Arizona, in conjunction with the Harvard Project on American Indian Economic Development, to write a paper on Indigenous governance considering the question, "What is governance, and what are its implications for First Nations?". The highlights of the paper are as follows:	
Need for governance	• Good governance is as necessary for Indigenous Nations as it is for others. • Indigenous Nations benefit from good governance and suffer from its absence. • All things being equal, those Nations that have taken control of their own affairs and backed up that control with capable, culturally appropriate and effective governing institutions do significantly better economically than those that do not.
History	• Over the past century, Indigenous Nations have not been allowed the power to govern or a set of governing institutions that could exercise that power effectively. • While they may have had governments, to the extent that Indigenous governance was allowed at all, these tended to be imposed and organized by outside governments.
Self-government versus self-administration	• The jurisdictional powers of Indigenous governments are limited and they do few of the things that governments are supposed to do. • They run programs, but most of the programs are designed by other governments who fund them. • The major decisions are made somewhere else. The Nation simply gets to implement them. • This is "self-administration," not "self-government." • The idea of government as law-maker, dispute-resolver or vehicle for pursuing collective goals is buried beneath the need for services and the fact that Indigenous government is the funnel that supplies the services.
Essential elements of governance	(1) Providing a constitutional foundation for self-rule (2) Making laws (3) Making day-to-day decisions (4) Implementing decisions (5) Providing for the fair and non-political resolution of disputes
Key tasks for First Nations	To lay the foundation on which a self-determined community and economic development can be built in order to move away from self-administration and toward genuine self-governance, Nations need to: (1) Expand jurisdiction (2) Build capable and appropriate governing institution (3) Diversify revenue sources (4) Broaden accountability
Key tasks for other governments	(1) Support expanded First Nation jurisdiction (2) Invest in institutional capacity building (3) Do not allow fiduciary responsibility to become a barrier to creative policy development
Conclusion	Transforming government is no small task and won't be easy. Some challenges are: • After years of band council governments, it may be as difficult for First Nations as it is for federal overseers to shed the habits of colonialism or self-administration and tackle the formidable tasks of nation building. • For some people, the status quo works and serves their interests; for some, old habits die hard; for others, change is frightening. • There can be very real tensions between current and traditional practices, and it can be difficult to find ways to mix the two. • There are two options: more self-administration or true self-government. The second option wins hands-down; given the evidence, it is far more likely to produce societies that prosper.

PART 1 /// SECTION 2.1

Legal Status and Capacity

2.1

LEGAL STATUS AND CAPACITY

2.1

LEGAL STATUS AND CAPACITY

BACKGROUND

All governments require basic recognition of their legal existence and power to carry out their functions and duties. This is referred to as their "legal capacity" and is necessary in ensuring that they have adequate legal status to interact with other governments and third parties.

Legal capacity generally means the ability to have the capacity, rights, powers and privileges of a natural person. This means being able to sue or be sued; to enter into contracts and agreements and offer guarantees; to own shares in a corporation; to borrow money; to raise, spend and invest money; to acquire, hold, manage and dispose of property (including "real property," meaning land and fixtures, such as a house, and "chattels," meaning other movable property); and to act as a trustee or administrator. This is often called the "private person" aspect of legal capacity. For governments, legal capacity also includes and must mean having the powers to make and enforce laws. An individual does not have legal capacity to make law: this is a power of government and it is called the "public" aspect of legal capacity. For First Nations, both the private and public aspects of legal capacity need to be recognized at law.

LEGAL STATUS AND CAPACITY AND THE *INDIAN ACT*

The question of First Nations' legal capacity has been the subject of much ongoing legal and political debate. Under the *Indian Act*, there is no section saying that the "band" or the chief and council as the governing body of the First Nation are legal entities. This is not surprising, as the act sets up a wardship relationship between the "band," "Indian people" and the Crown, which on its face means that the legal capacity of a "band" and its council is diminished or eliminated in favour of Canada.

All governments require basic recognition of their legal existence and power to carry out their functions and duties. This is referred to as their "legal capacity" and is necessary in ensuring that they have adequate legal status to interact with other governments and third parties.

Of course, despite the *Indian Act*, and as can be attested to by anyone who has worked with or done business with First Nations, for years "bands" and "band" councils have been entering into contracts and carrying out business as though they had legal capacity to do so, even if under statute this capacity is not explicitly set out. One needs to look no further than the numerous agreements, funding and otherwise, that are entered into between "bands" and government. While it has taken court decisions to confirm that a "band" and council under the *Indian Act* does have the legal capacity to act in its own name, the situation is still not as clear as it could be. This issue can have an impact if a Nation is actively involved in business through the "band" or needs to have greater certainty and recognition of its legal capacity in dealing with third parties. In BC, for example, and despite recent court cases, a "band" created under the *Indian Act* still cannot hold land off-reserve in its own name (i.e., buy or acquire fee simple land and hold it in its own name), as the province argues there is no legal capacity for it to do so under the *Indian Act*. Where First Nations that are governed under the *Indian Act* do own land off-reserve, which is held in fee simple (the highest private interest in land that Western governments recognize), they actually do so through companies or in trust through individual councillors.

In short, while most First Nations communities seem to manage and struggle along with their ambiguous legal capacity under the *Indian Act*, this remains a significant issue, which all First Nations will need to resolve once and for all in moving beyond the *Indian Act* and the wardship relationship it entails. It will also need to be considered in the context of the evolving concepts of Aboriginal title and where declarations of Aboriginal title have been issued by the court.

With respect to clearing up any ambiguities as to the powers of the "band" governments under the *Indian Act*, some commentators have suggested that this should be done simply by way of a miscellaneous federal amendments bill making all *Indian Act* "bands," as well as, potentially, tribal councils, and so on, a "person." As simple as this approach would appear to be, it does raise questions of legal and political appropriateness, given that First Nations see the source of their legal capacity as based on the inherent right of self-government and not on federal legislation.

While supported by some legal theorists and academics, this issue has in fact been a thorny one for some Nations, as they look to rebuild their Nations. Because some leadership and others may not view legal capacity as arising under a federal statute, they do not want it suggested that legal capacity can be conferred by Canada though federal legislation. Indeed, the legal capacity of the federal government and provincial governments as a "person" is not explicitly set out in the *Constitution Act, 1867*, and they are not established as "legal" entities in this way. Rather, in both cases it is the Crown (the institution of the monarchy and the monarch) that has the legal capacity. Legal capacity arises from the nature of the Crown itself, not through the *Constitution Act, 1867*. First Nations argue that the source of their authority is also based on their own pre-existence and inherent capacity through their institutions.

While legally and politically this makes for good academic and political debate, practically speaking the lack of a simple and clear recognition of legal status and capacity has been a thorn in the side of First Nation governments. This is why, for certainty, all sectoral and comprehensive governance arrangements directly address either the legal status and capacity of the Nation and the governing body to act on behalf of the Nation or the legal status and capacity of the governing body itself.

LEGAL STATUS AND CAPACITY UNDER SECTORAL AND COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All sectoral and comprehensive governance arrangements set out, either through land claims or self-government or sectoral agreements or by legislation, that the First Nation or its governing body has legal capacity. Sometimes this is expressed to reflect the private nature of legal capacity, and other times it refers to both the private and public aspects of a First Nation's legal capacity.

In the case of sectoral governance arrangements, this is the legal capacity to deal with whatever is the subject matter of the sectoral arrangement. For example, the *First Nations Fiscal Management Act* (FNFMA) provides that a First Nation that is a borrowing member of the First Nations Finance Authority (FNFA) has the capacity to contract and to sue or be sued. Similarly, in accordance with the *Framework Agreement on First Nation Land Management* (Framework Agreement), operational First Nations are recognized as having legal capacity with respect to land-related matters. In addition, any institutions or bodies created under the sectoral governance initiative, such as the First Nations Financial Management Board and the First Nations Tax Commission under the FNFMA, are also generally recognized as having the necessary legal capacity to act in accordance with the legislation establishing them.

In the case of comprehensive governance arrangements, where a First Nation is self-governing, broad legal capacity is recognized and provided for in the self-government agreement and in any enabling federal legislation. These provisions ensure that the First Nation has all the recognized legal powers it needs to function and that this is recognized in agreements with outside governments and in legislation. Again, without such powers, there will continue to be confusion and uncertainty for the First Nation government.

In considering the entity that has the legal status and capacity, questions may be raised as to whether legal capacity is being extended to and recognized in the First Nation or to the government, governing body or bodies of the Nation. For all existing arrangements in BC, it is the First Nation that is the legal entity. However, this is not always the case in other parts of Canada, where it is the government

of the Nation that is the legal entity. Further, there may be a desire to ensure that other institutions duly constituted by the Nation could also be legal entities and have independent legal standing. For example, under the Framework Agreement, if a First Nation establishes an entity for the purpose of administering its lands, the entity is deemed to be a legal entity with the capacity, rights, powers and privileges of a natural person. While this report is focused on BC, it is worth considering further how this question is being addressed in other parts of Canada.

For the Tlicho peoples of the Northwest Territories, in accordance with their Land Claim and Self-Government Agreement (2003), it is the government of the Tlicho peoples and not the Tlicho peoples themselves as a group or nation that is recognized as having legal capacity. Also, and similar in principle to the powers of the First Nations under the Framework Agreement, the Tlicho government has legal capacity to form corporations or any other legal entities. The nature of the legal status and capacity of the Tlicho and other self-governing groups in the NWT was reflected in the 2014 *Northwest Territories Act*. The act defines a "self-government agreement" as including an agreement with an Aboriginal people of the Northwest Territories that is implemented by an Act of Parliament and that recognizes (a) the legal status and capacity of a governing body to represent that Aboriginal people; and (b) the authority of that governing body to enact laws.

This is different from the way legal capacity is described for self-governing Nations in BC, through either modern treaty agreements or bilateral self-government agreements, where it is the First Nation itself that is described as having legal capacity. Presumably, this is a way forward and in part helps to address questions of what is understood politically, if not legally, by the inherent right of self-government. The legal characteristics and legal status of the body of Aboriginal people can be differentiated from the legal capacity of the recognized government or governing body or bodies that actually governs a peoples. The peoples themselves have standing simply by virtue of being a people and not requiring any other determination of that fact (having the right to self-determine and the inherent right of self-government). However, in cases where the legal status and capacity of the First Nation has been recognized for practical purposes, it is still the governing body that has the authority to exercise the Nation's legal capacity on behalf of the Nation and for all legal purposes.

LEGAL STATUS AND CAPACITY AND DECLARED ABORIGINAL TITLE LANDS

For practical purposes, the question of the legal status and capacity of the governing body or bodies with respect to lands declared as Aboriginal title lands must also now be considered, following the first declaration of title over a specific area of lands in the *Tsilhqot'in* decision. How Aboriginal title lands are held and governed and the concomitant legal status and capacity of the First Nation government or governments that are responsible for them will need to be worked through. Presumably, title in the Nation and legal capacity to govern are through the governance institutions established by the Nation through its internal constitutions or protocols. For example, this is what the Haida and the Taku River Tlingit seek to do in their respective constitutions, as do other Nations though protocols among communities (e.g., the *Syilx Protocol*). Recognition of these institutions could be addressed in reconciliation discussions between the Aboriginal collective that shares Aboriginal title and the Crown, as appropriate structures of governance over Aboriginal title lands are confirmed, along with the necessary transition mechanisms from existing and limited governance frameworks that exist today (e.g., the *Indian Act* and tribal bodies established under BC's *Society Act* or the *Canada Corporations Act*).

Bill S-212, the proposed *First Nations Self-Government Recognition Act*, provided the option for the recognition of First Nation governments with the legal status and capacity to act with respect to both existing reserve lands and lands declared as Aboriginal title lands (either as former *Indian Act* "bands" or an amalgamation/confederation of former *Indian Act* "bands"). This approach warrants further consideration, as Nations look to re-establish their legitimate institutions of core governance, including legal status and

capacity clearly recognized by external governments and business, both on existing reserves and over Aboriginal title lands. This is important, as such recognition and legal certainty cannot be dependent on the outcome of modern treaty negotiations — either because the Nation is not involved in the current process of treaty negotiations (because they do not want to or do not need to — for example, they are not making a political "claim" for land) or they are involved in treaty negotiations but the outcome of those negotiations is uncertain or there is no reasonable expectation of settlement.

Nations must be able to move forward to address their political, social and economic needs through the form of governance institutions they determine appropriate, without waiting for a specific agreement with BC or Canada or a treaty. While it can be said that this was already recognized through section 35(1) of the *Constitution Act, 1982*, questions of proof of this aspect of the Aboriginal right of self-government might still be raised. Clear, simple recognition in federal legislation can remove any doubt, or the need for a court decision to remove any doubt, and create certainty.

Table — Comprehensive Governance Arrangements

LEGAL STATUS AND CAPACITY	
Sechelt	The band is a legal entity and has, the capacity, rights, powers and privileges of a natural person and, may: enter into contracts or agreements; acquire and hold property or any interest therein, and sell or otherwise dispose of that property or interest; expend or invest moneys; borrow money; sue or be sued; and do such other things as are conducive to the exercise of its rights, powers and privileges. (*Sechelt Indian Band Self-Government Act*, s. 6) The powers and duties of the Band shall be carried out in accordance with its constitution. (s. 7) The Band shall act through the Council in exercising its powers and carrying out its duties and functions. (s. 9)
Westbank	Westbank First Nation is recognized as a separate legal entity with the capacity, rights, powers and privileges of a natural person with the capacity to do various functions. (*Westbank First Nation Self-Government Agreement*: Part III, s. 19) The SGA also recognizes public legal capacity of WFN as a government with power to pass and enforce laws. SGA recognizes the government of WFN and its institutions as "public bodies" for the purpose of tort claims. (Part IV, s. 24) The SGA sets out the requirement for a *Westbank First Nation Constitution* consistent with the Agreement which will provide details of establishing a WFN Government, system of administration, process for enactment of laws. (Part VI, s. 42–52)
Nisga'a	Recognizes Nisga'a Lisims Government and Nisga'a Village Governments as provided for under the *Nisga'a Constitution* as the governments of the Nisga'a Nation and Nisga'a Villages respectively. (*Nisga'a Final Agreement*, Ch. 11, s. 2) The Nisga'a Nation has the right to self-government and the authority to make laws as set out in the Agreement. The Nisga'a Nation and each Nisga'a Village is a separate and distinct legal entity with the capacity, rights powers and privileges of a natural person. The rights, powers and privileges of the Nisga'a Nation and each Nisga'a Village will be exercised in accordance with the Agreement, the Nisga'a Constitution and Nisga'a laws. (Ch. 11, s. 1, 5 and 6)
Tsawwassen	The Final Agreement establishes Tsawwassen First Nation right to self-government and authority to make laws through Tsawwassen Government. (*Tsawwassen First Nation Final Agreement*, Ch. 16, s. 1) Tsawwassen FN is recognized as a separate legal entity with the capacity, rights, powers and privileges of a natural person and is empowered with public legal capacity. (Ch. 16, s. 7)
Maa-nulth	Each Maa-nulth First Nation recognized as distinct legal entity with the capacity, rights, powers and privileges of a natural person with ability to do various things set out in the agreement. (*Maa-nulth First Nations Final Agreement*, s. 13.2.1) Each Maa-nulth First Nation has right to self-government and authority to make laws. (s. 13.1.1) Each Maa-nulth First Nation has a Maa-nulth Government in accordance with its Constitution and the Final Agreement and each Maa-nulth First Nation will act through its Maa-nulth First Nation Government. (s. 13.1.2 and 13.1.4)
Yale	The Parties acknowledge that self-government and governance for Yale First Nation will be achieved through the exercise of the Section 35 Rights of Yale First Nation set out in this Agreement. (*Yale First Nation Final Agreement*, s. 3.1.1) Yale First Nation is a legal entity with the capacity, rights, powers, and privileges of a natural person. (s. 3.2.1) Yale First Nation will have a *Yale First Nation Constitution*. (s. 3.3.1)
Tla'amin	The Tla'amin Nation has the right to self-government, and the authority to make laws, as set out in the *Tla'amin Final Agreement*. (*Tla'amin Final Agreement*, Ch. 15, s. 1) Tla'amin Government, as provided for under the *Tla'amin Constitution* and this Agreement, is the government of the Tla'amin Nation. (Ch. 15, s. 2) The Tla'amin Nation is a legal entity with the capacity, rights, powers and privileges of a natural person. (Ch. 15, s. 6)

PART 1 /// SECTION 2.2

The Citizens

2.2

THE CITIZENS

2.2

THE CITIZENS

INTRODUCTION

Determining who is legally entitled to be a "citizen" of a Nation (regardless of whether governance is in respect of reserve land, settlement lands, Aboriginal title lands or beyond) is one of the most important and far-reaching decisions that First Nations have to make as they rebuild. At the core of any discussions that First Nations people in Canada are having about governance today is how they self-identify, organize into groups, and create rules for belonging to that group. It is a fundamental question of both personal and collective identity. Being clear as to who belongs or could belong to the group is very important, with respect to both participating in the process of social change by establishing appropriate institutions of governance and participating in those institutions once they are in place.

Consequently, for the purposes of this report, we have considered "the citizens" and citizenship to be an institution and, moreover, fundamental to core governance. Before all else, including territory, one needs to know who is a citizen of the Nation. Determining who is a citizen today is an exercise that typically requires looking back to see how belonging to the Nation or group was determined pre-contact, deconstructing the impact of colonial imposition of concepts such as "Indian" and "member," and then finally looking forward to decide who will be legally recognized as "citizens" of the rebuilt contemporary Nations, where citizens benefit from Aboriginal title and rights but also, and equally important to the Nation, have concomitant responsibilities to that Nation. The decisions that First Nations are making today about who is entitled to be a citizen will certainly have a significant impact on the identity and makeup of communities going forward. Given the substantive work that First Nations are undertaking along the governance continuum with respect to determining who belongs to a Nation and ultimately who is a citizen of a self-governing Nation, we have also included "citizenship" as a jurisdiction in Section 3.6 of the report.

THE "SELF" IN SELF-DETERMINATION

Self-determination requires, of course, the right to determine "self." If there is any aspect of the inherent right of self-government that is a protected right under section 35 of the *Constitution Act, 1982*, it is the right to determine who is and who is not a citizen — in short, to determine citizenship. The *United Nations Declaration on the Rights of Indigenous Peoples* recognizes that Indigenous populations have "the right to determine their own identity or membership in accordance with their customs and traditions" and to "determine the structures and to select the membership of their institutions in accordance with their own procedures" (Article 33). They also have "the right to determine the responsibilities of individuals to their communities" (Article 35).

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33: UN Declaration

It is significant that the term used in the UN Declaration is "membership" and not "citizenship." Presumably, this is so there is no confusion with the citizenship of a nation state within which the Indigenous Nation itself might be located. Indigenous peoples have a unique position globally, given that for the most part their Nations and peoples live within the boundaries of modern nation states (e.g., Canada, the U.S., Australia, New Zealand), each with their own rules for citizenship and defined rights and responsibilities associated with being a citizen. While some First Nations people might not view themselves as citizens of Canada (or perhaps prefer to see themselves as citizens of North America), most view themselves first as belonging to their particular Nation (e.g., Okanagan, Secwepemc, Nisga'a, Tsimshian, Haida).

As the Indigenous peoples, Nations typically express their identity as belonging to a particular peoples, based on a shared history and on a common culture, language and traditions, coming together to live within a generally defined geographical area that they occupy to the exclusion of others. These associations as distinct peoples have existed and evolved over millennia. Indigenous languages generally have words that describe the people of the land and those that are part of the group or the "Nation" that occupy it. There are also words that describe those who are not part of the Nation — the outsiders. These units of social and political organization or groups of people with a defined territory were recognized by the newcomers to the lands as "nations or tribes."

It was the English who used the term "nation" in the Royal Proclamation of 1763, when the Crown referred to the "various tribes or nations of Indians" with whom the Crown intended to treat. In fact, it is only in more recent times that First Nations themselves have been using terms drawn from Western political discourse and the English language — words such as "nation" and "citizen" — to define belonging to Indigenous "Nations" and "First Nations, and calling those who belong to these Nations "citizens." For the purposes of this report, we refer to Nations and First Nations rather than "bands" (unless specifically referring to an individual community that uses "band" as its identifier). For consistency, we have chosen to use the term "citizen" throughout the report, and with the exception of this particular explanatory subsection, we use the term "First Nation" in place of Indigenous Nation unless the context requires otherwise.

IMPOSED IDENTITY AND FOREIGN RULES

First Nations perspectives on who belongs to and who does not belong to a particular Nation for the purposes of contemporary governance arrangements have been affected in modern history by external influences. These influences have operated to redefine legally what constitutes citizenship in a Nation by defining who is legally, in the eyes of the Crown, an "Indian" and then, having so defined the Indian, to determine how to administer that person's affairs. The primary instrument for doing this was, of course, the *Indian Act*. Notwithstanding that the *Indian Act* was used to determine which individuals were entitled to rights recognized under historical treaties, the act was all part of a broader plan of assimilation. The purpose of defining someone as an "Indian" was not to associate him or her with a particular Nation for ongoing governance (or indeed to administer treaty rights). Rather defining someone as an Indian and making that person a "member" of a "band" was for administrative purposes until assimilation was complete and until there were no more "Indians" and consequently no more need for "lands reserved for the Indians." At that time, which the drafters of the act believed would have been by now, the once federally defined "Indian" would be no more. Descendants of that "Indian" would become full citizens of Canada (e.g., with the right to vote, hold property, and act in all ways as a legal "person").

The *Indian Act* was conceived as a tool to facilitate assimilation and provide for "enfranchisement" (no longer being legally Indian). Originally, enfranchisement was voluntary and had minimal standards (such as being able to speak and write in French or English, and being of "good moral character" and free of debt) to "allow" Indians to become Canadian citizens. This proved unpopular, as few were willing to give up their culture and legal identity. Rules were put in place that then forced enfranchisement on First Nations people. Women automatically lost their Indian status upon marrying a non-native male or if their native husband died or abandoned them. If a male enfranchised, his wife and children were automatically included. Enfranchisement was also required for joining the military, attending university or leaving reserves for long stretches of time (which was frequently related to employment opportunities), and these rules were generally targeted at men. The eventual goal was that there would be no more "Indians" and the act would no longer be required.

While assimilation did not occur before the modern project of rebuilding got underway in the period of rights recognition, the act has left its mark on how the descendants of the original people see themselves today. The Crown's efforts to define those who should always have been self-identifying

has created tremendous challenges to moving forward in the exercise of Nation rebuilding. This is because many descendants of the original people who are federal *Indian Act* "Indians" now themselves self-define and politically organize and limit their groups using the very same rules as the colonial ordnances that were designed to assimilate them.

Because of these external influences, it has been a struggle for many people to come to terms with and work through the existing multiple and overlapping identities (e.g., Indian, member, citizen, status, non-status, Bill C-31, native, Canadian and North American, as well as all the names Indigenous people have in their own languages to self-identify by cultural grouping). This has made any discussion on citizenship beyond the *Indian Act* and, in particular, with respect to Aboriginal title lands, very challenging. However, it is now the collective challenge of the descendants of the original occupants of the lands and their responsibility to work through these issues. It will not be possible to establish strong and appropriate institutions of governance for First Nations without asking and answering the most basic question: "Who belongs to the Nation?".

The rules for who can be a citizen in a Nation affect both the collective rights of the Nation and the rights of the individual. This decision is even more complicated by the legacy of the *Indian Act* and the rules now in place for determining who is a "member" of a "band" and who is registered as an "Indian" under the *Indian Act* ("status"). These rules can also change over time. The *Indian Act* was amended in 1985 by Bill C-31 to make the provisions dealing with status compliant with the *Charter of Rights and Freedoms*. As a result of the *McIvor v. the Registrar, Indian and Northern Affairs Canada (2007 BCSC 8270)* case in BC, where the court found that there was ongoing discrimination in the determination of Indian status even under the amended *Indian Act* of 1985, the rules were changed again through the passage of Bill C-3 (the *Gender Equity in Indian Registration Act*) in December 2010. This gave an estimated 45,000 people the opportunity to register for "status" through a legislative decision affecting the grandchildren of women who lost their status by marrying a non-Indian male. The irony of the *Indian Act* is well highlighted in the obvious contradictions and confusions in the *McIvor* case and the ongoing federal tinkering with an act that is, at its core, offensive to the principles of self-determination. On one hand, the case was about the right of native women to ensure non-discrimination under the *Indian Act*. However, in so arguing, the plaintiffs were really asking to be treated equally under a system that was designed to assimilate them in the first place, as it was intended to do for all Indians. There is perhaps no better expression of how perverse the *Indian Act* system is and how challenging it is to move beyond.

***McIvor v. Canada*, British Columbia Court of Appeal, 2009 (leave to SCC dismissed)**
Despite changes made to it in 1985, the *Indian Act* continued to discriminate against women by treating individuals differently, depending on whether they traced their Indian lineage through their male or female ancestors. For example, only two successive generations of a female line, all of whom married a non-Indian, would be entitled to status (the woman and her children), while three generations of a male line who married all non-Indian spouses would be entitled to status (the man, his children, and his grandchildren). Sharon McIvor and her son argued that it was a violation of the Charter that they were not able to pass on Indian status in the same manner as males and their descendants. The British Columbia Court of Appeal agreed that there was discrimination and gave parliament 12 months to remedy the situation, and in 2010 the federal government adopted Bill C-3 which sought to correct one aspect of the discrimination, but left other differences in treatment based on gender in place.

Part of the reason for wanting to be "status" as opposed to being a citizen of your Nation has to do with the benefits (perceived and real) of being a federal Indian as opposed to a citizen of your Nation. In some cases, existing "members" of a "band" might want to limit the number of others whom they want to be "members," because of the ownership and control of assets located on-reserve.

While the intention of creating the category of "Indian" was based on governance and wardship leading to assimilation, today there are certain statutory (federal) benefits associated with being registered as an Indian under the *Indian Act* (e.g., exemption from non–First Nation government

taxes, access to federal programs and services and therefore certain services delivered on behalf of Canada by First Nations) or being a "member" of certain "bands" that have valuable property (located in urban centres) or have significant natural resource wealth (oil and gas). This has become very important for many people who are registered as Indians and generally see it as why it is beneficial to be a federal Indian.

From the perspective of the federal government's purse, the gross number of status Indians in Canada affects Aboriginal Affairs and Northern Development Canada's (AANDC)'s budget and consequently the funding available for transfer to First Nations. Because for the most part federal responsibility is seen by the federal government as being limited to Indians, as opposed to "members" of an *Indian Act* "band" or "citizens" of a Nation, there may be a concern that if a Nation takes over determining citizenship, these benefits may be lost or people may be taxed by their own governments. This does not have to be the case, and indeed recent court cases respecting Metis and non-status Indians suggest that federally created distinctions under statute for funding purposes doe not stand up to constitutional challenge based on who is defined as "Aboriginal" under section 35.

Daniels v. Canada, Federal Court of Appeal, 2014
In *Daniels*, which was begun in 1999, the exclusions of Metis and non-status Indians from the definition of "Indians" under the *Indian Act* were challenged as being discriminatory to Metis and non-status Indians. In 2014 the Federal Court of Appeal agreed that Metis were "Indians" under section 91(24) of the Constitution. Though the Court did not grant other declarations that were sought — including that the Crown owed a fiduciary duty to them — if upheld the ruling has the potential over time to significantly alter aspects of the relationship between the federal government and the Metis. With regard to non-status Indians, the Court of Appeal ruled that the matter would have to be dealt with separately, as the reasons for excluding people from Indian status are complex and far-ranging, and each class of people who are excluded must be considered on a case by case basis. If leave to appeal is granted by the Supreme Court of Canada it is expected the exclusion of non-status Indians will be a matter on appeal.

DETERMINING CITIZENSHIP TODAY

All First Nations, whether they have begun the discussion or not, will at some point have to consider what citizenship means and how it is determined. Citizenship in the Nation and Indian status are separate and distinct. A person can, despite the potential inconsistencies, have both. Persons who are citizens of their Nation are entitled to participate in the institutions of government (elections, referendums, etc.) of that Nation and are entitled to whatever rights and privileges come with citizenship (e.g., to live on or to hold land). Citizens also have responsibilities. Indian status is not tied to actually being a part of a Nation unless the Nation itself chooses to make it a condition of citizenship. Despite this reality, in the past there has not been much creativity in moving beyond the *Indian Act* — in part because of the constraints of existing membership codes, and the legal requirements regarding protecting persons with acquired rights to membership.

To be clear, Canada really has no interest in who First Nations call citizens, as long as there is no impact on the determination of Canadian citizenship, the *Charter of Rights and Freedoms* is respected, and no extra money is required. On this last point, it must be understood that the federal government has made it clear that it will never agree to any process whereby First Nations would determine who can be registered as an Indian under the *Indian Act*, given the current system of governance and administration of their affairs under the *Indian Act*. Under the *Indian Act* systems of administration, each decision on who has status implies a permanent draw on federal finances and a wardship relationship between that individual and the Crown.

With respect to the *Charter of Rights and Freedoms*, and somewhat ironically, Canada is concerned with discrimination based on sex. There is a concern that First Nations may determine citizenship based on descent though the male or female lines. Interestingly, some matrilineal definitions of

citizenship used by Nations (where citizenship is determined along the mother's line) have been objected to in this regard, notably the Gitxsan and the Nisga'a. In the latter case, there seems to be tacit agreement by Canada to ignore the fact that the Nisga'a, today a self-governing Nation with its own control over citizenship, applies their traditional definition, despite the egalitarian language of the law. Maybe this is because the charter has a saving provision that recognizes First Nations collective rights?

Today, there are people who have no blood ties who are registered as Indians in "bands." Some may have married in. Some may have simply requested a transfer from another "band" and have been accepted by that "band." This potentially complicates matters for a Nation that has not settled the land question or does not have Aboriginal title. Can someone who has transferred into a federally created "band" as a federal Indian have Aboriginal rights to a territory he or she is not come from? Conversely, if there are people who are descendants of the original peoples but are not federal "Indians" under the *Indian Act* or have moved or transferred to another "band," do they still have Aboriginal rights to the reserve lands or the broader ancestral lands in their territory? If so, would it include ownership in the collectively held Aboriginal title lands? These issues will all need to be sorted out both from an ownership of assets perspective and more broadly from a governance perspective: who is a "citizen" and what rights do they hold?

The current BC treaty process considers the determination of "citizenship" in the new post-treaty world as an outcome of the settlement process and negotiations, where the Nation determines who is the successor group not only for the existing reserve lands but also for settlement lands. The question is, can this fundamental issue of citizenship just be left to an outcome of a negotiation process, or should the Nation really seek to sort this out in advance of any negotiations with the Crown as a question of self-determination (particularly where there is assumed Aboriginal title or declaration that may be forthcoming from the courts)? It also begs the question, can you have anything but citizenship in the broadest cultural group? And there may be further divisions with associated rights and responsibilities? In this way, some Nations may choose to have rules regarding citizenship in the Nation (at the tribal level) but also keep the concept of membership in the local or former "band" level to deal with specific assets and property associated with those parcels of lands that historically were set aside as a reserve? For the majority of First Nations in BC, as they look to address governance on reserve, over Aboriginal title lands and within the broader ancestral lands, these questions are not fully resolved.

Some commentators have suggested that as peoples, First Nations cannot have a real conversation about citizenship unless they are truly ready to move beyond the *Indian Act* system of governance. This was certainly the case for some of the Nations that have negotiated comprehensive governance arrangements. It was only when the reality of self-government was close and the prospect of the *Indian Act* ceasing to exist was real that the issues were crystallized and addressed. Now, with the reality of the transition to a world with Aboriginal title being recognized and declared outside of negotiating comprehensive agreements, this observation is even more relevant.

The determination of who is a citizen has also been complicated, in a good way, by the first declaration of Aboriginal title in the *Tsilhqot'in* case. The declaration was granted not to an *Indian Act* band or its members but rather to a group that the court presumed — based on the facts presented in the case — is an existing and self-defining body of people who collectively are the Tsilhqot'in. This is at the tribal level. It is the citizens of the Tsilhqot'in who collectively enjoy the title so declared, and these lands and the resources associated with the lands must be managed and governed for their collective benefit. The decision rightfully presupposes that the Tsilhqot'in themselves have a clear way to delineate their citizens, who are not all necessarily "Indians" as that term was imposed by the federal government or indeed even members of the Tsilhqot'in six communities (Tl'etinqox, Xeni Gwet'in, Tsi Del Del, Tl'esqox, ?Esdilagh and Yunesit'in) under the *Indian Act*.

Indeed, there could very well be people who are not Tsilhqot'in citizens but who are members of one of the six bands that politically make up the Tsilhqot'in Nation society that exists under the BC *Society Act* for administrative and practical reasons. How a Nation sets out who its citizens are legally is very important and is discussed in Section 3.6 — Citizenship. Many Nations are looking to set out who their citizens are in their constitution. Ultimately, the authority for the constitution is not derived from another government, although it can be recognized by other governments. The Haida Nation constitution, for example, set outs very broadly who can be a citizen of the Nation based on simple lines of descent. There is no link to the *Indian Act* rules or any other rules that have been imposed. (The place of the constitution as a core institution of government is discussed in Section 2.3 — The Constitution.)

Finally, at some point the discussions on citizenship shift to a discussion of how First Nations government will be paid for. Looking ahead, it is reasonable to assume that First Nations will have access to own-source revenues, some of which will necessarily have to be raised from citizens. In addition to own-source revenues, other revenues will necessarily have to come in the form of transfers from other governments, with transfers based on the First Nation government responsibilities and needs, not who is federally defined as an "Indian." So long as First Nations are predominantly reliant on financial transfers from Canada and funding levels are calculated primarily on the basis of who is a "status" Indian, and until our Nations have greater fiscal capacity, questions of citizenship will be always be clouded by funding issues. (These issues and developing a new fiscal relationship between Canada and First Nations are considered more fully in Section 4.0 — Financing First Nations Governance.)

In considering the issue of citizenship, the following four questions have been posed by the National AFN offices for dialogue among Nations:

1. What does First Nation citizenship mean to you today? How is this different from your grandparents? Will it be different for your grandchildren?
2. What is your understanding of the roles and responsibilities of citizens and their governments?
3. How would you like to see your Nation move forward?
4. What tools are required to make change a reality?

Some further questions, more personal in nature, that you may wish to consider during your Nation's deliberations on this issue are:

1. What is most important to you: 1) being a Citizen of your Nation, 2) being a member of your band, or 3) having Indian status? Why?
2. What criteria would you want to see for becoming a citizen of your Nation? How would this be different, if it is different, from determining membership in your band today?
3. How should we address the issue of dual citizenship and the movement of our citizens between Nations and their respective rights and responsibilities?
4. Can we define our rules for citizenship before we have recognized the need to reconstitute our governing structures beyond the *Indian Act*?

PART 1 /// SECTION 2.3

The Governing Body

2.3

THE GOVERNING BODY

2.3

THE GOVERNING BODY

BACKGROUND

A core institution of any government is its governing body or bodies. The term *governing body or bodies* denotes the institution or institutions through which central powers of government and decision-making are exercised, including setting policy, debating and enacting laws, raising and spending of moneys, and so on. Designing, establishing and maintaining an effective governing body or bodies is essential, because all other aspects of governance depend on these institutions. For each power or jurisdiction a First Nation takes on, it will be the governing body or bodies that will be responsible for representing the citizens and seeking their feedback, developing policy, enacting laws and seeing that laws are enforced. A First Nation's governing body or bodies also oversees the delivery of programs and services in accordance with its law, other governments' laws and other intergovernmental arrangements.

Through time, as self-determining peoples, First Nations have established many different examples of governing bodies, depending on their society and as reflected in their Nation's Indigenous legal traditions. Today, however, and almost without exception, these Indigenous institutions have been significantly affected by the imposition of foreign institutions of governance. While historically First Nations were self-governing over their ancestral lands and had their own established core institutions of government, the reality today is that since the passage of the *Indian Act*, the primary political unit for most First Nations, for better or for worse, is the federally created "band" and the primary governing body of that unit is the "chief and council," with authority that is essentially limited to "reserves." For First Nations exercising governance outside the *Indian Act*, the legal and administrative framework for governance can be quite different. Despite differences in legal frameworks, however, the principles of effective and good governance remain the same.

Moving forward, an objective of all First Nations is to establish an appropriate governing body or bodies to meet the their current governance needs, with respect to both existing "reserve" lands and ancestral lands, including Aboriginal title lands. As First Nations rebuild and move beyond governance under the *Indian Act* and reform or replace the existing imposed institutions of government, they have an opportunity to design culturally appropriate, effective governing institutions that consider appropriate geographical boundaries. A number of paths to strengthen a First Nation's institutions of governance have proven successful and there are resources available to help a First Nation do so. *The Governance Self-Assessment* (Part 2 of the Toolkit) was developed to assist First Nations in being self-reflective and to guide individual Nations through a confidential and internal self-assessment of both their governing body or bodies and their administration. The self-assessment can be undertaken by any First Nation, regardless of where it may fall along the continuum of governance reform, moving away from the *Indian Act*.

The Governing Body as an Aspect of the Inherent Right of Self-Government

There can be few other more fundamental and compelling aspects of self-government that are integral to the distinctive culture and traditions of a people than the control and maintenance of the structure of their governing body or bodies. Consequently, as with the determination of "citizenship" and all other core governance matters, designing and establishing the governing body or bodies of a First Nation is presumably an aspect of the inherent right of self-government, protected under section 35 of the *Constitution Act, 1982*. Indeed, if any sections of the *Indian Act* are suspected to be infringing

the inherent right of self-government, it is those that address the creation of "bands" and "chief and council" and the structure and procedures of those institutions. However, there is a need for caution.

While First Nations have a compelling argument that establishing institutions of governance is fundamental to the inherent right of self-government and is in fact a constitutionally protected right, no court has directly found this seemingly basic fact. Consequently, and notwithstanding how the courts may determine what is or is not legally protected under section 35 as part of the inherent right of self-government, until all First Nations in Canada establish their own legitimate and recognized institutions of government in the modern era, the governing body (chief and council) that is legally established and regulated in accordance with the rules set out in the *Indian Act* will apply. If put to the test, the sections of the *Indian Act* dealing with core institutions of governance may ultimately be found to be contrary to the inherent right and consequently found *ultra vires* (illegal) and "read down" and set aside by a judge. However, the legal uncertainty and the cost of this uncertainty is not conducive to stable, effective and strong First Nation governance.

Reconciling Different Governance Frameworks

Despite the *Indian Act*, some First Nations do have other governing bodies in place that may be legitimate and recognized by the citizens. These non–*Indian Act* institutions are sometimes referred to as "traditional governance," a reflection of the fact that they existed prior to the imposition of the *Indian Act* and are based on a First Nation's legal traditions. For example, in BC, there are communities that have functioning hereditary systems of leadership and decision-making, a form of traditional government. Sometimes these institutions work in parallel with the *Indian Act* chief and councils, but at other times do not. Conflict can exist regarding the legitimacy and authority of different and perhaps competing governance institutions. (The different systems for selecting leaders are discussed further in Section 3.8 — Elections.)

The core institution of any government is its governing body. While historically First Nations were self-governing and had their own established core institutions of government, the reality today is that since the passage of the *Indian Act*, the primary political unit for most First Nations is the "band" and the primary governing body is the "chief and council."

In addition to pre–*Indian Act* traditional systems, it is increasingly the case that First Nations have variations on the *Indian Act* structure of government through modern "customs" or "convention" and do not necessarily follow the rules as exactly laid out in the *Indian Act* and regulations. For example, meetings of council are not necessarily conducted in accordance with the *Indian Band Council Procedure Regulations*, but rather according to the "convention" of the community.

The fact that the *Indian Act* and its regulations constitute the "law" — albeit imposed federal law and not First Nations law — does have implications for both how First Nations govern themselves today and the legitimacy or effectiveness of traditional systems of governance or current conventions. There may be widespread recognition in communities of these systems and conventions, and therefore local political legitimacy, but this is not always enough to avoid legal uncertainty. While many First Nations people may recognize traditional institutions or current conventions, others may not. While some may see it as following the non-native system, those people can, until the community moves beyond the *Indian Act*, rely on the strict *Indian Act* framework and the institutions of governance established under that framework and therefore call into question the council and practices of their own "band." This might also include non-citizens who are subject to the rules and decisions made by a Nation or with whom the Nation may desire to conduct business, or officials from other governments (federal, provincial, local and other First Nations).

In addition to the *Indian Act* and traditional governing bodies, in many cases "bands" that are from the same Nation (i.e., they are a part of the same cultural and linguistic group) come together for the purposes of contemporary tribal administration, often initially to deliver programs and services, but increasingly to operate as quasi-governments. For legal purposes (i.e., to create a recognized "legal entity"), these bodies are typically established as a "society" in accordance with BC's *Society Act*, where the bands, through their chief and councils, are the "members" of the society. In the absence

of an alternative legal framework and mechanisms for recognition, and while not a particularly good legal fit for evolving First Nations governance (given that "societies" are not governments and have no law-making powers), they have nevertheless proven to be a pragmatic way to proceed in this confusing period of transition from *Indian Act* government to reconstituted tribal government. The Tsilhqot'in National Government, as an example, are a not-for-profit federal corporation incorporated under Part II of the *Canada Corporations Act* (R.S.C. 1970, c. C-32).

21 Tribal Councils in BC

Incorporated as a not-for-profit federal corporation under Part II of the *Canada Corporations Act*:

- Carrier Chilcotin Tribal Council
- Tsilhqot'in National Government

Incorporated as a not-for-profit provincial society under the *Society Act*:

- Carrier-Sekani Tribal Council
- Fraser Thompson Indian Services Society
- Gitksan Local Services Society
- Ktunaxa Nation Council Society
- Kwakiutl District Council Society
- Lillooet District Indian Council
- Lower Stl'atl'imx Tribal Council
- Musgamagw Tsawataineuk Tribal Council
- Naut'sa Mawt Tribal Council
- Nicola Tribal Association
- Northern Shuswap Tribal Council Society
- Nuu-chah-nulth Tribal Council
- Okanagan Nation Alliance
- Secretariat of the Haida Nation
- Shuswap Nation Tribal Council Society
- Sto:lo Nation
- Sto:lo Tribal Council
- Treaty 8 Tribal Association
- Wuikinuxv Kitasoo Nuxalk Tribal Council

This is becoming increasingly so with respect to the transition to self-government exercised off-reserve and over ancestral lands, including Aboriginal title lands that are held collectively and not typically at the "band" level. While the chief and council system under the *Indian Act* applies to governance on-reserve, *Indian Act* councils do regularly purport to address matters off-reserve in the absence of any other legitimate and recognized Indigenous governing body to do so. Using a society allows "bands" to organize administratively for addressing off-reserve matters, including engaging in consultation with non-Indigenous governments and other tribal Nations. Ultimately, however, we must assume that these provincially established societies will give way and be replaced by properly constituted tribal governing bodies that are legally and politically recognized and exercising the full powers of government, including law-making powers, within established geographical and jurisdictional boundaries.

In designing and establishing their governing body or bodies, First Nations that have entered into comprehensive governance arrangements have, for the most part, addressed the issues of transition from the *Indian Act*, incorporation of traditional governance, and participation in provincially established "societies." In designing their Nation's post-*Indian Act* governing body or bodies, the extent of the body's jurisdiction, in terms of both the division of powers of government (including

law-making powers) and the geographical extent of those powers, is set out for each governing body. With respect to the BC treaty-making process, structural reform of the governing body or bodies (as with the determination of citizenship rules) is an outcome of the negotiations and implemented in accordance with the negotiated land claim settlement (the treaty). This is not the case where a court declares Aboriginal title.

The Governing Body with Respect to Aboriginal Title Lands

Consequently, where a First Nation has received a declaration of Aboriginal title, the transition from the *Indian Act* structures and to the body governing the title lands may not be immediately clear. Where title is declared by a court, the Nation will likely need to determine with greater certainty the form and structure and accountability framework of the governing body that is going to be making decisions with respect to, and exercising the power of the collective over, the title lands so declared. This body must be legitimate to the citizens (as the collective) and presumably recognized by other governments and third parties. The transition from existing governing structures will need to be reconciled by each Nation with recognized Aboriginal title (including their *Indian Act* bands, traditional institutions, provincially created societies, etc.). The mechanisms for transition and the instruments used to set out the governance framework will also need to be confirmed by the Nation and the Crown, presumably as an outcome of reconciliation discussions that would inevitably follow a declaration of title and as a prerequisite to determining the inter-relationship of law-making powers (jurisdiction) between multiple levels of government. For many Nations, whether as part of governance reform through negotiating comprehensive arrangements or in implementing Aboriginal title supported by reconciliation agreements with the Crown, developing the Nation's constitution is the key. (This is discussed further below and in Section 2.4 — The Constitution.)

Sorting out governance over title lands is a critical issue not only where the court has issued a declaration of Aboriginal title, but also where it is reasonable to presume that it exists (based on the test established by the court) or is asserted to exist by a Nation. Before title lands are recognized or declared or a comprehensive agreement has been negotiated, if the Nation is expected to make decisions with respect to consultations by the Crown and where consent is asked for or required for uses of land, it is critically important that the decision-making body be legitimate and able to legally represent the proper title holder. For decisions to be enduring, the governing body purporting to represent the collective with respect to title lands, whether proven or not, requires legitimacy and legal power to represent the citizen of the Nation. From the Crown's perspective, it will also need to know that the governing body it is dealing with actually has the power to engage and where necessary truly give consent to use title lands (proven or not) if consent from the Nation is sought with respect to some decision(s) being made by the Crown. This all leads to the conclusion that, sooner than later, all Nations must agree and confirm the form and structure of their governing body or bodies, with respect to both existing reserve lands and off-reserve on title lands, and indeed more generally with respect to rights exercised over the broader ancestral lands of the Aboriginal peoples.

To facilitate and expedite the process of rebuilding First Nations governance, multiple studies and reports, including the *Final Report of the 1996 Royal Commission on Aboriginal Peoples*, have suggested that a mechanism be established through federal legislation for the recognition of legitimate First Nations institutions of government beyond the *Indian Act*, applicable to both existing reserves and ancestral lands, including Aboriginal title lands. On November 1, 2012, Senate Public Bill S212: *First Nations Self-Government Recognition Act*, was introduced and underwent first reading in the Senate. The bill eventually died on the Order Paper and was not enacted. However, it is the latest example of a federal legislative initiative that contemplates the establishment of a mechanism for Canada, on behalf of those First Nations that so choose, to remove the application of those sections of the *Indian Act* dealing with core institutions of governance, including the governing body, in favour of recognizing the reorganized and legitimate governing body or bodies replacing the former "bands."

Many of the current sectoral initiatives available to communities to assume expanded jurisdiction or authority beyond the *Indian Act* do not consider or address the structure and procedures of the governing body, but assume that they exist, in most cases delegated under the *Indian Act*. Nevertheless, sorting out the structure of the governing body should be considered a necessary prerequisite to assuming jurisdiction, regardless of how extensive that jurisdiction is and over what land base. While there will ultimately be questions of the viability of First Nations governments with respect to the range and scope of jurisdictions they wish to exercise, there will always be a need for governing bodies that are functional, legitimate, appropriate and, consequently, effective.

Designing the Governing Body

If they have not already done so, all First Nations (whether individually or in groups) will have to address the fundamental question of the legitimacy of their core political institutions as part of Nation-building or rebuilding. Whether the core institutions will be based on aggregations of communities or former *Indian Act* "bands," the Indian "band," or some combination thereof remains to be seen as work continues to gradually move away from government under the *Indian Act*. Future court decisions may also have an impact on the development of First Nations core institutions of governance. Whether the institutions are applicable to decision-making solely on-reserve, extend off-reserve over title lands, or are determined in the course of negotiating comprehensive arrangements with the Crown will be important considerations. Ultimately, what is most important is that the system of government put in place is clearly defined and recognized both politically and legally by all who are subject to its decision-making and laws and over which lands it has jurisdiction.

Many First Nations in BC are already working to establish or re-establish legitimate institutions of governance and are taking steps to move beyond the *Indian Act*. Indeed, many First Nations are looking to re-establish core institutions of government as an aspect of the inherent right rather than waiting for a court to rule on the question. Recognition of these institutions is important, not just by First Nations people but also by the federal and provincial governments and others. This requires that the federal government formally recognize that First Nations can in fact establish core governance institutions beyond the *Indian Act*.

Where a Nation is interested in promoting economic development or concerned about ensuring certainty, it is essential that the governing body have regularized operations and law-making processes. This is true regardless of whether a Nation is governed under the *Indian Act* and the *Indian Band Council Procedures Regulations*, has established its own structures and procedures for government through comprehensive governance negotiations with Canada, or is relying on an exercise of the inherent right of self-government. Citizens will demand regularized decision-making as part of accountability and transparency measures. For political, business and social development reasons, the collective experience of First Nations has also reinforced the need to ensure that government procedures are recognized beyond the community. Other Nations, partners, governments, banks and companies that are engaging with First Nations, as well as the markets, generally insist on governance transparency and legitimacy.

There are, of course, numerous ways to design and structure a governing body or bodies. The design will be influenced in part by traditional institutions, those that have been imposed, as well as other practices that will make sense for a Nation's current reality and needs. In developing appropriate governing structures for today, Nations have and likely will continue to consider existing governing structures under the *Indian Act*. While the *Indian Act* system has been imposed, it is also the most familiar system to many First Nation citizens and administrations. The powers or jurisdictions that the governing body may exercise will typically have some bearing on the way the institutions are structured. This, along with the Nation's population, the complexity of what it intends to govern and the most efficient way to govern, will all be important considerations. Given the complexity of some

jurisdictions that First Nations may take on, when creating appropriate institutions of government it is also important to consider economies of scale and whether an amalgamation of an *Indian Act* "band" into tribal groupings is warranted. These are, of course, challenging political questions that First Nations are asking internally as they rebuild and consider post-*Indian Act* government. Whatever the political and legal sensibilities, the more one can make common cause with related communities (i.e., grow the Nation's population), the more practical many aspects of governance and its administration become. Ultimately, whatever structure is chosen must be acceptable to the citizens of the former bands who will, more likely than not, be required to vote on the changes.

In looking for other models of government to draw from, First Nations have often looked within Canada. Canada is a federation with a British-style parliamentary system, where the powers of government are split between various institutions. The core governing body that makes federal laws is Parliament, with an elected House of Commons and an appointed Senate. However, an executive council (cabinet) also has powers to make decisions and enact subordinate laws (regulations). Canada's provinces and territories each has its own parliamentary-style legislature. In addition, there are numerous other types of governing body structures in Canada, depending on the type of powers they exercise. For instance, local governments with municipal powers are typically structured around a mayor and council (not dissimilar to a chief and council under the *Indian Act*), where their powers are delegated, usually from a province or a territory. There are also special purpose governments for running schools, fire departments, water systems, universities, airports and ports, and so on.

Much has been written on how to structure government, of course, and it is well beyond the scope of this report to look at all the possible options and permutations or to go into detail about how they work in practice. However, what is important for purposes of this report is to highlight the fact that a Nation is not limited in its choices. Ultimately, what First Nations create is their choice alone as they contemplate their individual governance needs.

While all the comprehensive governance arrangements in BC that are detailed in this report address the establishment of appropriate institutions of core governance, including the governing body or bodies, it is interesting to note that, despite some similarities, all of the Nations have structured their governing bodies differently. The point is that each was developed independently, Nation by Nation. This should come as no surprise, but it does reinforce the idea that what will exist in terms of governance after the *Indian Act* will be very different from the governing reality of today. In some cases, there is a core governing body (such as a council), while in others there is an assembly or a legislature and a series of governing bodies, depending on the type of powers being exercised. For instance, there may be a central government for a group of Nations, with each Nation having its own local governing body (the Nisga'a model). In such a system, the powers and law-making authority of the Nation may be divided, depending upon which governing body has authority over particular subject matters.

For any number of reasons, not all Nations may be ready for or want to look at a complete overhaul of their existing governance institutions, as is contemplated when a Nation becomes self-governing. Some Nations have chosen to start by reforming governance practices that exist under the *Indian Act*, often by drawing on the potential for expanded authority and jurisdiction under sectoral governance initiatives.

While a continuum of governance options exists for each Nation to consider in their efforts to rebuild strong and appropriate governance, many governance experts as well as our Nations have pointed out the limitations of certain initiatives to date. With regard to core governance reform, sectoral options have been described as "limited" in terms of providing options that result in both citizen support for the reform and legal recognition from other governments and third parties. Legal recognition occurs where, as necessary, the federal government for that Nation removes any uncertainty about

the *Indian Act* application, making those sections that address the governing body (chief and council, elections, etc.) no longer applicable to that Nation. The ongoing and concurrent efforts to create a federal legislative mechanism in Canada to recognize First Nations self-government could work to further strengthen and support many existing sectoral governance initiatives and others along the governance continuum.

The Role of National and Regional Bodies

Also along the continuum of governance options, and usually associated with sectoral governance initiatives, a number of First Nations national institutions have been established to assist with the rebuilding exercise. These institutions are not based on the authority of any one particular Nation and are, in fact, brought into effect by federal legislation though federal machinery of government that is still evolving. They can, however, undertake specific governance and regulation functions and provide oversight and support services to First Nations. These include statutory bodies such as the First Nations Financial Management Board (FMB), the First Nations Tax Commission (FNTC), the First Nations Lands Advisory Board and, to a more limited degree, the First Nations Land Management Resource Centre (FNLMRC). In the case of FMB and FNTC, these institutions are referred to as "shared governance bodies"; the members of the governing body are chosen by the governor-in-council (cabinet) and other non-federal bodies. The FNLMRC is a special purpose body with powers established under the *Framework Agreement on First Nation Land Management*.

Such bodies, whether created under statute or not, can play an important role in setting standards, promoting good governance and generally supporting First Nations in the transition from governance under the *Indian Act*. (The role of each of these bodies and others is discussed in Section 3 of this report, in the chapters addressing the jurisdictions for which they have a role.) If First Nations so desire, and Canada and, where appropriate, the province agrees, other such national or regional institutions may be established. Over time, it is expected that the role and function of these institutions will evolve as more Nations move toward comprehensive governance arrangements. For now, most of these institutions provide services to First Nations whose core governance remains under the *Indian Act*.

In addition to these national bodies, there are other regional First Nation organizations in BC, some of which are recognized in federal and provincial legislation, including the First Nations Education Authority and the First Nations Financial Management Board, First Nations Tax Commission, and First Nations Finance Authority. Other bodies that are not recognized in legislation but are recognized by agreement include the First Nations Health Authority and the First Nations Health Council. Again, these are bodies established by First Nations to assist in the administration of, and to potentially govern over, specific areas of jurisdiction in support of the transition from First Nations governance under the *Indian Act* to recognized self-government in the modern era.

In addition to these national and regional recognized institutions and bodies, a number of other province-wide "councils," committees and working groups have been established in BC in recent years to address a range of sectoral issues. Councils established under a number of authorities are addressing various aspects of governance. These councils, like the provincial and territorial organizations (PTOs) in BC (the BC Assembly of First Nations, the First Nations Summit and the Union of British Columbia Indian Chiefs) and the national First Nations institutions, are not "governments," nor do they have any legal authority. However, they can and do play an important role in providing individual Nations with technical support and assistance in advancing their governance agendas. Councils that have been established in BC include the First Nations Fisheries Council, the First Nations Forestry Council and the First Nations' Energy and Mining Council. (Their work is more fully described in the relevant chapter(s) in Section 3.)

The Role of Non-Citizens

Finally, it is important to remember the role of non-citizens when developing the structures and procedures for a governing body. Typically, as governing bodies are not chosen by and do not represent non-citizens, questions are inevitably raised about how the interests of non-citizens who live or conduct business on, or have other interests in those communities or on their lands, are represented, particularly where taxes are raised from those persons. The *Indian Act* does not specifically address non-citizens' political or legal rights. It barely addresses citizen rights. Moving beyond the *Indian Act*, while there is no general legal requirement that non-citizens should participate in First Nations governing bodies, all comprehensive governance arrangements do address this issue, as do sectoral arrangements where governance affects non-citizens. The mechanisms used range from advisory bodies for non-citizens to requirements for consultation and participation in certain, but not all, governance institutions of the Nation. In order to provide those who might invest in or live on First Nations lands with confidence, it is important to consider how the interests of non-citizens will be represented. In all cases, non-citizens living on First Nations lands (whether on reserves, settlement lands or Aboriginal title lands) retain their rights to participate in provincial, federal and, in some cases, local government elections.

The remainder of this chapter focuses on what First Nations in BC are doing or have done in moving their governance beyond the *Indian Act* in establishing their governing body or bodies. We consider in more detail the types of core governance institutions that exist or are being developed along the continuum of governance from and beyond the *Indian Act*.

THE GOVERNING BODY UNDER THE *INDIAN ACT*

The *Indian Act* and its regulations set out how the governing body of the "band," the chief and council, is selected and operates. Canada has made regulations that govern band council meeting procedures under the powers set out in section 80 of the *Indian Act* (*Indian Band Council Procedures Regulations*, C.R.C., c. 950). These regulations apply to all "bands" that elect their council under section 74 of the *Indian Act*. Unless a "band" was never under section 74, or it has made an election code and no longer elects its council in accordance with section 74, these rules apply.

The *Indian Act* and the *Indian Band Council Procedures Regulations* are silent on many basic procedures required for effective governance. For example, there are no procedures set out as to how a "band" actually makes bylaws under the *Indian Act*, other than that a council passes a resolution. This is but one example of the failure of the *Indian Act* to serve as a suitable model for a First Nation's exercise of jurisdiction. Currently, it is only after self-government has been achieved that these matters are addressed comprehensively, although developing rules as part of an election code or making a bylaw under section 81 of the *Indian Act* can be a good first step. (The conduct of elections, whether by custom or otherwise, under the *Indian Act* is more fully described in Section 3.8 — Elections.)

Where a community has made an election code, the procedures for its council, including how laws are enacted, can be set out in a policy of the First Nation. As of May 31, 2014, there were 112 First Nations with custom election codes in BC. Through these election codes, Nations have already begun the process of developing core governance structures and moving away from those set out in the *Indian Act*. However, these rules are policy and not law. As such, they may be changed more easily or not followed at all. In addition to setting out the procedures of council in a policy, the council may enact a section 81 "procedures of council" bylaw under the ancillary bylaw-making powers (s. 81(1)(q)). As an *Indian Act* bylaw, it would be subject to disallowance by the Minister under section 82(2). There are few such procedural bylaws in BC.

Even though the *Indian Act* may be imposed and ultimately may not stand up to legal challenge respecting the ability of the Crown to legislate and regulate the core of self-government, it is important to remember that where decisions and bylaws made by councils are subject to the *Indian Band Council Procedures Regulations*, and where these procedures are not followed, the decisions and bylaws made are susceptible to being challenged by citizens or third parties. If First Nations find that the regulations are not being followed or that they do not have rules in place or do not elect council under section 74, they are therefore advised to take steps to ensure that either the regulations are followed or new rules are developed for a legally recognized system that reflects their custom or convention (i.e., what is actually done). If a First Nation determines that the regulations do not meet its needs or conventions, it may wish to enact its own rules to replace them. Outside of comprehensive governance negotiations, this can be done by taking control of the election process.

In 2013, the federal government enacted the *First Nations Financial Transparency Act* (S.C. 2013, c.7), which touches upon aspects of core governance and the functioning of the governing body. Under the new act, a chief and council governing under the *Indian Act* are required to prepare audited financial statements in accordance with public sector generally accepted accounting principles for all revenues received by the Nation, and, in a separate schedule, post the remuneration paid to the chief and council from all sources (as well as expenses) on the Nation's website or another website. (This initiative is more fully described in Section 3.11 — Financial Administration and Section 4 — Financing First Nations Governance.) The *First Nations Financial Transparency Act* does not apply to First Nations with self-government agreements. Presumably, the application of the act along with the *Indian Act* would be removed for First Nations that are recognized as self-governing in the future. Under self-government arrangements, First Nations establish their own more comprehensive accountability mechanisms (both political and financial). However, the act does apply to First Nations under sectoral governance arrangements, including those that have already established robust financial management systems under the *First Nations Fiscal Management Act* in accordance with the standards set by the Financial Management Board, which are far more comprehensive than the limited reporting requirements under the *First Nations Financial Transparency Act*.

THE GOVERNING BODY UNDER SECTORAL GOVERNANCE INITIATIVES

Moving along the continuum of governance, sectoral governance initiatives do not typically consider the core institutions of governance and for the most part rely on *Indian Act* institutions. There is currently no sectoral process or initiative a community can use to comprehensively establish its own governing body or bodies as core institutions of governance beyond the *Indian Act*. Establishing the governing body or bodies is undertaken as part of comprehensive governance arrangements, either bilaterally or as part of treaty negotiations.

Notwithstanding that there is no broad sectoral initiative dealing with the establishment of a governing body, in order to address recognized problems inherent in *Indian Act* election procedures, there is now an option for First Nations to choose to come under the federal *First Nations Election Act* (FNEA), which became law in 2014. The FNEA is a sectoral governance initiative led by the Atlantic Policy Congress.

Under the FNEA, the rules for election are established and replace the *Indian Act* rules. There is no variation, and all those that opt into the system agree to follow the prescribed rules. Council terms are extended from two to four years, mail-in ballots are more closely regulated, there is a different formula for the number of councillors, candidacy is restricted to members of the band, candidacy fees cannot exceed $250 (refundable if a candidate receives at least 5 percent of the vote), and a person cannot run for both chief and council in the same election. While these changes were seen as largely positive, there are troubling aspects of the act. Specifically, the act gives the Minister the ability to place a

custom election community under the act in the case of a protracted leadership dispute. (The impact of the FNEA and the changes it creates are discussed more fully in Section 3.8 — Elections.)

In addition to the FNEA, there are, some aspects of core governance relating to the governing body that are attached to specific sectoral governance initiatives (e.g., law enactment procedures, conflict of interest). For example, they are included as an incidental aspect of land management under the *Framework Agreement on First Nation Land Management* (Framework Agreement) and the *First Nations Land Management Act* (FNLMA). However, the FNLMA rules relate only to land and resource matters and do not cover issues such as elections. In addition, the Financial Management Board has set standards for financial administration laws and financial management certification under the *First Nations Fiscal Management Act*. The former includes requirements for aspects of core governance with respect to finance (e.g., the requirement for an audit committee) and other core governance matters, such as conflict of interest, transparency, etc., that can be addressed in a Nation's financial administration law. (These elements are discussed more fully in the chapters in Section 3 where the specific sectoral initiatives are described.)

THE GOVERNING BODY UNDER COMPREHENSIVE GOVERNANCE ARRANGEMENTS

For the purposes of negotiating self-government agreements, Canada's approach to how First Nations should establish the core institutions of government, including the governing body, is set out in the 1995 Inherent Right Policy. With respect to core institutions of government and specifically the governing body, Canada requires that agreements contain provisions concerning the establishment of governing structures, internal constitutions, elections and leadership selection processes, as well as provisions dealing with accountability and transparency.

All of the comprehensive governance arrangements require the First Nation to adopt a constitution that addresses core governance matters. All agreements provide for the Nation to have the power to establish its own institutions of government. The core institutions of government, including the establishment of the governing body or bodies, under all of the post–*Indian Act* comprehensive governance arrangements (both inside and outside treaty), are set out in each Nation's constitution. When a self-government agreement has been concluded with Canada, and the First Nation has agreed to certain principles, which are contained in the self-government agreement, Canada does not typically approve the constitution. Rather, the constitution is typically ratified by the First Nation at the same time as the self-government agreement and comes into force at the same time as the agreement. Sechelt is the exception: there is no written self-government agreement, but simply provincial and federal legislation and a constitution, and any amendments require approval from the governor in council.

The constitutions of all self-governing First Nations typically include basic rules setting out how the Nation's governing body or bodies are selected, as well as other core governance matters. These can be expanded upon in ancillary laws and policies. The requirements for constitutions in all of the treaties set minimum standards with respect to some aspects of government, including maximum terms for elected representatives, systems of financial administration comparable to other governments in Canada, entitlement of every person enrolled to be a citizen of the Nation, and conflict of interest rules comparable to similarly sized governments in Canada. The Westbank constitution, in contrast, details council's duties and the individual responsibilities of the chief and councillors, who are bound by their oath of office to carry out those duties. Failure to carry out the duties is grounds for removal. While the treaties do not set out the duties and responsibilities of council members, they do provide for this to be set out in the First Nation's laws. Constitutions are an important institution of government in their own right. (For a more comprehensive discussion on developing a constitution, see Section 2.4 — The Constitution.)

The federal government's current Inherent Right Policy is silent on the structure and characteristics of the governing body. There is a proviso that the institutions must be "democratic," although no definition of this is set out. This is of concern to some Nations that have hereditary or family-based systems and that may have differing perspectives on what "democratic" means.

As part of concluding a self-government agreement, and before agreeing to First Nations governance changes, Canada requires that the governing body or bodies be fully accountable to a Nation's citizens for all decisions made and actions taken in the exercise of their jurisdiction or authority. The Inherent Right Policy requires that mechanisms be in place to ensure political and financial accountability. These must be comparable to those in place for other governments and institutions of similar size, although they need not be identical. The mechanisms for political accountability are typically set out in each Nation's constitution, so that they are transparent to all citizens and to others who deal with the Nation's government. Canada's Inherent Right Policy speaks to this issue, stating:

> Where the core institutions are making laws, which will be the case for all First Nations under self-government, there must be:
> - clear and open processes of law-making;
> - transparent processes for proclaiming a law to be in effect;
> - procedures for the notification and publication of laws; and
> - procedures for the appeal of laws or other decisions.

Interestingly, the policy seems to suggest that laws can be appealed. Typically, laws are not appealable, and this is probably a mistake in the policy. The drafters likely meant that a Nation's laws could be challenged for validity in the courts, but not "appealed." In fact, this is the case for all First Nations bylaws or laws under the *Indian Act*, sectoral governance arrangements, and comprehensive governance arrangements and is a principle of good governance.

The federal Inherent Right Policy goes on to state that:

> Aboriginal institutions exercising authorities must:
> - ensure that the decision-making processes central to the core functions of those institutions are open and transparent;
> - ensure that information on administrative policies and standards is readily obtainable by clients; and
> - establish procedures, where appropriate, for administrative review of decisions, including appeal mechanisms.

The federal policy also requires a Nation's government institutions to develop conflict of interest rules for both elected and appointed officials. In particular, conflict of interest rules must ensure that services that provide an opportunity for financial gain operate at arm's length from elected and appointed officials. Some Nations have included conflict of interest rules in their constitution; others deal with conflict of interest through law or policy.

In addition to provisions for core governance in their constitutions, Nations with modern treaties also have recognized authority to enact laws regarding their core institutions of government. In Westbank, the rules for the structure of chief and council, elections procedures, law-making procedures, and so on are found in the constitution; in the case of treaty Nations, these details are set out in other laws.

The core institution of governance at Westbank is an elected chief and council that is responsible for law-making in accordance with the procedures set out in the constitution. This process involves a high degree of citizen participation. The number of councillors has been fixed. Sechelt has also opted to go with a chief and council. While both systems exhibit similarities to the *Indian Act* system, they are

in many ways very different from the *Indian Act* provisions and from each other, both in the detail of their structure and in their procedures.

Other treaty self-government models use other approaches. The Nisga'a treaty provides for Nisga'a government, which is composed of two levels of government (Nisga'a Lisims Government and Nisga'a Village Governments). The Nisga'a constitution deals with both levels of government. The Tsawwassen constitution sets out a single level of government. There is a Tsawwassen legislature that is responsible for making laws and an executive council consisting of the seven people elected with the highest number of votes to the legislature. The executive council has executive and administrative responsibilities and can issue orders and make regulations. The Maa-nulth agreement, on the other hand, provides for each Maa-nulth First Nation to have its own constitution. The Final Agreement lists the matters to be addressed in those constitutions.

Table — Comprehensive Governance Arrangements

Sechelt	The *Sechelt Indian Band Self-Government Act* provides that Sechelt Indian Band Council shall be the governing body of the Band, and is elected in accordance with the Sechelt Constitution. (s. 8) The Constitution may establish or provide for: (a) the composition, term and tenure of council and procedures for elections; (b) the procedures or processes to be followed by Council in exercising its powers and carrying out its duties. (s. 10(1)(a) and (b))
Westbank	The Self-Government Agreement sets out that the Constitution of the Westbank First Nation provide for a democratically elected Council that acts on behalf of Westbank in exercising jurisdiction setting out the composition of the Council, its tenure and removal of Council members. (Part VI, s. 43(b)) The Constitution of the Westbank First Nation sets out the procedures for the passage and amendment of laws. (Part VI, s. 43(e)) Westbank First Nation has the power to create institutions of governance. (Part VI, s. 47) Westbank First Nation has the power to make laws regarding the indemnification of officers. (Part IV, s. 24)
Nisga'a	The Nisga'a constitution will provide for: Nisga'a Lisims Government and Nisga'a Village Governments, including their duties, composition, and membership; requires that Nisga'a Government be democratically accountable to Nisga'a citizens with elections for Nisga'a Lisims Government and each Nisga'a Village Government to be held every five years, and that, subject to residency, age, and other requirements set out in the Nisga'a Constitution or Nisga'a law all Nisga'a citizens are eligible to vote in Nisga'a elections and to hold office in Nisga'a Government; the enactment of laws; Nisga'a Urban Locals, or other means by which Nisga'a citizens residing outside of the Nass Area may participate in Nisga'a Lisims Government; establishment of Nisga'a Public Institutions; provides for role of the Nisga'a elders, *Simgigat* and *Sigidimhaanak* in providing guidance and interpretation of the *Ayuuk* to Nisga'a Government; provide for Nisga'a Government until the first Nisga'a elections. (Ch. 11, s. 9) Nisga'a Lisims Government may make laws with respect to the administration, management and operation of Nisga'a Government, including: (a) the establishment of Nisga'a Public Institutions, including their respective powers, duties, composition, and membership; (b) powers, duties, responsibilities, remuneration, and indemnification of members, officials, employees, and appointees of Nisga'a Institutions; (c) the establishment of Nisga'a Corporations, but the registration or incorporation of the Nisga'a Corporations must be under federal or provincial laws; (d) the delegation of Nisga'a Government authority, but the authority to make laws may be delegated only to a Nisga'a Institution; (e) financial administration of the Nisga'a Nation, Nisga'a Villages, and Nisga'a Institutions; and (f) elections, by-elections, and referenda. (Ch. 11, s. 34)
Tsawwassen	The Tsawwassen constitution provides that Tsawwassen government will be democratic and sets out duties, composition and membership with elections at least every five years with the majority of members of Tsawwassen Government being elected; Tsawwassen Government may include elements of traditional governance; role of advisory bodies in Tsawwassen Government; the authority of the Tsawwassen Government to make laws; a process for the enactment of laws; establishing Public Institutions. (Ch. 16, s. 8) Tsawwassen Government may make laws with respect to the election, administration, management and operation of Tsawwassen Government including: (a) the establishment of Tsawwassen Public Institutions, including their respective powers, duties, composition and membership, but the registration or incorporation of the Tsawwassen Public Institution must be under Federal or Provincial Law; (b) the powers, duties, responsibilities, remuneration and indemnification of members, officials, employees and appointees of Tsawwassen Institutions; (c) the establishment of a Tsawwassen Corporation, but the registration or incorporation of the Tsawwassen Corporation must be under Federal or Provincial Law; (d) the financial administration of Tsawwassen First Nation and Tsawwassen Institutions; and (e) elections, by-elections and referenda. (Ch. 16, s. 43)

Table — Comprehensive Governance Arrangements... *continued*

Maa-nulth	The Final Agreement sets out that the Constitution provides that Maa-nulth government will be democratic. Sets out duties, composition and membership; government democratically accountable — elections at least every five years; a process for removal of Office Holders of its Maa-nulth First Nation Government; enactment of laws; and establishment of public institutions. (s. 13.3.1) Each Maa-nulth First Nation Government may make laws with respect to the election, administration, management and operation of that Maa-nulth First Nation Government, including: (a) the establishment of Maa-nulth First Nation Public Institutions, including their respective powers, duties, composition and membership, but the registration or incorporation of Maa-nulth First Nation Public Institutions will be under Federal Law or Provincial Law; (b) the establishment of Maa-nulth First Nation Corporations, but the registration or incorporation of Maa-nulth First Nation Corporations will be under Federal Law or Provincial Law; (c) the powers, duties, responsibilities, remuneration, and indemnification of members, officials, employees and appointees of that Maa-nulth First Nation Government or its Maa-nulth First Nation Public Institutions; (d) financial administration of that Maa-nulth First Nation Government, its Maa-nulth First Nation Public Institutions and the applicable Maa-nulth First Nation; and (e) elections, by-elections and referenda. (s. 13.11.1)
Yale	Yale First Nation Constitution will provide for: a democratic Yale First Nation Government; a government that is democratic and elected at least every five years; a system of financial administration; conflict of interest rules; the protection of Yale First Nation members' rights and freedoms; processes for the enactment and challenging of Yale laws; for the establishment of public institutions; conditions for disposing of land or land interests; a transitional Yale government; the amendment of Yale laws; and, for the removal of elected members. (s. 3.3.1) Yale First Nation Government may make laws with respect to the election, administration, management and operation of Yale First Nation Government. Including: the establishment of Yale First Nation Public Institutions, including their respective powers, duties, composition, and membership; the powers, duties, responsibilities, remuneration, and indemnification of members, officials, and appointees of Yale First Nation Institutions; the establishment of Yale First Nation Corporations; financial administration; and elections, by-elections, and referenda. (s. 3.11.1)
Tla'amin	The Tla'amin Nation will have a Tla'amin constitution which will provide: Tla'amin Nation will act through the Tla'amin Government in exercising its rights, powers, privileges and authorities in carrying out its duties, functions and obligations; for a democratic Tla'amin Government; that Tla'amin Government will be democratically accountable and hold elections at least every five years; that a majority of members of Tla'amin Government will be elected; for a system of financial administration with standards comparable to those generally accepted for governments in Canada; for conflict of interest rules comparable to those generally accepted for governments of similar size in Canada; for recognition and protection of rights and freedoms of Tla'amin Citizens; that every individual who is enrolled under this Agreement is entitled to be a Tla'amin Citizen; that sets out the authority of the Tla'amin Nation to make laws; the process for the enactment of laws; that any Tla'amin Law inconsistent with the Tla'amin constitution is of no force or effect; for the establishment of Tla'amin Public Institutions; for conditions under which the Tla'amin Nation may dispose of lands or interests in lands; for amendment of the Tla'amin constitution. (Ch. 15, s. 9) The Tla'amin Nation may make laws in relation to the election, administration, management and operation of Tla'amin Government, including: the establishment of Tla'amin Public Institutions; the powers, duties, responsibilities, remuneration and indemnification of members, officials and appointees of Tla'amin Institutions; the establishment of Tla'amin Corporations financial administration of the Tla'amin Nation and Tla'amin Institutions; and elections, by-elections and referenda. (Ch. 15, s. 47)

QUESTIONS A COMMUNITY WILL LIKELY CONSIDER IN ESTABLISHING ITS GOVERNING BODY

The following questions and answers are provided to assist First Nations as they undertake internal discussions regarding the structure of their governing body or bodies. These are the typical questions raised by citizens, who are for the most part familiar with governance structures under the *Indian Act*. Of course, there are many ways to structure a governing body, as evidenced by the different examples negotiated and implemented under comprehensive governance arrangements. The questions and answers are not intended to be exhaustive or to prescribe a particular approach for individual Nations. Written from the perspective of the authors, they reflect questions that have been raised in community meetings and with elected officials. They also reflect questions that have been asked about councils where the governing body is a "chief and council" as opposed to a "legislature" or a "Parliament" or some other uniquely First Nation institution (e.g., big house with clans and/or hereditary chiefs). *The Governance Self-Assessment* (Part 2 of the Toolkit) and, in particular, Module 1 — The Governing Body — Establishing Effective Governance, is another tool that a Nation can use

to assist in having internal discussions regarding its governing body or bodies. In creating the self-assessment, we were mindful of the many differing approaches to governing bodies undertaken by Nations in BC.

Chief and Council

How many members of council should we have?

The *Indian Act* stipulates that there is one councillor for every 100 members, up to a maximum of 12. The FNEA suggests similar representation but allows for council to reduce the number to a minimum of at least two councillors. These stipulations are not based on any model of efficiency, but are arbitrary and may not match a Nation's needs. The number of council members is an important consideration, as it affects the extent of member representation, the efficiency of the council and the financial cost to the community.

The number of councillors, including the chief or head councillor, should ideally be an odd number to avoid tied votes where decisions of the governing body are made by vote. This may not work out, however, where some or all of the councillors are selected by clans or families and not by the electorate as a whole. The larger the council, the more difficult or complicated it can be to make decisions. There is less efficiency in decision-making, as there are inevitably more voices around the council table and there is typically less opportunity for consensus. However, having more members of council provides more representation for the community. When designing their governments, some smaller First Nations have limited the size of council, regardless of how much the community will grow in the future. There is no minimum or maximum number of councillors or other representative that must be established if a First Nation leaves the *Indian Act* election rules. Communities should look at their particular needs and choose the number that best meets the goals of representation and efficiency.

Does the community need an additional level of governance with its own governing body, perhaps a tribal council made up of several First Nations?

It is necessary to consider governance not just over reserve lands but also governance beyond the reserves and over ancestral lands, including Aboriginal title lands. Some Nations have created a tribal government or a tribal legislature that may have members from all component Nations. Before self-government, these exist as "tribal councils" typically established under the BC *Society Act*. Currently, there are more than 20 tribal councils in BC. These bodies generally exercise primarily administrative powers for coordinating and delivering programs and services to "Indians" on behalf of other governments; they do not "govern," despite often giving the impression that they do or that they are trying to govern. However, they may also deal with lands and resource matters, typically off-reserve and within the realm of Aboriginal title and rights where consultation with and accommodation with by the Crown and third parties is requested or required. The concept of a tribal government with law-making power is more significant than the common experience of existing tribal councils of non–self-governing Nations.

When Nation building or rebuilding is contemplated at the tribal level, there will need to be a clear statement of the powers that will be exercised by any local council in the community and the powers that will be exercised by the broader tribal government, whose laws will affect all of the participating Nations. First Nations may desire a mechanism for reversing the division into "bands" under the *Indian Act*. If so, this option needs to be fully considered. Not only will law-making powers have to be described for the different levels of governance, but also leadership selection rules for the tribal government will also need to be established.

Currently, there is no simple mechanism to facilitate the transition from "band" government to tribal government through the appropriate governing bodies, division of powers and responsibilities, and for "bands" to formally become truly self-governing as part of tribal or Nation government, apart from

negotiating comprehensive governance arrangements with the Crown. However, as noted earlier in this report, this may change in the future if mechanisms such as those proposed in the draft *First Nations Self-Government Recognition Act* become law, or if Nations at the tribal level are required to determine governance structures beyond the simple legal entities established under the BC *Society Act* to manage and govern Aboriginal title lands that are held collectively and typically by more than one "band." The hope is that whatever governance structures are being developed on-reserve will be coordinated with whatever structures are ultimately applicable to Aboriginal title lands.

How long should council terms be?

One of the main decisions to be made when designing election rules (see Section 3.8 — Elections), regardless of whether the choice is to have a council or a legislature or some other form of governing body, is the term of office for the members of the governing body. Also important is the decision regarding whether all members are elected at the same time or the elections are staggered. Under the *Indian Act*, all council members are elected at the same time and the term of office is two years. For many communities, a two-year term has proven too short, as it takes councillors several months to a year to learn and fully understand the operation and governance of the First Nation, and then there is only one year (the last six months of which is often focused on the next election) to implement the council's decisions. To meet modern needs, many First Nations are establishing their own rules and are already instituting longer terms, preferring three- or four-year terms for council. Under the optional federal *First Nations Election Act*, council members serve four-year terms; this change was made, at least in part, in response to concerns that two-year terms, as prescribed in the *Indian Act*, were insufficient to allow a council to achieve its goals.

Another factor to consider is whether all council members are elected at the same time. This is beneficial for cost reasons, as there are fewer elections. However, some Nations prefer an overlap of experienced and new councillors and therefore establish election rules whereby half of the council is chosen in one election and the other half is elected midway through the first group's term. Since all council members will serve the same term of office, this "staggered" model means there are always experienced council members in office and there is a turnover of only half the council, at most, in an election. Nations will have to weigh the pros and cons of staggered election terms in making this choice.

Should qualifications be set for who can run for chief and council?

Sometimes a Nation's constitution, election code or other laws set general qualifications or restrictions on who can run for public office and be a member of the governing body. For instance, under the American constitution the President of the United States must have been born in the United States, must have lived there as a permanent resident for at least 14 years, and cannot be younger than 35. The *Indian Act* does not require a person to be a "member" of the "band" to run for the elected office of chief, although people running for council have to be a "band member." The FNEA requires candidates to be band members and prohibits individuals from running for both chief and council in the same election, whereas under the *Indian Act*, a person may stand for both offices. The *Indian Act* provisions do not bind a First Nation that is developing its own election rules. One of the first questions a community will need to answer, therefore is, whether a person must be a citizen to run for all elected offices?"

Nations may also want to decide whether there should be any residency requirements — for example, in order to run for council, a person must live within the community (on-reserve) or perhaps within a broader geographical area. The policy reason for a residency requirement is to better ensure that people running for office are part of the local community, are familiar with local issues, and can attend meetings. They can demonstrate this to their fellow citizens by making a commitment to live in the community. Residents may have different perspectives on community issues, which could influence decisions of council. Again, there is no right or wrong answer about a residency requirement for candidates. However, this is a question to consider when designing the structures and procedures of government as set out in an election code or other law.

Some First Nations have built other restrictions on who can run for chief and council that into their election codes or other laws. These include disqualification of candidates who have been found guilty of a criminal offence (either summary conviction or indictable) or who have breached the Nation's constitution or other rules of the First Nation. Election codes may also consider other qualifications, such as age and education. In some cases, certain positions in the governing body are reserved for members coming from a particular clan or family or who considered an "elder" or "youth." Care should be taken not to disqualify individuals who may contribute to the discussion and the quality of decision-making. Moreover, there is a general principle that representation in a democracy should not be restricted unless there are compelling public policy reasons for doing so.

Should there be a chief?

Under section 74 of the *Indian Act*, "bands" have a chief who is elected to a position separate from the councillors. If the community decides that there must be a chief or chief councillor, or some other person with responsibilities and authority different from those of an individual councillor, the community will need to decide how that person is selected. This can be done in different ways, including naming the chief as the individual who achieves the highest number of votes when councillors are elected or electing the chief in a separate ballot.

Under the *Indian Act*, the chief has no greater or lesser powers than any other member of council and has the same vote on council. Some First Nations by custom have the chief vote only to break a tie. It is also common to have the chief chair council meetings. This is also the default rule under the *Indian Band Council Procedures Regulations* in circumstances where those regulations apply to the First Nation. Nations that have established institutions of government similar to a parliamentary system rather than a local government system often appoint a speaker to control business in their legislature. More populous Nations that include a number of communities may elect local chiefs or chief councillors and also elect a grand chief for the entire Nation.

How to select the primary leader of the community and/or Nation is really a question of choice, with no particular model better than another. What is possible today will be influenced by where a Nation is along the governance continuum moving away from the *Indian Act*. Regardless of the system of governance a Nation is currently under, what is important is that members of the governing body and the leaders have clear roles and responsibilities.

What should chief and council be paid?

Most systems of government provide some form of remuneration for members of the governing body (elected or appointed). This is also true for First Nations, regardless of the source of authority or governance structure of the First Nation (e.g., *Indian Act* or self-governing). Elected officials are usually not government "employees" and their remuneration is provided for under law. When an elected official receives remuneration, it may be called an honorarium, a per diem or an indemnity. A per diem or per day payment is paid for attending meetings on an "as required" basis, and the amount of the per diem typically takes into account preparation for meetings. Per diems typically range from $100 to $900, depending on the length of meeting, the size of government and the complexity of the decisions being made. An indemnity is an amount provided to an elected official calculated on an annual basis. It is not tied to any particular meeting, but rather pays the person on the basis of his or her responsibilities as an elected official. Indemnities vary considerably, again depending on the size and responsibility of the government.

In non–First Nation examples, indemnities for municipal officials range from $10,000 to $60,000 for councillors and from $20,000 to $100,000 for mayors. Members of the Legislative Assembly in BC receive a base salary of $101,000. Similarly, a Member of Parliament receives a base salary of $163,700 annually, with increases based on their position. The prime minister, for instance, will receive $327,400 in 2014/15. If elected officials have additional responsibilities, such as being on committees

or, in the parliamentary system, being in cabinet, they receive additional remuneration. In addition to an indemnity, elected officials are typically entitled to travel expenses and, in some cases, living expenses. These may either be included in the indemnity or calculated separately. When designing a system of government, consideration should be given to ensuring that there is openness and transparency in the establishment and setting of elected officials' remuneration.

Because many First Nations are small in size, there has been a tendency for elected leaders to take on administrative roles, such as providing federal programs and services, and to be paid from the funding arrangements in place with Canada or through the use of the First Nation's own sources of revenue. Sometimes, these administrative responsibilities are reflected in a portfolio system, in which individual councillors are assigned portfolios for particular administrative areas (e.g., lands, social services, membership). This approach is far less common in governments with resources to support a professional civil service that carries out the administrative functions of government while the political leaders decide on policy or exercise statutory decision-making responsibilities. Having councillors perform administrative roles merely to provide them with compensation for serving on council has a negative effect on communities, because the person given the administrative responsibilities may not be qualified for the task. Further, there is often sufficient work and responsibility for council members already, particularly where they are not full time, so they should not be required to take on additional administrative responsibilities. This is also a funding issue, as Canada has not adequately recognized the governance work required to be done by First Nation council members (see Section 4 — Financing First Nations Governance).

The Governance Self-Assessment (Part 2 of the Toolkit) consists of two modules, Module 1 — The Governing Body — Establishing Effective Governance and Module 2 — The Administration — Establishing Effective Organization. These modules were designed to assist Nations in having internal conversations around the roles and responsibilities of members of their governing body and administration, particularly as they move away from governance under the *Indian Act*.

In addition to federal contributions, First Nations are increasingly using their own sources of revenue to pay elected officials. This revenue can come from a range of sources. First Nations are being cautious, however: where income is derived from non-governmental activities (for example, businesses or commercial activity), the compensation elected officials may receive as directors of the "band"-owned businesses or companies is not confused with the remuneration they are entitled to as elected officials. The governance of the community and the institution of chief and council is separate from the governance of First Nation–run corporations. The different responsibilities and individual legal liabilities for each should be considered.

As mentioned earlier in this section, the *First Nations Financial Transparency Act* was brought into law in 2013. It requires, among other things, that bands governed in accordance with the *Indian Act* post the remuneration paid to the chief and council from all sources (including corporations and other "band"–run or owned businesses), plus expenses, on the Nation's website or another website. (This act is more fully described in Section 3.11 — Financial Administration and in Section 4 — Financing First Nations Governance.)

What types of safeguards against abuse of power by chief and council can be built into institutions?

Neither the *Indian Act* nor the *First Nations Financial Transparency Act* adequately addresses political and financial accountability of the governing body (chief and council), although the FNFTA does ensure that the remuneration paid to members of the governing body are published. Under the *Indian Act*, primary accountability is to the minister and not to the citizens of the First Nation. Indeed, it is because of deficiencies like these that First Nations are looking for more appropriate structures and procedures of government outside the *Indian Act*. Therefore, unless a First Nation

fills the gap in its own policy or laws or moves beyond the *Indian Act*, either through developing a financial administration law under the FNFMA or a land code under the FNLMA, or by moving to comprehensive self-government, there is very little to protect First Nations from abuses of power other than common law.

Moving beyond the *Indian Act*, a community's constitution, election code or other laws can include sanctions against the governing body where members fail to do their duty or misuse community assets. These can include clear statements of chief and council responsibilities, often tied to a legally binding oath of office, as well as recall mechanisms. Political and financial accountability are also provided where members of the governing body are required to regularly report back to the citizens, either at community meetings in other ways.

With respect to elections themselves, an election code can set out internal appeal and review bodies — for example, a council of elders or First Nation review board. The same body can perform both functions. These bodies should have procedures that follow rules of natural justice — that is, lack of bias and a fair opportunity for parties to be heard.

One way to minimize the potential for abuse of power or to catch it when it happens is to establish clear conflict of interest rules (see below). In addition, there may be opportunities to mentor newly elected officials and to ensure that the Nation has adequate powers to establish bodies to hear complaints and review decisions made by officials. An example is the Tsawwassen Judicial Council, established under Tsawwassen law.

The Governance Self-Assessment (Part 2 of the Toolkit) exists as one tool to assist Nations in having many of these challenging conversations about what currently exists and what can be built into their core governance institutions to protect them from abuses of power by chief and council or other members of the governing body.

How is conflict of interest addressed within the governing body?

A conflict of interest arises when a person making a decision in his or her public capacity has a personal or business interest in the outcome of the decision, and might therefore gain from the decision. Conflict of interest or the perception of a conflict of interest should be avoided. There are no rules in the *Indian Act* addressing conflict of interest. However, Aboriginal Affairs and Northern Development Canada (AANDC) has established guidelines that chief and council can follow and there is substantial case law on this subject.

When designing a system of government, a First Nation will want to consider how it addresses situations in which there might be conflict of interest. It is expected that First Nations will have an established policy or law that covers conflict of interest for members of the governing body or bodies, including elected or appointed officials, as well as staff and, in some cases, contractors. Conflict of interest in First Nation communities can be a challenging issue, because many communities are small and the residents tend to be more closely related than in non-Aboriginal communities of similar size. A number of examples of conflict of interest laws or policies are included in the Toolkit for consideration.

One of the main questions is how far in the family line does a First Nation go when considering whether there is a conflict? Is it just the immediate family or the extended family as well? In designing policy or law, consideration should be given to ensuring that there is a procedure in place if the conflicts are so great within the governing body that it cannot make a decision on a particular issue. For such cases, some Nations have chosen to set out in their rules that the decision will be taken to a community meeting where either the citizens will decide or the decision of the governing body will be made in the most transparent way possible, to demonstrate that the decision-makers are accountable for the decision.

Meetings of the Governing Body

How should meetings of the governing body proceed?

It is important for everyone who is part of a governing body to clearly understand how meetings are conducted and decisions are made. There are no set rules for meetings, although in the Western tradition, *Robert's Rules of Order* are often used as default rules for the running of meetings. Some Nations have chosen to generally follow *Robert's Rules of Order* when conducting a meeting. However, most non-Aboriginal governments do not use these rules, but set out their own rules, often in law but also in policy or in conventions that are well understood and usually written down. All Nations can do the same.

In the 1860s, following the American Civil War, Major Henry M. Robert became concerned with the apparent lack of any agreement for governing meetings of organizations and governments, and the resultant inefficiencies of decision-making processes. Major Robert put forward rules for "order" when considering any question brought before a society or organization. These rules, revised many times since, were published and are today known as *Robert's Rules of Order.*

In developing procedures for the governing body, a Nation may wish to follow existing custom or a variation of it, as opposed to what is strictly prescribed under the *Indian Act*. As a starting point for discussion, someone in the administration or in the governing body may wish to write down the practice (convention) of the Nation for conducting governing body meetings, regardless of the legal framework currently in place and the community's future direction. This can be a good foundation for a discussion as to how the governing body, whether a council or some other institution, might proceed in future. *The Governance Self-Assessment* (Part 2 of the Toolkit) can also aid Nations in this discussion.

Regardless of the governing structure that applies or is ultimately chosen, meetings should be duly convened — that is, they must be "legal." In order for a meeting to be duly convened, all members of the governing body must receive adequate notice so that they can attend. Meetings should not be called on a whim or with only certain members of the governing body notified or invited to attend. Any decisions made by a governing body where proper notice was not given may be challenged and may not be valid under the principles of good governance.

For *Indian Act* "bands," the *Indian Band Council Procedures Regulations* provide the authority for AANDC to call council meetings. This is not appropriate and is unlikely to continue under any post–*Indian Act* governance procedures. However, Nations may wish to provide that a petition signed by a certain number of members can require the governing body to meet to address the issue identified in the petition.

In addition to proper notice of meetings being required, no meeting of the governing body should take place if there is not a quorum — the required number of members present before any business can be conducted. A quorum must exist for the entire duration of the meeting. Rules for quorum are typically set out in a law that clearly establishes when there are enough members of a governing body to hold a meeting or vote on a matter. This is almost always the case where the governing body is a council. A legislature may not have the same requirements for a quorum.

Rules for who can vote on a matter under consideration by the governing body vary. Under the *Indian Band Council Procedures Regulations*, the presiding officer of the council only votes to break a tie. Every councillor is required to vote, unless a councillor has a conflict of interest. The rules under the *Indian Band Council Procedures Regulations* for both establishing a quorum and voting are quite simplistic. These rules may become more complicated when a First Nation develops an appropriate conflict of interest code or policies, because sometimes a quorum cannot be achieved for specific decisions in which conflict is declared. If a Nation establishes a form of council as a governing body, replacing the *Indian Band Council Procedures Regulations* with its own procedure rules, the rules should address what happens when there is no quorum of council to make a decision because of conflict of interest.

Procedures for the governing body may also include a list setting out the order of business at a meeting, assembly or session of the governing body.

These are only some of the situations that procedure rules should address. What is important is that rules for how a governing body proceeds and how votes are taken are fundamental to a government's operation. In establishing a system of rules for the governing body, everyone who is subject to those rules must be aware of them and confident that the rules will be followed and interpreted in a consistent manner. The chair (or equivalent) of the meeting, whether the chief or another presiding officer (such as a "speaker,"), has the responsibility to conduct meetings in accordance with the Nation's procedural rules. It is the responsibility of all members of the governing body to see that this is done and that procedural questions are addressed. A governing body that follows its own well-constructed rules will make better decisions and be more consistent in its decision-making. The decisions made will consequently be enduring and subject to fewer challenges. The two modules of the *The Governance Self-Assessment* (Part 2 of the Toolkit) can assist a Nation in its efforts to determine how well constructed its governance rules are and where there may be opportunities to improve.

Who should be able to attend meetings of the governing body?

Nations have an opportunity to create their own rules and to create an efficient and positive procedural context in which the government will operate. One of the principles of open and transparent government is access to government. Most systems of government allow public access to meetings in which the governing body debates public policy and makes laws. To a large extent, this is true of local governments, provincial governments and the federal government in Canada when they debate laws or make important decisions. A Nation may wish to include rules in its laws or constitution to allow citizens to be present at meetings or assemblies of the governing body or other institutions of government where public policy is debated and laws are made. *A Guide to Community Engagement* (Part 3 of the Toolkit) is one tool to assist Nations in their efforts to be inclusive and to engage citizens.

However, there are times when closed-door decision-making is needed, without the attendance of the public or people who work for the government. For local governments in Canada, this happens when a council goes "in camera" and the public is excluded; for the provincial and federal governments, this happens during meetings of the cabinet (the "executive council"), which are almost always conducted in strict secrecy. In cabinet, members of the government's executive council meet in camera and make certain decisions that are separate from Parliament or the legislature. First Nations may wish to establish their own rules for when the governing body goes in camera and how business is conducted during in-camera sessions. Given the size and scale of First Nations governments, there are currently very few examples of a cabinet with an executive council, although some Nations may wish to create an executive body as a smaller sub-group of its council or legislature. Tsawwassen has established an executive council in addition to a legislature that meets annually. There are two sessions of the legislature each year (spring and fall). All meetings of the legislature are open to the public.

In designing a system of government for a First Nation, the issue of whether citizens in attendance can speak at meetings of the governing body or if citizens' comments are to be given at a separate community meeting often arises. These are questions that will need to be addressed, as the effectiveness of band meetings is inevitably questioned as a community moves away from governance under the *Indian Act*. In some cases, First Nations choose to have special "public hearings" or community meetings attended by the governing body and where citizens or others affected by decisions of the First Nation can attend and have the opportunity to speak. The way community meetings are structured can be set out in policy and, moving beyond the *Indian Act*, set out in the Nation's laws or constitution.

When designing the institutions of government, First Nations will want to consider, in addition to cost and administrative complexity, how open their institutions of governance will be. In considering the openness of core institutions of governance, Nations are also having to decide whether meetings

of the governing body, whether a council or otherwise, and other institutions of the government are open to citizens only or open to the general public, which would include the media. On principle, if a Nation's government is not open, there can be suspicions about decision-making and questions about transparency, which could have a negative impact on the Nation. Nonetheless, there are many occasions where matters concern citizens only and perhaps only they should be present, reflecting the unique nature of First Nations governments. Each community will have to find a proper balance for its situation.

Experience shows there are positive changes in the dynamic when councils that have previously operated under the *Indian Act*, in which there are no rules regarding openness, have moved to open government. While many First Nations have limited space in their offices to enable people to attend meetings of the governing body, these are issues of infrastructure. Restricted space should not be used as a reason for not ensuring openness.

How do we keep records of our government business?

It is important to keep a record of all decisions made by the governing body or bodies and any other institutions of the government with decision-making authority. Typically, decisions of governing bodies such as councils are recorded in the written minutes of meetings. Minutes may or may not contain details of the discussions, but in all cases will record the decisions made. They may or may not indicate how individual members of the governing body voted, unless a community's procedural rules allow for a councillor to call for a recorded vote, in which case votes are individually noted. Minutes may contain the complete text of the discussion (verbatim), but where they include a summary of the discussion there is more opportunity for subjective interpretation by the minutes-taker. The person or system used to keep the official record is very important, and the position and responsibilities must be clearly set out so that there is no interference from elected officials. The governing body generally approves the minutes at the next meeting to confirm that they accurately reflect the discussion and any decision taken. However, where a complete transcript of proceedings is kept, this is less necessary.

In the Canadian parliamentary system, the record of debate between Members of Parliament or members of a provincial legislature is recorded verbatim and decisions of the parliament or legislature are maintained in a publication called Hansard, which is a printed and complete record of what took place. Consequently, there is no approval required of the record. However, this is not the case with the records of the executive council (cabinet meetings). In cabinet, minutes are kept by a senior officer of the Privy Council Office (PCO) and signed by the Secretary of the Cabinet. They are not approved at the next meeting. These minutes are definitive, and the records of decision, which conclude each agenda item, are written by the PCO and can only be interpreted, in case of dispute, by the PCO.

When creating a system of government, First Nations will consider how records are kept, who keeps them and who is responsible for this activity. As a First Nation comes to exercise greater law-making authority, a clear and accurate record of the government's actions and the decisions made by the governing body will be an important part of the overall governance system. *The Governance Self-Assessment* (Part 2 of the Toolkit) has been used successfully by individual Nations to jumpstart that discussion.

Procedures for Making Laws

What procedures should we follow in order to make bylaws or laws?

The *Indian Act* has almost no rules regarding how bylaws are made. All that is required is that a copy of the bylaw be sent by the chief or a member of council to the Minister (section 82 (1)). There is very little in the *Indian Band Council Procedures Regulations* to say how a First Nation enacts bylaws. Under the *Indian Act*, therefore, a "band's" bylaws, if not disallowed by the Minister, become law.

The *Indian Act* system provides First Nations with only limited bylaw-making authority, and there is oversight of this bylaw-making power by the federal government through the "disallowance" powers of the Minister. As First Nations move away from the *Indian Act*, it is unlikely that there will be the same level of federal oversight. Consequently, First Nations will want to ensure that their law-making processes ensure adequate time to develop and consider a law before it is made. If the process is rushed or flawed, it could result in weaker laws. Given that a Nation's powers of government cover matters that range from municipal to provincial to federal, and some that are uniquely Aboriginal, it may wish to set different thresholds or standards for the approval of its laws. For example, laws of a fundamental nature, such as a constitution setting out core rules for structures and procedures of governance or citizenship codes, may require higher thresholds of approval, such as ratification (i.e., the community votes), than do laws of a more local nature, such as animal control or street-lighting laws. A First Nation's law-making processes are a key part of governance. In developing a constitution or other laws, the community has an opportunity to create a process that reflects its practices and needs.

Policy considerations involved in designing a law enactment process can include the following:

1. What is the process for initiating a law?

2. Are there different types of laws (e.g., laws, bylaws, regulations, orders)?

3. Can a law be initiated by a member of the governing body, or only by the governing body as a whole?

4. Can laws be initiated through another process — for instance, through a community petition or request?

5. What is the appropriate balance between "community control" of the law-making process and the need for a governing body to act quickly where it might need to do so?

6. How is the law developed and who is responsible for its development and the policy considerations that go into its development? What significant policy issues should be taken to the community?

7. How is the law enacted? Is it enacted by the governing body (e.g., in council), and if so what level of consideration is given to the law? Many systems of government typically divide the law-enactment process into different stages to allow for adequate consideration of the law. For example, the law may be drafted and then considered for a first time by council, followed by a period of time when there may be further consideration of or deliberation on the law, before it is considered by council for a second or third time. There may be a mechanism for the law to be considered or brought before a community meeting where citizens can debate its contents. In some instances, the law may be finally approved by the council, while in others a law that is sufficiently important has to be approved by a vote of the citizens at a community meeting or in a referendum. In some cases, laws may be enacted by an elected legislature following basic procedures common to legislatures but adapted to First Nations customs and values.

8. Where are laws kept? How are they made available to persons subject to the law? Generally, laws must be public, in the interests of fair process and avoiding legal challenges. Any person who is subject to a law must have the ability to know the law that applies to him or her. Therefore, it is good governance for a First Nation's legal codes to address the establishment of a law registry or to use a registry that has already been developed (e.g., the First Nations' Gazette).

9. How are persons affected by the law consulted before the law is made? In any society, the effectiveness of a government in enforcing laws depends on acceptance of those laws by its citizens and others that may be subject to the laws. Regardless of how the laws are initiated, to ensure that the community is comfortable with the policy considerations that have gone into the drafting of a particular law, it will be very important to consider how policy behind the law is developed, how the community is consulted and involved and ultimately how the law is made. (Examples of policy considerations for the different types of laws that First Nations will be making are discussed under specific jurisdictions in Section 3).

Finally, First Nations should also consider the enforceability of any laws being made. While the making of laws is in itself an involved process, there are also many issues regarding enforcement. (These are discussed more fully in Section 3.2 — Administration of Justice.) Enforcement is a big, costly and sometimes contentious issue. If a government cannot afford enforcement, or will not actually do it, the question arises as to whether law-making with respect to a particular jurisdiction should be undertaken, or even whether a particular jurisdiction ought to be exercised by another government. These are some of the difficult questions First Nations will face as they establish governing institutions and then consider the range of jurisdictions and law-making that institutions will be responsible for.

Establishing Other Institutions of Governance

Should a community establish committees? If so, for what purposes?

Depending on the size of a First Nation and the complexity of its affairs, the community may wish to establish institutions of governance in addition to the primary governing body or bodies. It is common for First Nations governing bodies to establish committees in order to effectively conduct their business. The *Indian Band Council Procedures Regulations* contemplate the establishment of certain committees of council. In fact, many First Nations use committees on either an ad hoc (in place only for the duration of a specific issue) or a more formal basis, (standing committees, such as finance, housing and public works, that are permanent and meet on a regular basis). Other kinds of standing committees could include audit, citizenship, lands, and fisheries, to name a few. The committee considers business outside of council to take some of the pressure off council. Committees generally do not have any law-making authority and have limited decision-making capacity. However, certain decision-making authorities may be delegated to a committee, which can make recommendations.

Perhaps the two most important committees are the finance committee and the audit committee. The former is primarily concerned with finding the resources to pay for the jurisdictions exercised and for money management. The audit committee, which is independent of the finance or other executive committees, is a watchdog. Its terms of reference, whether set in a law or in policy, must ensure that its purposes and its membership are clear of any potential conflict. The finance and audit committees should not be confused. The standards for financial management for a First Nation set by the Financial Management Board require a First Nation to have an audit committee (see Section 3.11 — Financial Administration).

In designing government, First Nations should consider the use of committees and whether there are certain committees that need to be established by law as opposed to at the discretion of the chief and council from time to time. Finance and audit committees are examples of committees that should ideally be established under a law.

What is the role of commissions, boards and tribunals?

In addition to committees, some First Nations may want to establish commissions, boards or tribunals, which typically have more responsibility and authority than committees. These bodies are usually established under a law for specific purposes and with clearly articulated powers. Boards may be established to address jurisdictions such as managing education and schools, handling disputes and appeals regarding the interpretation of First Nation laws or a range of other subjects. Another example is a licensing commission established under a First Nation licensing law that sets out rules for licensing businesses. In this example, the commission might be delegated the responsibility to consider applications and grant licences. The commission would not have law-making ability, but would make decisions and have administrative responsibilities as authorized under the law. Some Nations have established an economic development commission to attract economic activity to their lands.

It may not be necessary for a First Nation to establish independent bodies immediately upon moving beyond the *Indian Act*. However, in some cases, the establishment of a particular committee may assist with the Nation's transition away from governance under the *Indian Act*. The need to establish commissions, boards or tribunals will become evident as the First Nation government evolves. The delegation by a government of its law-making authority or decision-making authority can be quite complicated and should be considered carefully by the Nation and those drafting its laws.

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaw — Section 81(1)(q) Ancillary powers (Powers of Council)			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Fort Nelson First Nation	1	ANCILLARY POWERS	A Management Procedures Bylaw
Nisga'a Village of Gingolx	9-88	ANCILLARY POWERS	Bylaw Respecting Communications
Tk'emlups te Secwepemc	1979-1	ANCILLARY POWERS	Bylaw to Establish Procedures of the Council of the Band
Tk'emlups te Secwepemc	1979-2	ANCILLARY POWERS	Bylaw re Administration and Management of the Band
Tk'emlups te Secwepemc	1979-3	ANCILLARY POWERS	Bylaw to Establish the Position of the Band Administrator
SECTORAL GOVERNANCE INITIATIVES			
FNLMA - FRAMEWORK AGREEMENT - OPERATIONAL	**DATE**	**FIRST NATION LAW**	
Kitselas First Nation	OCT 5, 2010	Kitselas Committee To The Council Act, K.B.C. 2010-01	
Kitselas First Nation	MAR 16, 2009	Kitselas Policy Manual — Policy Distribution	
Leq'a: mel First Nation		Leq'a: mel First Nation Personnel Policy	
Leq'a: mel First Nation		Leq'a: mel First Nation Sexual Harassment Policy	
Seabird Island Band	2004	Seabird Island First Nation Governance Manual	
Seabird Island Band	2009-2011	Seabird Island — Vision 2020	
Tla'amin First Nation	JUL 13, 2009	Constitution Of The Tla'amin Nation	
Squiala First Nation	APR 2008	Squiala First Nation Governance Manual	

Table — BC First Nations' Laws/Bylaws in Force... *continued*

COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Huu-ay-aht First Nations		Constitution Act
Huu-ay-aht First Nations		Huu-ay-aht First Nations Citizenship Act
Huu-ay-aht First Nations		Code Of Conduct And Conflict Of Interest Act
Huu-ay-aht First Nations		Effective Date Precedures Act
Huu-ay-aht First Nations		FAA Regulation
Huu-ay-aht First Nations		Gift Disclosure Regulation (Code Of Conduct And Conflict Of Interest Act)
Huu-ay-aht First Nations		Government Act
Huu-ay-aht First Nations		Interpretation Act
Huu-ay-aht First Nations		Elections Act
Huu-ay-aht First Nations		Freedom Of Information And Protection Of Privacy Act
Huu-ay-aht First Nations		Referendum And Recall Act
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Referendum Act
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Citizenship Act
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Access To Information Act
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Administrative Decisions Review Act
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Effective Date Procedures Act
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Government Act
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Integrity Act
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Interpretation Act
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Legislature Rules Of Order And Procedure Act
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Recall Act
Nisga'a Nation		Nisga'a Final Agreement
Nisga'a Nation		The Constitution Of The Nisga'a Nation (October 1998)
Nisga'a Nation	2000/04	Nisga'a Administrative Decisions Review Act — Unofficial Consolidation (January 4, 2008)
Nisga'a Nation		Nisga'a Citizenship Act
Nisga'a Nation	2008/07	Nisga'a Elections Act (June 11, 2008)
Nisga'a Nation		Nisga'a Elections Dispute Resolution Regulation (June 16, 2008)
Nisga'a Nation	2006/01	Nisga'a Government Act (January 31, 2007)
Nisga'a Nation		Nisga'a Nation Entitlement Act — Unofficial Consolidation (September 26, 2008)
Nisga'a Nation		Nisga'a Village Entitlement Act — Unofficial Consolidation (September 26, 2008)
Sechelt Indian Band	1987	Sechelt Indian Government District (SIGD) Enabling Act
Sechelt Indian Band	1993	Sechelt Constitution
Sechelt Indian Band	1988-01	Passing Of Laws
Sechelt Indian Band	1989-02	Regulation Of Meetings
Sechelt Indian Band	1996-02	Conflict Of Interest Rules
Sechelt Indian Band	1996-04	Recreation Commission
Sechelt Indian Band	2004-01	Governing The Contents Of Voting Packages To Be Sent To SIB Members Living Outside The Traditional Territory Of The SIB In The Case Of Referendum On An Issue Of Importance To The SIB
Sechelt Indian Band		Sechelt Self-Government Act

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

CGA	LAW NO.	DESCRIPTION
Sechelt Indian Band (SIGD)	1988-01	Procedure Law
Sechelt Indian Band (SIGD)	1988-02	Interpretation Law
Sechelt Indian Band (SIGD)	1988-14	Procedure Law No. 2
Sechelt Indian Band (SIGD)	1988-16	Procedure Law No. 3
Sechelt Indian Band (SIGD)	1991-06	Procedure Amendment
Sechelt Indian Band (SIGD)	1992-05	Adopt BC Reg 244/88
Sechelt Indian Band (SIGD)	1997-04	Revised Statutes Of BC
Sechelt Indian Band (SIGD)	2006-04	Interpretation Law Amendment
Toquaht Nation		Citizenship Act
Toquaht Nation		Administrative Decisions Review Act
Toquaht Nation		Council Rules Of Order & Procedures Act
Toquaht Nation		Effective Date Procedures Act
Toquaht Nation		Elections Act
Toquaht Nation		Freedom Of Information & Protection Of Privacy Act
Toquaht Nation		Government Act
Toquaht Nation		Integrity Act
Toquaht Nation		Interpretation Act
Toquaht Nation		Referendum Act
Toquaht Nation		Executive Rules Of Order And Procedure Regulation
Tsawwassen First Nation		Tsawwassen First Nation Final Agreement
Tsawwassen First Nation		Appendices To The Final Agreement
Tsawwassen First Nation		Final Agreement Errata
Tsawwassen First Nation		Implementation Plan
Tsawwassen First Nation	APR 3, 2009	Declaration Of Tsawwassen Identity And Nationhood
Tsawwassen First Nation	APR 3, 2009	TFN Constitution Act
Tsawwassen First Nation	APR 3, 2009	TFN Community Governance Act
Tsawwassen First Nation	APR 3, 2009	TFN Conflict Of Interest Act
Tsawwassen First Nation	111-2009	TFN Conflict Of Interest Act Affidavits Regulation
Tsawwassen First Nation	APR 3, 2009	TFN Economic Development Act
Tsawwassen First Nation		Election Act
Tsawwassen First Nation		Campaign Advertising Regulation
Tsawwassen First Nation		Conflict Of Interest Act Affidavits Regulation
Tsawwassen First Nation		Election Notice Regulation
Tsawwassen First Nation		Election Officer Regulation
Tsawwassen First Nation		Election Recount And Appeal Deposit Regulation
Tsawwassen First Nation		Nomination Regulation
Tsawwassen First Nation		Voting And Mail-In Ballot Regulation
Tsawwassen First Nation		Freedom Of Information And Protection Of Privacy Act
Tsawwassen First Nation		Access To Information Regulation
Tsawwassen First Nation		Interpretation And Definitions Act
Tsawwassen First Nation		Government Employees Act
Tsawwassen First Nation		Government Organization Act
Tsawwassen First Nation		Chief And Executive Council Remuneration Regulation
Tsawwassen First Nation		Advisory Council Regulation
Tsawwassen First Nation		Membership Act

Table — BC First Nations' Laws/Bylaws in Force... *continued*

CGA	LAW NO.	DESCRIPTION
Uchucklesaht Tribe		Administrative Decisions Review Act
Uchucklesaht Tribe		Citizenship Act
Uchucklesaht Tribe		Council Rules Of Order And Procedures Act
Uchucklesaht Tribe		Disclosure Forms Regulation
Uchucklesaht Tribe		Effective Date Procedures Act
Uchucklesaht Tribe		Elections Act
Uchucklesaht Tribe		Executive Rules Of Order And Procedure Regulation
Uchucklesaht Tribe		Freedom Of Information And Protection Of Privacy Act
Uchucklesaht Tribe		Government Personnel Act
Uchucklesaht Tribe		Government Act Amendment Act
Uchucklesaht Tribe		Integrity Act
Uchucklesaht Tribe		Interpretation Act
Uchucklesaht Tribe		Referendum Act
Ucluelet First Nations		Administrative Decisions Review Act
Ucluelet First Nations		Banking Signatories Regulation
Ucluelet First Nations		Citizenship Act
Ucluelet First Nations		Citizenship And Enrolment Forms Regulation
Ucluelet First Nations		Code Of Conduct And Conflict Of Interest Act
Ucluelet First Nations		Disclosure Forms Regulation
Ucluelet First Nations		Effective Date Procedures Act
Ucluelet First Nations		Elections Act Consolidation
Ucluelet First Nations		Executive Rules Of Order And Procedure Regulation
Ucluelet First Nations		Freedom Of Information And Protection Of Privacy Act
Ucluelet First Nations		Government Act
Ucluelet First Nations		Governance And Fiscal Agreement Amendment Regulation
Ucluelet First Nations		Government Personnel Act
Ucluelet First Nations		Interpretation Act
Ucluelet First Nations		Legislature Rules Of Order And Procedure Act
Ucluelet First Nations		Referendum Act
Westbank First Nation		Westbank First Nation Self-Government Agreement
Westbank First Nation		Westbank First Nation Constitution
Westbank First Nation	2005-23	WFN Immunity And Indemnity Law
Westbank First Nation	2008-04	WFN Advisory Council Law
Westbank First Nation	2008-07	WFN Council Remuneration And Expense Law
Westbank First Nation	2010-04	WFN Community Plan Law

PART 1 /// SECTION 2.4

The Constitution

2.4

THE CONSTITUTION

2.4

THE CONSTITUTION

BACKGROUND

Developing a constitution is arguably one of the most important and constructive Nation-building activities taking place within First Nations communities today. Many Nations have developed, are developing or are contemplating developing constitutions, as part of either comprehensive governance arrangements negotiated with the Crown or independent of negotiations, based on exercising the inherent right of self-government. Assuming that when a Nation makes a constitution it is legally enforceable and supersedes all other laws established that might conflict with the constitution (including the *Indian Act*), a Nation-created constitution becomes the Nation's foundational law.

A constitution both enables and limits power. It identifies who belongs to the Nation, the citizens, and the relationship between the citizens and the Nation, setting out the broad rights and freedoms of the citizens. It establishes the basic structure of the government and establishes the core rules and principles that define the government's nature and extent. It regulates the relationship between the institutions of the Nation and typically sets out the fundamentals of how a Nation is governed by identifying and allocating government powers among its parts. This includes basic rules dealing with how the governing body or bodies (law- and decision-makers) are chosen, how laws are made and enforced, and how accountability to citizens is maintained. It is the most basic and fundamental law of a "people with a territory" from which all other laws and rules are hierarchically derived.

Constitution:

The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers.

Black's Law Dictionary

It is also important because, in First Nations, a constitution is usually established from the community upwards, and in turn establishes the foundation and legitimacy of the Nation's government and activities. In speaking to legitimacy, a constitution will typically articulate core principles about the Nation and teach fundamental values about the people who have adopted it. It can, in varied ways, define or articulate a Nation's culture and its traditions.

In addition, and arguably just as importantly, a constitution also speaks to those outside the Nation, including other governments, the general public, businesses and other third parties. Some Nations have, in fact, judged that guiding their interactions with external communities was a crucial consideration in drafting their constitutions. A well-crafted and culturally appropriate constitution will provide consistency, stability and accountability to a First Nation's government.

Constitutions are intended to be enduring, create stability and survive the test of time. Accordingly, constitutions are usually more difficult to adopt and change than other laws. They serve to limit and guide community actions over time. Therefore, it is very important to get them right and to include only those elements of good governance that will not need to be, or should not be, changed often or at all. This is because they can become out of date if circumstances change and the interpretation of their content is static. Although necessarily limiting, constitutions can and should be written in ways that invite evolving interpretation and as such should be viewed as a "living tree." Nevertheless, to the extent that First Nations governance is an evolutionary experience and is in transition, there will inevitably be trial and error. When adopting and amending a constitution, a community will no doubt need to go to a referendum. Thus, amending formulas become all-important.

In this regard, the constitution of a Nation is very different from, say, a constitution under the *Society Act*, with which some First Nations are familiar because many of the Tribal Councils (usually a group of "bands") are established and governed in accordance with it, in the absence of recognized legal capacity.

There are many examples of First Nations successfully developing constitutions, and most First Nations leaders have expressed the view that their Nations want to have their own constitution if they do not already have one. Building a constitution can be a very powerful step in engaging citizens and charting a Nation's own governance course, as a constitution requires a strong and well-established consensus to be legitimate and, once adopted, provides an increased sense of unity. *The Governance Self-Assessment* (Part 2 of the Toolkit) was developed to assist First Nations in being self-reflective and to guide individual First Nations through a confidential and internal self-assessment of both their governing body or bodies and their administration. The self-assessment can be undertaken by any First Nation, regardless of where it may fall along the continuum of governance reform, moving away from the *Indian Act*, and can be a useful tool when a Nation is working to develop a constitution or is looking to review its existing core governance.

Currently, all First Nations in Canada that are self-governing have adopted their own constitution. In fact, all comprehensive governance arrangements include provisions respecting the Nation's constitution and its legal validity. However, if the source of authority for a Nation's constitution is not dependent upon the actions of any other government (i.e., it is inherent) then adopting a constitution does not just have to be an outcome of comprehensive governance arrangements. In this way, for example, the Haida Nation has adopted through its citizens' forum a constitution that applies to its people and lands and operates in parallel with the *Indian Act* (which still applies unless a court declares otherwise or the federal government repeals it) with respect to the two reserve-based Haida "bands" (Skidegate and Old Massett).

To support Nation rebuilding and reconciliation between the Crown and First Nations, the BCAFN and others have recommended that new mechanisms, including federal legislation, be developed to encourage and recognize First Nations constitutional development and the desire of Nations to substantially move away from governance under the *Indian Act*. Such a mechanism would provide increased legal certainty and improved governance with respect to existing reserve lands, but would also address questions of governance over ancestral lands, including Aboriginal title lands. Developing a constitution can also provide direction for incremental governance initiatives under the *Indian Act* or sectoral governance initiatives.

DEVELOPING A CONSTITUTION

A Nation will need to consider what is and what is not appropriate to include in its constitution. To begin this discussion, it is useful to first ask the fundamental question, "What is a constitution?", as opposed to what is a law or a bylaw, before tackling the details of its contents.

When contemplating developing a constitution, a First Nation will typically consider a range of issues that need to be addressed through the constitution — for example, accountability and transparency of the governing body and other institutions of government; reconciliation of conflicting governance structures (e.g., traditional and imposed), including governing Aboriginal title lands; strengthening cultural awareness and group identity; support for outside investment and economic development; creation of a stronger, more effective and independent administration that is separate from the governing body or bodies, and; community safety and well-being.

The challenge, but also the reward, in developing a constitution will be to achieve the broad-based community consensus needed to legitimize and ultimately ratify it. To accomplish this, it is important for the process to be inclusive and for the Nation not to be in a hurry. As the constitution is the highest law of the Nation, it must be well considered. It does not make any sense to rush it. In fact, it can be counterproductive to do so.

To support this approach to community engagement and development, some First Nations have established community working groups, which are independent of the current governing body or

bodies (e.g., chief and council), to develop their constitutions. Experience shows that designing the process to develop a constitution can be just as important as the developing the elements of the constitution itself, particularly where there is an expectation that the citizens will vote on the constitution and where it is acknowledged that it is their document, not the current leadership's. We have also learned that in Nations with constitutions developed as part of their comprehensive governance arrangements, the constitution itself is as important to the citizens as the final agreements with the Crown. It is, in fact, their living document, relied upon in guiding their ongoing interactions with one another and with their government. It is transformative and real.

When developing a constitution, a Nation may be tempted to borrow from other systems or models. While precedents dealing with similar issues in one Nation may be useful to consider in another, it is not recommended to simply "cut and paste." Doing this will take away from the process of community engagement and the important work of those developing the constitution — to consider the key policy questions that need to be asked, debated and then answered before the legal drafting is undertaken. If this work is not undertaken properly, the end product likely will not meet the needs of the Nation, will not be considered legitimate and, even if ratified, will run the risk of not being followed.

Here are some questions to keep in mind when designing a legitimate process to develop a constitution:

1. Who should be involved in developing the constitution?
2. Is there a special role for elders, youth or other key groups?
3. Should surveys and open hearings be used?
4. What is the appropriate role of advisors (e.g., lawyers and consultants)?
5. How will the community review successive drafts of the constitution?
6. How will citizens who do not participate in the development of the constitution be educated about it?
7. How should the constitution be ratified and what is the threshold for ratification?

These questions may be useful to ask when contemplating the content of a constitution:

1. To what extent should the Nation's culture and traditions be reflected in the constitution?
2. What values does the Nation want to represent in the constitution?
3. What institutions of governance does the Nation want, including the structure of governing body or bodies?
4. Will decision-making be vested in one body? Do other decision-making processes need to be considered as well?
5. What is an appropriate division of powers between institutions?

Constitution:

1: an established law or custom: ordinance
2: a) the physical makeup of the individual especially with respect to the health, strength, and appearance of the body "a hearty constitution" b) the structure, composition, physical makeup, or nature of something "the constitution of society"
3: the act of establishing, making, or setting up
4: the mode in which a state or society is organized; especially: the manner in which sovereign power is distributed
5: a) the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it b) a written instrument embodying the rules of a political or social organization.

Merriam-Webster.com. Merriam-Webster Dictionary

6. How much participation by citizens should the constitution provide for (e.g., in the development of laws, decision-making with respect to land use and the use of other community assets, required community meetings or notice provisions)?

7. To what extent is it important for an external audience to understand the First Nation's ways of doing things?

8. What rights and responsibilities should be conferred upon the citizens of the Nation?

9. Does the constitution recognize both individual and collective rights? How are these balanced?

A constitution does not need to be long document. In fact, constitutions are typically short and include only high-level rules of application and principle, fundamental rules that people do not think they will want to change. For instance, both the Constitution of the United States and Canada's *Constitution Act, 1982* including the *Charter of Rights and Freedoms*, contain fewer than 5,000 words. Most of the details of how the government operates on a daily basis are usually left to the governing body and should be dealt with in separate laws, with only the broadest, most fundamental rules included in the constitution. Some matters referred to in the constitution may require other laws to be made to provide the details; otherwise, serious problems in relation to validity of other laws and actions, and in amending the rules, could arise. Similarly, rules in the constitution that are over-prescriptive and internally inconsistent could paralyze the government, especially as such rules are not easily changed. *A Guide to Community Engagement* (Part 3 of the Toolkit) provides some tools for Nations to use when undertaking the work to develop their own constitution.

Some of the high-level principles a First Nation can incorporate in its constitution may have already been developed as part of other processes the Nation has been involved in — for example, a Membership Code or an Election Code that removes *Indian Act* rules in those matters, or a financial administration law or a Land Code under a sectoral governance initiative. When this is the case, developing a constitution can consolidate the most fundamental aspects of a First Nation's basic rules into a single document that is consistent and clear.

The type of governance arrangements that a First Nation is negotiating and/or implementing or is simply exercising, will have a bearing on how its constitution is developed. First Nations can exercise many different powers or jurisdictions (some federal, some provincial, some municipal and some unique to First Nations), either in accordance with a negotiated agreement or simply on the understanding that they have the inherent right to do so (with the attendant risks discussed previously in chapters, such as Section 1.3 — Sectoral Governance Initiatives and Section 3.0 — Introduction, as well as in a number of the Section 3 sectoral chapters). Accordingly, the constitution might seek to ensure that the institutions created support the different types of jurisdiction and powers to be exercised. Some of the laws made may reflect a high level of government, whereas others may be laws or regulations and bylaws made at a local government/municipal level. It may be necessary, therefore, to reflect on the type of jurisdiction being exercised or contemplated in establishing the fundamental structure and institutions of government (but not the detail) in the First Nation's constitution. For example, some First Nations' constitutions state that a legislature is responsible for making laws and other resolutions as it sees fit, while others set out the powers of councils and other local bodies. A First Nation might also set out rules regarding the delegation of powers to other bodies through its governance institutions.

In *A Guide to Community Engagement* (Part 3 of the Toolkit), Section 3.3 — Developing a Community Constitution speaks specifically to working with community members on this issue. Other areas of *A Guide to Community Engagement*, as well as *The Governance Self-Assessment* (Part 2 of the Toolkit), will assist a First Nation in considering the process for developing a constitution, policy questions to

address, and ways to engage the community. For example, in Part 2 of the Toolkit, Section 2 discusses establishing effective organization and managing change; in Part 3, Section 2 looks at community engagement and organizing for change.

ELEMENTS TO CONSIDER IN A CONSTITUTION

No one size of constitution can fit all First Nations and there certainly does not need to be, nor should there be, "cookie-cutters." As discussed above, developing a constitution is an opportunity to be creative and open and to meet the people's needs and circumstances. While it is useful to know that there are common elements in most constitutions, it is important to bear in mind that they are developed and approached differently by the Nations that actually draft them.

These common elements are described below. They are:

- Founding provisions
- Description of lands
- Citizenship
- Rights, responsibilities and freedoms of citizens
- Institutions of government
- Law enactment
- Meetings
- Conflict of interest
- Financial administration
- Adjudicatory bodies
- Referendums
- Transitional provisions
- Amendment

This list is not intended to be prescriptive or exhaustive, but rather to illustrate the options to consider when developing a constitution. It represents the authors' perspectives on how the sections of a constitution might typically be set out and what they would contain. Each First Nation will need to decide what headings to use, what order to adopt, and the degree of detail and complexity contained in its constitution.

Founding provisions: Constitutions typically include a context statement or introductory clauses, usually in a preamble, regarding the origin or source of the First Nation and its core values. Setting out values is an opportunity to establish principles that will guide the interpretation of the rest of the constitution and the making of all laws and decisions under the constitution. This section is often considered the most important part of the constitution for the citizens, as it usually takes into consideration the views of the whole "community," including elders, youth and others. The principles in the constitution provide basic direction to the government of the First Nation, including the governing body and its leaders in their actions and the creation of laws, as well as to the administration or civil service carrying out the business of the government. The principles can guide all decision-making in the community.

Description of lands: The constitution usually describes in general terms the geographical extent of the territory it applies to, as this may be further clarified and modified over time. This description is often in the founding provisions. The geographical extent of its application can vary, depending in part on the context in which the constitution is being developed or drafted (e.g., either as part of a negotiated comprehensive governance arrangement or as a stand-alone exercise in self-determination). This is important, given that there may be disagreement between the First Nation and the Crown, or the First Nation and other First Nations, with respect to the extent of the territorial application of the constitution. This issue is very much alive when questions of reserve governance, Aboriginal title lands governance, and governance generally over ancestral land are being resolved

and negotiated between and among First Nations and with the Crown. Generally, though, the intention is that a First Nation's constitution would be definitive over its ancestral lands and peoples, even where the exercise of certain jurisdictions may have more limited application.

Citizenship: This section typically establishes the basic rules regarding who is a citizen of the First Nation and any transitional or other rules regarding previous or ongoing classifications of persons belonging to the group (e.g., "members" or "Indians" determined in accordance with *Indian Act*) that is now governed by the constitution. Certain rights or benefits belong to citizens (e.g., participating in government, being able to live in the community and to receive services), as do responsibilities. Issues respecting the determination of citizenship and transition from previous classifications are discussed more fully in Section 2.2. — The Citizens and Section 3.6 — Citizenship.

Rights, responsibilities and freedoms of citizens: The constitution can set out the basic rights and freedoms of the citizens. These can clarify or expand upon the rights and freedoms that all Canadians enjoy under the *Charter of Rights and Freedoms* and can speak to the unique nature of collective rights and their relationship to individual rights. The constitution can also set out what is expected of the individual as part of the collective. This is of particular importance where Aboriginal title has been found by the Supreme Court to be held collectively. The constitution would be an expression of how the collective interest is considered and then balanced with the interests of the individual when implementing governance over Aboriginal title lands. This is one important way of respecting the collective interest in governing, managing and administering Aboriginal title lands moving forward.

Institutions of government: The constitution can establish the framework for government, setting out government institutions and the responsibilities of those institutions, including the governing body or bodies. It may provide some details on how the governing body is selected (e.g., by elections of a legislature or a council, by appointment, or hereditary or other tribal leaders by clan or family). In some cases, it may be a chief and council elected by the citizens. In other cases, an elected legislature might pass laws and maintain oversight of the business of the Nation, while an executive council of the legislature acts as the executive body responsible for managing the government. That body may be empowered to create other institutions. Of course, governing bodies can be designed in many ways, as there are many ways to create government and to govern. The key is for each Nation to create a system for choosing its government that meets the Nation's values and needs. This section can also set out principles for how the governing body must act and can establish community expectations for the governing body, regardless of how it is constituted. It can set the standard that government officials always act in the best interests of the community and represent the Nation to the best of their abilities. This is discussed more fully in Section 2.3 — The Governing Body.

Financial administration: A constitution will often include principles of financial administration to ensure protection of the Nation's financial resources and other assets. This is usually the responsibility of the governing body. It will set out the revenue-raising powers of the governing body or bodies, and any restrictions on those powers. There may be a requirement for a financial administration law that sets out the more specific requirements of financial management. The direction that the governing body may receive reasonable pay for their duties could also be included in the constitution, while the amounts typically would be determined in a separate law. There may be a constitutional requirement for an annual budget to be adopted by the governing body and accountability for expenditures made. To address accountability, there will generally also be provision for periodic reporting to the citizens, including yearly audits (available to all citizens). Financial administration issues are more fully discussed in Section 3.11 — Financial Administration and in Section 4 — Financing First Nations Governance.

Meetings: A constitution might set out rules as to when and how the governing body or the citizens meet and a general requirement for holding meetings. Examination of this matter shows how important rules regarding meetings are in providing accountability and transparency for a Nation's citizens.

Many First Nations constitutions therefore include rules for meetings. However, it is important for a constitution not to contain overly prescriptive rules.

Law enactment: While most Nations will typically set out the law enactment process in a separate law, the authority of particular institutions (namely the governing body or bodies) to make laws or bylaws is often established under the Nation's constitution. This part of the constitution might set out how laws or bylaw are initiated and made by the governing body or other institutions, or even by citizens through a petition and vote. Some laws may be of such importance to the First Nation that there are special requirements for initiating or making them. Some laws may have to be presented to the citizens, and in some cases, require a national vote or referendum.

Conflict of interest: Constitutions can provide that the First Nation will have rules ensuring that the governing body and others with decision-making powers are subject to conflict of interest rules.

Adjudicatory bodies: Again, depending on the type of governance structure being put in place and the powers of the First Nation, the constitution might include provisions for adjudicatory bodies. This is particularly important when the Nation is responsible for aspects of the administration of justice. Such provisions may establish that the governing body can establish other bodies to, for example, hear disputes, or set up the institutions of justice in the constitution itself.

Referendums: A constitution might set out the requirement for holding referendums, but not usually the process and procedures, which would typically be included in a separate law. There may be different thresholds for different types of decision. There would also normally be a requirement for an appeal procedure to allow the result to be challenged by a citizen who believes that a referendum was not conducted in accordance with the rules.

Transitional provisions: Given that the constitution of a First Nation will supersede any structure of governance that preceded it (usually the *Indian Act* but also any other systems that the people might have been subject to by convention or practice), transitional provisions may be necessary. These might include rules allowing for the continuation of the previous governing body until the new governing body is selected in accordance with the constitution, or for the phased coming into effect of certain parts of the constitution.

Amendment: Finally, because there will in future be a need for new or updated provisions, all constitutions set out amendment procedures. A constitution will usually be amended in the same way as it was initially adopted. The amendment provision will also set out related matters such as how change is initiated (e.g., by a citizens petition, by the governing body).

Some First Nations may choose to include much more content in their constitution than others, depending on their circumstances and the will of the people. However, keeping it simple and short is generally preferred. Of those First Nations with constitutions in effect in BC today, Westbank's constitution is the longest and most detailed, containing many provisions that most other Nations have set out in separate laws. Sechelt's constitution is also very prescriptive and detailed. For instance, under the Westbank constitution there are detailed rules for the holding of elections and rules for membership, conflict of interest guidelines, detailed financial administration rules, and so on. Perhaps the largest section of the Westbank constitution deals with lands and land management. Other First Nations with comprehensive governance arrangements have not set these out in the constitution but in a land act or equivalent. In part, this is a result of the Westbank membership's desire to ensure certainty in the governance framework and to limit the powers of the governing body. Accordingly, the laws cannot be changed without significant debate and, in the case of those elements in the constitution, without a vote of the members. The Sechelt constitution is also different from the others in requiring the approval of the proposed changes by governor-in-council before it can be amended.

THE AMERICAN INDIAN NATIONS EXPERIENCE

It should be noted that there are also many examples of tribal constitutions from the United States, where the American Indian Nations have been organizing their governance through constitutions for many years. In the US, there is clear legal authority for a recognized Tribe to develop its own constitution and not be subject to the US equivalent of the *Indian Act* with respect to its core institutions of governance.

Since 1975, the US government's policy of self-government recognition has led numerous Tribes to amend their constitutions, many of which were drafted by the US government for them during the 1930s and 1940s. At the time, the US government essentially forced Tribes into constitutions that were not appropriate for them. Since the 1970s, American Indian Nations have been involved in an exercise of constitutional reform and rebuilding, not unlike the one being undertaken in Canada. In many ways they face the same challenges in transitioning from an unsatisfactory or imposed constitutional regime as First Nations do when transitioning from the *Indian Act*.

What is important to draw from the US experience is that constitutional reform initiatives have been one of the most important parts of the exercise of self-government by American Indian Nations. As with First Nations in Canada, American Indian Nations are creating new constitutions to foster greater stability and accountability of government, increase citizen support of government, and provide a stronger and more appropriate foundation for economic and political development. However, what sets the two countries apart is that in Canada, notwithstanding the inherent right to self-government, a First Nation must first convince the Crown to negotiate self-government, while in the US, once recognized, a Tribe is able to adopt and amend its own constitution with legal certainty, and indeed operate as a self-governing entity without interference from the national or state governments. To this end, in Canada, a First Nations self-government recognition act that supports recognized Nations developing constitutions would certainly go a long way to facilitating the transition to strengthened and reinvigorated First Nations government in Canada.

Table — Constitutions Recognized under Comprehensive Governance Arrangements in BC

Sechelt	*Sechelt Indian Band Self-Government Act* provides that: The powers and duties of the Band shall be carried out in accordance with its constitution. (s. 7) Sechelt Indian Band Council shall be the governing body of the Band, and is elected in accordance with the constitution. (s. 8) The constitution may establish or provide for: (a) the composition, term and tenure of council and procedures for elections; (b) the procedures or processes to be followed by Council in exercising its powers and carrying out its duties; (c) a system of financial accountability of the Council to the members including audit arrangements and the publication of financial reports; (d) membership code for the Band; (e) rules and procedures relating to the holding of referenda; (f) rules and procedures to be followed with respect to the disposition of rights and interests in Sechelt lands; (g) specific legislative powers of the Council selected from the general powers set out in the Act; and (h) any other matters relating to the government of the Band, its members or Sechelt lands. (s. 10(1)) A membership code established in the constitution must respect rights to membership in the *Indian Act*. (s. 10(2)) The Governor in Council may declare that the constitution of the Band is in force, if it: (a) includes the required provisions; (b) has the support of a majority of the electors; and (c) the Governor in Council approves it. (s. 11(1))
Westbank	Constitution provides for the following: (a) Council acts on behalf of Westbank in exercising jurisdiction; (b) democratic elections of Council, its composition, tenure and removal of Council members; (c) internal financial management and accountability to Members; (d) conflict of interest; (e) procedures for the passage and amendment of laws; (f) appeal mechanisms; (g) an amending procedure for the Constitution; (h) provisions for public notification of Westbank Law; (i) rules governing membership in the Westbank First Nation in accordance with Part VII of Agreement; (j) land rules; (k) referendum procedures; and (l) other matters over which Westbank has jurisdiction. (Part VI, s. 43)

Table — Constitutions Recognized under Comprehensive Governance Arrangements in BC… *continued*

Nisga'a	The Constitution: (a) provides for Nisga'a Lisims Government and Nisga'a Village Governments, including their duties, composition, and membership; (b) provides that the Treaty sets out the authority of Nisga'a Government to make laws; (c) assigns to Nisga'a Lisims Government and Nisga'a Village Governments the rights, powers, privileges, and responsibilities under the Agreement not specifically assigned to Nisga'a Lisims Government; (d) provides for enactment of laws; (e) provides for challenging the validity of Nisga'a laws; (f) provides for creation, continuation, amalgamation, dissolution, naming, or renaming of: i. Nisga'a Villages on Nisga'a Lands, and ii. Nisga'a Urban Locals; (g) provides for Nisga'a Urban Locals, or other means by which Nisga'a citizens residing outside of the Nass Area may participate in Nisga'a Lisims Government; (h) provides for establishment of Nisga'a Public Institutions; (i) provides for role of the Nisga'a elders, *Simgigat* and *Sigidimhaanak* in providing guidance and interpretation of the *Ayuuk* to Nisga'a Government; (j) provides that in the event of an inconsistency or conflict between the Nisga'a Constitution and the provisions of any Nisga'a law, the Nisga'a law is, to the extent of the inconsistency or conflict, of no force or effect; (k) requires that Nisga'a Government democratically accountable to Nisga'a citizens with elections for Nisga'a Lisims Government and each Nisga'a Village Government to be held every five years, and that, subject to residency, age, and other requirements set out in the Nisga'a Constitution or Nisga'a law all Nisga'a citizens are eligible to vote in Nisga'a elections and to hold office in Nisga'a Government; (l) require a system of financial administrationcomparable to standards generally accepted for governments in Canada, through which Nisga'a Lisims Government will be financially accountable to Nisga'a citizens, and Nisga'a Village Governments will be financially accountable to Nisga'a citizens of those Nisga'a Villages; (m) requires conflict of interest rules that are comparable to standards generally accepted for governments in Canada; (n) provide conditions under which the Nisga'a Nation or a Nisga'a Village may dispose of its estate or interests in any parcel of Nisga'a Land or Nisga'a Fee Simple Lands, or create or dispose of any lesser estate or interest in any parcel of Nisga'a Land or Nisga'a Fee Simple Lands; (o) recognize and protect rights and freedoms of Nisga'a citizens; (p) provides that every Nisga'a participant who is a Canadian citizen or permanent resident of Canada is entitled to be a Nisga'a citizen; (q) provide for Nisga'a Government until the first Nisga'a elections; (r) provide for amendment of the Nisga'a Constitution; (s) includes other provisions, as determined by the Nisga'a Nation. (Ch. 11, s. 9)
Tsawwassen	Constitution provides for the following: (a) government will be democratic. Sets out duties, composition and membership; (b) government democratically accountable; elections at least every five years; (c) majority of members of Tsawwassen Government will be elected; (d) Tsawwassen Government may include elements of traditional governance; (e) role of advisory bodies in Tsawwassen Government; (f) set out the authority of the Tsawwassen Government to make laws; (g) financial administration (standards comparable to those for other governments in Canada). Financially accountable to Members; (h) conflict of interest rules (comparable to those for governments of similar size in Canada); (i) recognition and protection of rights and freedoms of Members; (j) every person who is enrolled is entitled to be a Tsawwassen Member; (k)a process for the enactment of laws; (l) process for challenging the validity of laws; (m) any Tsawwassen law inconsistent with the Constitution is, to the extent of the inconsistency, of no force or effect; (n) establishing Public Institutions; (o) conditions for disposal of land or interests in land; (p) removal from office of members of Tsawwassen Government; (q) amendment of Constitution; and (r) for other provisions. (Ch. 16, s. 8)
Maa-nulth	Constitution provides for the following: (a) government will be democratic. Sets out duties, composition and membership; (b) government democratically accountable — elections at least every five years; (c) a process for removal of Office Holders of its Maa-nulth First Nation Government; (d) financial administration (standards comparable to those for other governments in Canada). Financially accountable to Citizens; (e) conflict of interest rules (comparable to those generally accepted for governments in Canada); (f) recognition and protection of rights and freedoms of its Citizens; (g) every Maa-nulth-aht of that Maa-nulth First Nation is entitled to be a Maa-nulth First Nation Citizen of that Maa-nulth First Nation; (h) every registered Indian of the applicable Maa-nulth Indian Band is entitled to be a Maa-nulth First Nation Citizen of that Maa-nulth First Nation; (i) enactment of laws; (j) challenging the validity of Maa-nulth Laws; (k) any Maa-nulth Law inconsistent or in conflict with a Maa-nulth Constitution is, to the extent of the inconsistency or Conflict, of no force or effect; (l) establishment of public institutions; (m) conditions for disposal of lands or Interests in lands; (n) amendment of Constitution; (o) processes for appeal or review of administrative decisions; and (p) for other provisions. (s. 13.3.1)
Yale	Yale First Nation will have a Yale First Nation Constitution which will provide: (a) for a democratic Yale First Nation Government, including its duties, composition, and membership; (b) that all members of Yale First Nation Government will be elected; (c) that Yale First Nation Government is democratically accountable with elections at least every five years; (d) for a system of financial administration with standards comparable to those generally accepted for governments in Canada, through which Yale First Nation Government will be financially accountable to Yale First Nation Members; (e) for conflict of interest rules comparable to those generally accepted for governments in Canada; (f) for recognition and protection of rights and freedoms of Yale First Nation Members; (g) for processes for the enactment of laws by Yale First Nation Government; h. for a process for challenging the validity of Yale First Nation Laws; (i) that a Yale First Nation Law that is inconsistent with the Yale First Nation Constitution is, to the extent of the inconsistency, of no force and effect; (j) for the establishment of Yale First Nation Public Institutions; (k) for conditions under which Yale First Nation may dispose of land or interests in lands; (l) for a transitional Yale First Nation Government from the Effective Date until the first elected Yale First Nation Government takes office; (m) for amendment of the Yale First Nation Constitution; (n) for a process for the removal of elected members; and (o) for other provisions. (s. 3.3.1)

Table — Constitutions Recognized under Comprehensive Governance Arrangements in BC... *continued*

Tla'amin	The Tla'amin Nation will have a Tla'amin Constitution which will provide: (a) that the Tla'amin Nation will act through the Tla'amin Government in exercising its rights, powers, privileges and authorities in carrying out its duties, functions and obligations; (b) for a democratic Tla'amin Government, including its duties, composition and membership; (c) that Tla'amin Government will be democratically accountable and hold elections at least every five years; (d) that a majority of members of Tla'amin Government will be elected; (e) for a system of financial administration with standards comparable to those generally accepted for governments in Canada, through which Tla'amin Government will be financially accountable to Tla'amin Citizens; (f) for conflict of interest rules comparable to those generally accepted for governments of similar size in Canada; (g) for recognition and protection of rights and freedoms of Tla'amin Citizens; (h) that every individual who is enrolled under this Agreement is entitled to be a Tla'amin Citizen; (i) that this Agreement sets out the authority of the Tla'amin Nation, acting through the Tla'amin Government, to make laws; (j) the process for the enactment of laws by the Tla'amin Nation acting through the Tla'amin Government; (k) that any Tla'amin Law which is inconsistent with the Tla'amin Constitution is, to the extent of the inconsistency, of no force or effect; (l) for the establishment of Tla'amin Public Institutions; (m) for conditions under which the Tla'amin Nation may dispose of lands or interests in lands; (n) for amendment of the Tla'amin Constitution; and (o) for other provisions. (Ch. 15, s. 9)

Table — Constitutions Developed Outside of Comprehensive Governance Arrangements

Haida	The *Constitution of the Haida Nation* contains 17 articles building on the Haida Proclamation but also establishing its governance structure and communities. The document places an emphasis on the territories, its people and their collective rights and responsibilities by listing those articles prominently: 1) Haida Territories, 2) The People, 3) Rights and Freedoms, 4) Haida Citizenship Participation, and 5) Haida Citizenship by Acquisition. Governance considerations make up the majority of the remaining 17 articles. These include the composition of the House of Assembly and the Haida Nation Council, when those bodies meet, how they conduct business, who is eligible to serve, and so on. The document also outlines the structure of the Hereditary Chiefs Council, Elders Council and Haida Village Councils.
Tahltan	The *Tahltan Constitution* is a 1.5-page document that specifies the purposes of the Tahltan Central Council, including advancing the interests of the Tahltan people, entering into agreements that are conducive to the council's goals which are to protect Tahltan Aboriginal rights and to strengthen the community by promoting traditional values based on caring, sharing, co-operation, truth, honour, fairness, and above all, respect.
Taku River Tlingit	The *Taku River Tlingit First Nation Constitution* focuses on three main areas: 1) Fundamental principles, including governing principles and responsibilities of the governing bodies, protection of Aboriginal rights, titles and interests. These principles speak to the Nation's unceded territory and the important connection to and responsibility for caring for the land. Governing bodies' responsibilities include exercising power in a fair and non-discriminatory way, not surrendering title, and respecting citizens and non-citizens alike. 2) Law-making powers and governing responsibilities, which covers meetings of the joint clan and the importance of equal participation of both clans, the composition and purpose of the elders' council (to ensure the continuity of Tlingit laws, values, customs and traditions), individual clans (including the structure of meetings and work that clan leaders and representatives undertake), the roles of the spokesperson and clan directors, and so on. 3) General matters such as clan membership and social structure, appeals, constitutional amendments and implementation of the act.
Huu-ay-aht	Each of the five Maa-nulth First Nations has its own constitution, although there are similarities between them. For example, the Huu-ay-aht is 22 pages, and covers a broad range of topics, including: • a declaration of Identity, expressing who the Huu-ay-aht people are and their connection to the land • a declaration of rights and values, including reverence for the Creator; honour for ancestors; respect for elders, children and families; pride in identity, language, culture, and so on; and the rights connected to these values • the individual rights, freedoms and responsibilities of citizens, such as the right to participate in political activities, to be informed about Huu-ay-aht decisions and laws, and to public services and health care, and the responsibility to adhere to the teachings, respect the Huu-ay-aht Constitution, fulfill personal obligations, and so on. • the government structure and how it operates, including the legislative branch (council), the Ha'wiih Council (advisory), the Executive Council (Chief Councillor and those appointed by the Chief Councillor and council), the People's Assembly that is held at least once a year to discuss financial information and strategic objectives, and standing and ad hoc committees • the Huu-ay-aht lands system and land code • financial administration and accountability, including a financial administration act based on generally accepted Canadian standards • the outlines for a Code of Conduct and Conflict of Interest guidelines for both elected and non-elected representatives as well as employees • the outline for dispute resolution and an act that addresses an appeals process and administrative reviews and that creates a body empowered to address disputes and make decisions related to the validity of Huu-ay-aht law.

Table — Constitutions Developed Outside of Comprehensive Governance Arrangements ... *continued*

Nippising	In August 2013, the Nipissing First Nation became the first in Ontario to enact a constitution. This 10-page document includes a preamble with a brief history of the Nipissing and their beliefs. It is followed by 25 short subsections that address topics including the document's purpose, the use of the Nipissing official language, rights and freedoms, core values, government, law-making, leadership, handling money, the environment and natural resources, referendums, appeals, holding court, compliance with the Nation, and so on. The constitution has some broad principles, but also proscribed processes for council and financial activities.

CONSTITUTIONS OF INTEREST

Haida Nation: www.haidanation.ca/Pages/governance/pdfs/HNConstitutionRevisedOct2010_officialunsignedcopy.pdf

Huu-ay-aht First Nations: www.maanulth.ca/downloads/Constitution_Huu-ay-aht.pdf

Ka:'yu:'k't'h/Che:'k'tles7e't'h First Nations: www.maanulth.ca/downloads/Constitution_Kyuquot_Checlesaht.pdf

Nisga'a Nation: www.nisgaanation.ca/constitution

Tahltan Nation: www.tahltan.org/sites/default/files/legal/Constitution.pdf

Taku River Tlingit First Nation: www.bcafn.ca/files/documents/Presentation_Taku_River_Tlingit_FN_Constitution.pdf

Teslin-Tlingit: www.ttc-teslin.com/constitution.html

Toquaht Nation: www.maanulth.ca/downloads/Constitution_Toquaht_Nation.pdf

Tsawwassen First Nation: www.tsawwassenfirstnation.com/pdfs/TFN-Laws-Regulations-Policies/Constitution/Constitution_Act_Final-QP.pdf

Uchucklesaht Tribe: www.maanulth.ca/downloads/Constitution_Uchucklesaht.pdf

Ucluelet First Nation: www.maanulth.ca/downloads/Constitution_Ucluelet.pdf

Westbank First Nation: www.wfn.ca/docs/wfn_constitution_-_consolidated.pdf

Nippising First Nation (first Ontario First Nation to pass a Constitution):
www.bobgoulais.com/wp-content/uploads/nfn_constitution_final_august_8_20131.pdf

Canadian Constitution (Constitution Act, 1982):
www.solon.org/Constitutions/Canada/English/ca_1982.html

Constitution of the United States: http://constitutionus.com

RESOURCES

First Nations

National Centre for First Nations Governance
Toll-free: 1-866-922-2052
www.fngovernance.org

Sechelt Indian Band
PO Box 740, 5555 Sunshine Coast Highway
Sechelt, BC V0N 3A0
Phone: 604-885-2273
www.secheltnation.ca

Westbank First Nation
Suite 301, 515 Hwy 97 South
Kelowna, BC V1Z 3J2
Phone: 250-769-4999
Fax: 250-769-4377
Email: mail@wfn.ca
www.wfn.ca

Tsawwassen First Nation
1926 Tsawwassen Drive
Tsawwassen, BC V4M 4G2
Phone: 604-943-2112
Toll-free: 1-888-943-2112
Fax: 604-943-9226
Email: info@tsawwassenfirstnation.com
www.tsawwassenfirstnation.com

Nisga'a Lisims Government
PO Box 231
2000 Lisims Drive
New Aiyansh, BC V0J 1A0
Phone: 250-633-3000
Toll-free: 1-866-633-0888
Fax: 250-633-2367
www.nisgaanation.ca

Huu-ay-aht First Nations
Administration Office
PO Box 70
Bamfield, BC V0R 1B0
Phone: 250-728-3414
Toll-free: 1-888-644-4555
Fax: 250-728-1222
www.huuayaht.org

Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations
General Delivery
Kyuquot, BC V0P 1J0
Phone: 250-332-5259
Fax: 250-332-5210

Toquaht Nation
PO Box 759
1971 Peninsula Road
Ucluelet, BC V0R 3A0
Phone: 250-726-4230
Toll-free: 1-877-726-4230
www.toquaht.ca

Uchucklesaht Tribe
PO Box 1118
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Kamloops Office
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First Nations Summit

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SELECT LEGISLATION

Provincial

- *Society Act* (R.S.B.C. 1996, c. 433)

Federal

- *Canada Corporations Act* (R.S.C. 1970, c. C-32).
- *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in R.S.C. 1985, Ap II, No 5.
- *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), c. 11
- *First Nations Financial Transparency Act*, (S.C. 2013, c.7)
- *First Nations Election Act*, (S.C. 2014, c. 5)
- *First Nations Land Management Act*, (S.C. 1999, c. 24)
- *First Nations Fiscal Management Act*, (S.C. 2005, c. 9)
- *Indian Act*, (R.S.C. 1985, c. I-7)
- *Indian Band Council Procedure Regulations*, (C.R.C., c. 950)

MAJOR COURT DECISIONS

- *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [2009] CNLR 236 (BCCA) (leave to SCC dismissed)
- *Daniels v. Canada*, (2014) FCA 101

PART 1 /// SECTION 3

Powers (Jurisdictions) of the First Nation

3.0

POWERS (JURISDICTIONS) OF THE FIRST NATION INTRODUCTION

3.0

INTRODUCTION

Section 3 is provided as an aid to navigating the complex evolution of First Nations' exercise of law-making powers over a wide array of subject matters. Accordingly, the chapters in this section set out a number of law-making powers or "jurisdictions" that a First Nation may consider exercising or drawing down when looking at its current and future governmental needs. The subject matters over which a First Nation, or group of First Nations, may wish to exercise law-making powers can be extensive and varied. Before moving ahead and potentially exercising jurisdiction over a particular subject matter, First Nations should carefully consider the benefits and responsibilities related to taking over that power. Making decisions about what jurisdictions are required or wanted can be complicated, and there can often be different perspectives among the citizens and certainly with other levels of government. Considering the range of legislative powers that may be sought and/or exercised also provides a First Nation with an opportunity to articulate and implement its vision. With the uptake of "real" law-making power comes the ability to determine policy at the highest level and through that policy, as reflected in the First Nation's law, affect change.

The scope and application of law-making powers can be quite diverse. The law-making powers of First Nations can and will vary both from First Nation to First Nation and depending on the geographical scope of the powers (i.e., whether they are applicable on reserve lands, treaty settlement lands, Aboriginal title lands, or within the broader ancestral lands). They may apply to First Nation citizens, or all persons living or conducting business on lands controlled by the First Nation, or to certain and all persons within ancestral lands. In some cases the powers will be constitutionally protected, while in other cases they will not. Further, in some cases, First Nations will have exclusive law-making powers, and in others they will have concurrent law-making powers with either the federal or provincial governments or both. For these and many other reasons, decisions about the range and exercise of law-making powers should be carefully considered.

Jurisdiction vs. Authority

"Jurisdiction" involves law-making power. It is a powerful legal tool. The exercise of "authority" is legally distinct from "jurisdiction." Authority does not generally carry with it the power to make a law and is generally created through administrative agreements, with the external government exercising control over the matter.

JURISDICTION VERSUS AUTHORITY

It is helpful when looking at a particular subject matter to assess whether the First Nation is seeking "jurisdiction" or simply "authority" in order to meet its governmental needs. Jurisdiction involves law-making power. It is a powerful legal tool. Decisions about making a specific law, while beginning with a First Nation's need to address the subject matter, also involve consideration of additional factors in the community. These include the financial and human resources capacity to make and enforce the law; mechanisms for adjudication of violations of the law; processes for amending laws to meet changing needs; potential liability of a First Nation for decisions and actions under the law; and the difficulty in having other governments recognize a First Nation's jurisdiction in a negotiated agreement.

The exercise of "authority" is legally distinct from jurisdiction or law-making. Authority does not generally carry with it the power to make a law or to establish offences punishable in a court. Authority is generally created through administrative agreements, with the external government exercising jurisdiction over the subject matter. A First Nation taking over authority from another government will have some, although typically limited, policy flexibility and discretion in exercising the rules or procedures in the subject matter, but responsibility for the fundamental policy and the law itself remains with the external government, which retains jurisdiction/law-making power over the subject matter. These are general statements, and a Nation may take over significant responsibility and discretion by way of authority, but in all cases the authority stops short of the power to make laws on the subject matter. For some subject matters, where there are significant costs or liability issues, a First Nation may in

fact conclude that recognition of its administrative authority along with as much policy discretion as it can achieve, without full law-making powers, meets its needs and avoids the complexities of assuming jurisdiction over that subject matter.

For the most part, First Nations under the *Indian Act* govern under federal authority and deliver federal programs and services, but do not exercise jurisdiction. Jurisdiction is available under sections 81, 83 and 85 (i.e., in making bylaws) under the *Indian Act*, but is limited and delegated. It could even be argued that developing an election code or membership rules under the *Indian Act* is not, technically, an exercise in "jurisdiction," but rather is an action under federal authority, because Canada is involved in all of the governance-related processes arising out of and under the *Indian Act*.

When considering the subject matters over which a First Nation will require or want jurisdiction, it is important not to confuse the political desire or presumed legal need to have jurisdiction with the administrative desire or need to exercise authority. While in many cases a First Nation will be truly seeking jurisdiction and require the full law-making powers to meet its public policy objectives and goals, in other subject matters the First Nation may simply want or only need to exercise authority. This will depend on a First Nation's priorities, the subject matter and the policy considerations involved — not the least of which is an assessment of the risk of increased responsibility and liability that comes with exercising jurisdiction. Part 2 of the Toolkit, *The Governance Self-Assessment*, has been designed to help First Nations navigate this period of transition in which Nations are moving away from primarily delivering federal programs and services on-reserve on behalf of Canada to designing First Nations programs and services and delivering them to both First Nations citizens and others — in some cases on-reserve and in other cases beyond — through the exercise of recognized jurisdiction.

CONSTITUTIONAL DIVISION OF POWERS

In Canada, the respective jurisdiction of the federal and provincial governments is clearly set out in the division of law-making powers in the *Constitution Act, 1867*. Federal powers are found in section 91 and provincial powers in section 92. As discussed in Section 1.1 — A Brief History of Evolving First Nations Governance within Canada, the situation with respect to First Nations is not as simple as First Nations looking to create their own space within an already divided jurisdictional space. While an attempt was made to specifically recognize and identify First Nations' powers of self-government under section 35 of the *Constitution Act* in the Charlottetown Accord (*Consensus Report on the Constitution, Charlottetown, August 28, 1992, Final Text*, 1992, Supply and Services Canada), this initiative ultimately failed. In the absence of a list of powers for Aboriginal governments comparable to those found in 91 and 92 for the federal and provincial governments respectively, First Nations' constitutionally recognized and protected law-making powers today are 1) whatever the courts have identified or will identify in their evolving rulings on the inherent right of self-government under section 35 of the *Constitution Act, 1982*, including governance rights associated with declared Aboriginal title lands (the jurisdictional component of title), and 2) whatever First Nations have been able to or are able to negotiate in sectoral and comprehensive governance arrangements with the Crown, where First Nations' legislative powers are recognized and reconciled with those of the other two levels of government. In the latter case, these agreements are typically ratified and thereby legitimized by First Nations citizens and are thereafter recognized by other governments through the passage of legislation. In addition to these constitutionally protected rights of governance as aspects of the inherent right, First Nations have other bylaw- and law-making powers recognized in federal and provincial legislation (under the *Indian Act*, sectoral governance initiatives and comprehensive governance arrangements).

The courts have confirmed the constitutional space for the inherent right of self-government. In the *Campbell* case (*Campbell et al. v. AGBC/AG Canada and Nisga'a Nation et al.*, 2000 BCSC 1123), the court considered, among other matters, whether the self-government provisions of the Nisga'a Treaty

were inconsistent with the exhaustive division of powers granted to Parliament and the legislative assemblies respectively. The court found that sections 91 and 92 of the *Constitution Act, 1867* do not divide all of the law-making powers in Canada and that the Aboriginal right of self-government and Aboriginal jurisdiction remains. However, that case and others supporting the view that self-government is an Aboriginal right within section 35 of the *Constitution Act, 1982* have not provided any specifics as to the extent of such a right, nor have they ruled on a specific example of the exercise of a First Nation's self-government law-making as an Aboriginal right.

With respect to Aboriginal title, there is clearly a jurisdictional component to that title. In the *Tsilhqot'in* decision, the court did not say definitively how Aboriginal title lands are to be governed by all three levels of government (Aboriginal, federal and provincial), or how the constitutional division of powers will work in practice with respect to the First Nation's rights to govern within Aboriginal title lands. The court was not asked to rule on these broad questions of governance, but rather to focus on the property and ownership aspect of title. However, the court did provide some useful direction as to when provincial law may or may not apply and clearly contemplates that these matters will be negotiated and that there is going to be multi-level governance where doctrines such as "interjurisdictional immunity" will, as discussed below, have less importance.

While it always remains an option for a First Nation to assert an Aboriginal right to make a law under a particular head of power and defend that right against any challenge by relying on section 35 of the *Constitution Act, 1982*, this may not necessarily always be the best option. This is because of the relatively difficult challenge of meeting the test to prove an Aboriginal right, as perhaps compared to the more flexible and evolving legal environment respecting the division of powers and the opportunities now afforded for reconciliation after the *Tsilhqot'in* decision, given the clear need to sort out multi-level governance. If court direction is chosen, and given the importance of legal decisions on governance matters, care should always be taken to ensure that the strongest historical evidence is collected and a sound legal basis developed, as any such step could lead to a precedent-setting test case.

The alternative to seeking a court ruling on an Aboriginal right to make a law under a particular head of power, whether as a stand-alone power or as aspect of Aboriginal title, is to explore the possibility of gaining recognition for law-making powers through negotiations with Canada and British Columbia, irrespective of whether the subject matter is under section 91 or 92 of the *Constitution Act, 1867*. As discussed in Section 1.1 — A Brief History of Evolving First Nations Governance within Canada, following the rejection of the Charlottetown Accord in a referendum, Canada developed its Inherent Right Policy (Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, 1995) for negotiations to implement the inherent right of self-government. Based on the fact that most First Nations are seeking to re-establish their governance powers within the current Canadian constitutional framework with respect to reserve lands, Aboriginal title lands and ancestral lands that transcend both, sorting out all the issues surrounding each jurisdiction (legal, political, administrative/practical, etc.) and over which lands can quickly become very complicated. For each subject matter, there are many factors to be weighed by a First Nation in developing its approach to negotiations. The range of powers First Nations are exercising is therefore continually evolving in this period of Nation rebuilding.

DESCRIBING THE POWERS

In developing this section of the report, we spent some time considering how best to describe subject matters and to organize them. We initially considered grouping jurisdictions thematically — for example, along the lines of lands and resources or human services, and so on. We also considered organizing them in terms of comparability to federal, provincial and municipal jurisdictions or as uniquely First Nations jurisdictions. In the end, for ease of reference we opted to organize them alphabetically.

Choosing the title for each subject matter chapter was also difficult, and the result is somewhat arbitrary. There is no single way in which law-making powers are described for all governments, whether Aboriginal or otherwise. No definitive list of jurisdictions exists, and the titles themselves continually evolve as governments exercise law-making powers in different ways and in different areas over time. Indeed, the very nature of government changes as new areas for law-making are identified and new laws required. For example, in the case of the federal and provincial government powers under the *Constitution Act, 1867*, there is no specific power set out for "environment" or for "telecommunication," since neither existed as a public concern when the Constitution was drafted in 1867. A more modern division of powers for Canada and the provinces, in addition to a new division of powers for Aboriginal governments, would also have been addressed had the Charlottetown Accord been ratified by Canadians.

Royal Commission on Aboriginal Peoples

For its part, the report of the *Royal Commission on Aboriginal Peoples* (RCAP) in its comprehensive discussion on governance looked at what jurisdictions are or might be exercised by Nations. RCAP divided the jurisdictions into what it called "core" and "periphery" and came up with the following list of subject matters:

- Governing institutions, constitutions
- Citizenship, membership
- Elections and referendums
- Access, residence on First Nation lands
- Management of lands, sea-ice, waters
- Natural resource management
- Protection, preservation and management of the environment, including wild animals and fish
- Economic life, including commerce, labour, agriculture, grazing, hunting, trapping, fishing, forestry, mining
- Operation of businesses, trades and professions
- Management of public moneys and other assets
- Taxation
- Family matters, including marriage, divorce, adoption and child custody
- Property rights, including succession and estates
- Education
- Social services, including child welfare
- Health
- Language, culture, values and traditions
- Criminal law and procedure
- Administration of justice, including the establishment of courts and tribunals with civil and criminal jurisdiction
- Policing
- Public works, housing and infrastructure
- Local institutions

Community-Based Self-Government Policy

Under the federal government's "Community-Based Self-Government" (April 1986) (CBSG) negotiation process in the late 1980s and early 1990s, Canada divided the subject matters for negotiations, including jurisdiction, into what were called "essential subject matters" and "optional subject matters":

Essential subject matters included:

- Legal status and capacity
- Structure and procedures
- Membership
- Lands and resources
- Financial arrangements
- Application of the *Indian Act*, other laws, and authorities
- Implementation plan

Optional subject matters included:

- Infrastructure and public works
- Education
- Social and welfare services, including custody and placement of children
- Administration of justice
- Licensing, regulation and operation of business
- Taxation for local purposes
- Public order, safety and security
- Indian and Northern Health Services
- Wildlife and wildlife habitat
- Indian moneys
- Agriculture
- Protection and management of the environment
- Succession
- Culture
- Traffic and transportation
- Access to and residence on reserve

Federal Inherent Right Policy

Building on the CBSG process, Charlottetown, and under *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Canada further identified the range of subject matters that it saw as jurisdictions that could be considered in comprehensive governance arrangements. These included core subject matters that Canada considers integral to a First Nation's culture or that are internal to an Aboriginal group. Here, the First Nation would have primary law-making power (to the exclusion of British Columbia and Canada). These subject matters also include matters that Canada feels go beyond this core group and are considered non-core, where a First Nation would for the most part not have primary law-making powers. These categories still guide Canada's approach to negotiating sectoral and comprehensive governance arrangements beyond the *Indian Act*.

The range of "core" subjects for negotiation includes:

- Establishment of governing structures, internal constitutions, elections, leadership selection processes
- Membership
- Marriage
- Adoption and child welfare
- Aboriginal language, culture and religion
- Education
- Health
- Social services

- Administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws
- Policing
- Property rights, including succession and estates
- Land management, including: zoning; service fees; land tenure and access; and expropriation of Aboriginal land by Aboriginal governments for their own public purposes
- Natural resources management
- Agriculture
- Hunting, fishing and trapping on Aboriginal lands
- Taxation in respect of direct taxes and property taxes of members
- Transfer and management of moneys and group assets
- Management of public works and infrastructure
- Housing
- Local transportation
- Licensing, regulation and operation of businesses located on Aboriginal lands

The "non-core" areas are:

- Divorce
- Labour/training
- Administration of justice issues, including matters related to the administration and enforcement of laws of other jurisdictions, which might include certain criminal laws
- Penitentiaries and parole
- Environmental protection and assessment and pollution prevention
- Fisheries co-management
- Migratory birds co-management
- Gaming
- Emergency preparedness

Self-Government Recognition Legislation

The various iterations of federal self-government recognition legislation over the years have also included lists of powers. In the most recent iteration, Bill S-212, *An Act providing for the recognition of self-governing First Nations of Canada* (2012), the powers were divided into four categories. The first was "exclusive powers" of the First Nation to be drawn down immediately upon recognition. The second was "priority laws in respect of citizens" and the third was "other priority law-making powers" with respect to all persons, where for both categories a First Nation's law would have priority over a federal law in the event of a conflict. The fourth category was "Additional law-making powers" with respect to all persons and where priority would be in favour of the federal law. Whenever a recognized First Nation intended to exercise its law-making powers under any of the categories other than the first ("exclusive powers"), before doing so, the First Nation would notify the Minister. The Minister would then be required to enter into negotiations with the First Nation respecting the exercise of those powers. The First Nation and the Minister could agree that an agreement is not required. Where there are to be negotiations, the Minister must use "best efforts" to negotiate an agreement with the First Nation, including the terms and conditions respecting the exercise of the law-making power and any financial transfers associated with the implementation and enforcement of laws made under that power.

Exclusive powers include:

- Citizenship in the First Nation and the procedure for determining whether a person is a citizen
- The governing body for the First Nation, and its composition, powers, duties and functions

- The rules and procedures relating to the selection and tenure of the members of the governing body
- Conflict of interest rules
- Rules and procedures for the enactment and publication of laws
- A system of financial management and accountability
- The appeal or review of decisions of the governing body of the First Nation that affect legal rights or interests
- The qualifications of electors of the First Nation
- The holding of meetings of the governing body and other assemblies of the citizens
- Rules for the conduct of referenda of the First Nation
- A process for the amendment of the constitution of the First Nation by its citizens
- Any other matter relating to the governance of the First Nation that the First Nation proposes to include

Priority law-making powers with respect to citizens include:

- Provision of programs and services for its citizens in relation to their spiritual and cultural beliefs and practices
- Aboriginal healers and traditional medicine
- Adoption of children who are citizens of the First Nation
- Guardianship, custody, care and placement of children of its citizens
- Provision of education programs and services for its citizens
- Solemnization of marriages where one or both of the parties to the marriage are citizens of the First Nation
- Matrimonial property on First Nation lands of the First Nation where one or both of the spouses are citizens of the First Nation
- Inheritance, wills, intestacy and administration of estates of its citizens

Other priority law-making powers include:

- Use, management, administration, control and protection of First Nation lands
- Use, management, administration, control and protection of natural resources that form part of First Nation lands
- Gathering, hunting and trapping and the protection of wildlife and their habitat
- Control or prevention of pollution and protection of the environment
- Licensing and regulation of persons or entities carrying on any business, trade, profession or other occupation
- Residency on First Nation lands, including matters related to residential tenancies
- Trespass on First Nation lands
- Public works and undertakings, including buildings, community infrastructure and local services
- Raising of revenues, by way of
    - fees, charges, royalties, permits, licences or other non-tax means
    - the direct taxation of its citizens, and
    - the taxation of persons other than its citizens, to the extent agreed to by the First Nation and the Government of Canada
- Generally all matters of a merely local or private nature on the First Nation lands of the recognized First Nation

Additional law-making powers include:

- Administration of justice, including the establishment and designation of courts and tribunals of criminal and civil jurisdiction
- The establishment of administrative boards, tribunals, commissions or other administrative bodies

- Emergency preparedness
- Provision of health care and services
- Transportation, including the construction, maintenance and management of roads, the regulation of traffic, and the control or prohibition of the operation and use of vehicles
- Labour relations
- Agriculture
- Fishing and the protection of fisheries, fish and fish habitat
- Control or prohibition of the manufacture, supply, sale, exchange, transport, possession and consumption of intoxicants
- Control or prohibition of actions, activities and undertakings that constitute, or may constitute, a threat to public order, peace or safety
- Gaming

Negotiated Agreements

In considering how to title the chapters, we also looked at how the sectoral or comprehensive governance arrangements that have been negotiated and implemented in BC set out a Nation's jurisdiction — essentially, how the subject matters for First Nations' law-making powers have been set out in these arrangements and the headings and the scope of jurisdictions. However, these arrangements are not all the same and the law-making powers are not described in the same way. How they are described depends on the priorities of government and the First Nation, the First Nation's particular circumstances, how the matters were addressed in the negotiations that led to the governance arrangements, and who was at the negotiating table for all parties and their preferences. The needs and priorities of each Nation will differ, as can the focus of the other government. In the comprehensive governance arrangements, the law-making powers are not organized as "core/non-core" or as "essential or optional," but are simply set out throughout the agreements. Final agreements as part of modern treaty arrangements do have a chapter addressing "governance," but it is important to point out that not all of the law-making powers are found in the governance chapter.

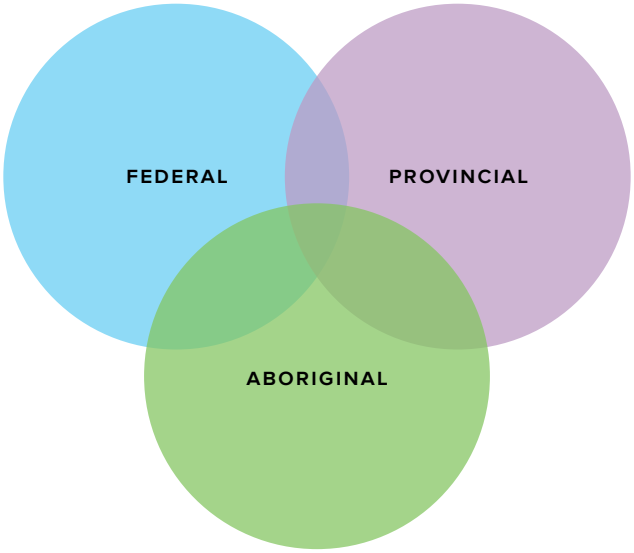
As a consequence of the above, we have chosen subject headings for each chapter that we feel most appropriately reflect how these subject matters are evolving and being addressed in actual sectoral and comprehensive governance arrangements. To this end, the areas of law-making powers have been divided into 33 subject matters. The way we describe the powers in Section 3 should not be taken as definitive, but rather as illustrative. We hope this section will assist communities in sorting through the issues, jurisdiction by jurisdiction, and in identifying where work has already been done or is ongoing. Also, in this section we have not included all of the law-making powers that relate to creating and maintaining the core institutions of First Nations governance (through a constitution), as these have been covered in Section 2, although we have chosen to include a chapter on Citizenship and Elections. Regardless of the range of jurisdictions a First Nation government may ultimately exercise through its institutions of governance, the central law-making powers over core government functions will be a constant aspect of its law-making. Based on the experiences of First Nations in BC to date, what each will actually govern beyond core governance will vary, and this will become evident when using this report.

It should also be noted that these subject matters are general in nature, and very often a government (whether federal, provincial or First Nation) will rely on a combination of these heads of power as their legal basis for making a particular law. From this perspective it is therefore not necessary to be overly concerned about how the subject matters are described. Thus, a First Nation's law addressing "housing" (which we have not itemized as a specific jurisdiction, although RCAP included it) may be made under the jurisdiction over land, land management, financial administration, landlord and tenant, and so on. So, in approaching the question of what law-making powers a First Nation needs, it is also useful to consider how many of the subject matters are interrelated and connected.

In our list of law-making powers, we have not included some of the areas that Canada currently does not recognize as falling within the law-making powers of First Nations and refuses to consider in self-government negotiations. This includes a number of powers related to Canadian sovereignty, defence, external relations and other "national interest" powers. A First Nation may still seek to exercise law-making in these areas and may look for recognition of such jurisdiction through the courts or in other forums (perhaps international). Until a court determines otherwise, it is not likely that Canada will recognize these powers in a sectoral or comprehensive governance arrangement or even include them in negotiations. Where First Nations are pursuing governance agendas in these areas, they are highlighted in this report, notably in the area of intellectual property (see Section 3.16 — Heritage and Culture).

THE RELATIONSHIP OF LAWS

How law-making powers are described is very important when determining the relationship between the laws of different levels of government. The interaction between First Nations jurisdiction and law-making authority and federal and provincial powers can be confusing. Because First Nations, Canada and BC can have overlapping or concurrent jurisdiction in some areas, it is important to know which government's laws apply and in what circumstances. When more than one law applies and the laws conflict (i.e., you can not meet both laws), rules are needed to say which law is followed and relied upon — that is, which law has "priority." Conflicts of law can exist within a government's own body of laws and regulations as well as between levels of government.



Relationship of Laws

However, the fact that laws are different does not mean they are necessarily in conflict. Generally, laws will be found to be in conflict when a person cannot comply with both laws at the same time. Thus, there is no conflict between traffic laws with different speed limits, because a person can comply with both by travelling within the lower limit. On the other hand, there is a conflict between two environmental laws where one law requires a concrete container for safety purposes and the other requires a steel container. A person could not comply with both laws at the same time. In such circumstances, the conflict rules would determine which law would govern the container to be used.

Under section 88 of the *Indian Act*, when a "band" makes a bylaw it prevails in the event of a conflict or inconsistency with general federal and provincial laws in relation to that subject matter. It has "priority." A matter that is addressed under the *Indian Act* itself replaces any provincial law on the same subject, as it affects "Indians." However, there are some exceptions. This is also generally the case

with sectoral governance initiatives. The priority rules vary for different subject matters and between agreements under comprehensive governance arrangements. Certainly, some First Nations have or seek to have exclusive powers for some subject matters and for certain purposes (i.e., over citizenship, governance institutions or lands, etc.). Others look to ensure that where powers are concurrent with either the federal or provincial governments or both that the relationship between law-making powers is clear.

In addition to basic rules of conflict and priority that need to be considered in negotiating governance arrangements (including the description of powers) and then in drafting laws and interpreting those laws, there are a number of other legal doctrines and principles that are used to determine which laws apply and in what circumstances where it is not obvious or clear. While those First Nations that are involved in governance negotiations and considering the relationship between laws will normally have legal counsel available to provide them with advice, it is important for those intimately involved in the process to have some idea of the these legal doctrines and principles. These doctrines and principles inevitably inform negotiating positions and drafting techniques used and will come into play in any negotiation of self-government, and they need to be kept in mind when reconciling First Nations law-making powers with those of the Crown. In the Canadian context, these doctrines and principles will no doubt themselves be modified, taking into account the accommodation of First Nations law-making powers within confederation and, indeed, new doctrines and principles that may be developed by the courts — perhaps, for example, with respect to the evolving law of Indigenous legal traditions and the manner in which those traditions are reconciled with the non-Indigenous legal traditions of Canada. Some of these legal doctrines and principles are discussed below.

Doctrine of Paramountcy

Under Canadian constitutional law, the doctrine of paramountcy establishes that where there is a conflict between valid provincial and federal laws, the federal law will prevail and render the provincial legislation invalid to the extent that it conflicts with the federal law.

Pith and Substance of the Law

Subject to the central paramountcy rule applicable to federal powers, described above, under the constitutional division of powers found in sections 91 and 92, the general rule is that one level of government does not make laws in another government's area unless there is an exception or both governments have powers over the subject matter. While the intention of the framers of the Constitution was to ensure that the division of powers was to be comprehensive and clear, it soon became obvious that the listed matters in the two sections (91 and 92) overlapped. Further, it was not always easy to figure out if a law was federal or provincial when that law appeared to touch on a number of subject matters and crossed over between the two lists. Hence the development of the "pith and substance" test, which is used by the courts when a law is challenged to determine if one level of government (whether provincial or federal) has encroached upon the exclusive jurisdiction of the other level of government.

Under this test, the courts look to see whether in "pith and substance" the law deals with a subject matter that the level of government has jurisdiction over. If a law is found in substance to relate to a subject matter within the competence of a province, it will be found to be legal, even though it might incidentally deal with matters not within its core legislative powers. The extent of the encroachment on matters beyond its competence can be a factor in determining whether there is problem with the law and therefore if the law is valid. That is, in appearing to make a law on a matter within its list of powers, was the province really trying to enact a law on a subject matter beyond its law-making powers? If it was, the law is struck down. However, where this is not the case, and where there was no intention to govern in an area outside of the province's powers, the fact that the provincial law

might encroach on federal powers does not affect the legality of the provincial law, even to the extent that it encroaches. All of the law is valid.

Because First Nations have broad law-making powers akin to the federal and provincial governments' powers (unlike municipalities, whose powers are limited to those expressly set out in the legislation creating them), this principle will be of increasing importance to First Nations in interpretations of the relationships between federal as well as provincial laws and First Nation laws. In many cases, First Nations laws will, or already do, include provisions over matters that are not strictly recognized as being within its powers, but this should not necessarily make a First Nation's law invalid.

Double Aspect

Connected to the question of "paramountcy" and "pith and substance" is the legal doctrine called "double aspect," which permits both the federal and provincial governments to make laws in relation to the same subject matter. While the powers of the two levels of government are set out in sections 91 and 92 of the *Constitution Act, 1867*, some subject matters have several "aspects" to them, such that for one purpose the matter will fall to one head of power, while for another purpose it will fall to the other. An example of double aspect is in traffic and transportation laws, which can fall into the "property and civil rights" power of a province but can equally be a criminal offence and therefore also fall within the federal power over "criminal law." The courts have ruled that some matters are considered "double aspect" and therefore can be legislated by either the federal or provincial governments. These include:

- security regulations
- interest rates
- insolvency
- gaming
- spousal maintenance
- child custody
- entertainment in taverns
- temperance.

Interjurisdictional Immunity

Interjurisdictional immunity is an exception to the "pith and substance" principle discussed above. The doctrine is triggered, in contrast to the doctrines and principles described above, even where there is no "meeting" of one level of government's laws with another or an actual conflict or contradiction between federal and provincial laws. It simply requires that the provincial law significantly affect federal "things," "persons" or "undertakings," and when it does the doctrine makes the provincial laws of general application inapplicable. For example, a provincial law that imposes a tax on banks would be ruled "legal," as it does not come within the federal core power over "banking," while a provincial law that limits the rights of creditors to enforce their debts would strike at such a core and therefore be ruled inapplicable.

Most of the cases in Canada where this doctrine has been used involve the applicability of provincial laws on "undertakings" under federal jurisdiction, such as the banking example above. However, it is important to consider its relevance with respect to "things" and "persons" and particularly with respect to First Nations' issues. This is how, with regard to "Indians, and Lands reserved for Indians," certain provincial laws regulating hunting have been held not to apply to Indians where they significantly interfere with Aboriginal rights, including treaty rights, as these rights are at the "core" of the federal powers under section 91(24).

As discussed in Section 1.4 — Comprehensive Governance Arrangements, there has been a gradual diminishment of the importance of the doctrine of interjurisdictional immunity by the Supreme Court of Canada in favour of a less hard-and-fast interpretation of the constitutional division of powers. We see this where the court has expressed caution in using this doctrine in future cases because it is seen as too narrow and to be in tension with a developing and increasingly prevailing approach that permits concurrent federal and provincial legislation with respect to the same subject matter of law-making. The premise of the doctrine on fixed and watertight "cores" of power is seen to be out of step with the evolution of Canadian constitutional interpretation toward the more flexible concepts of "double aspect" and "co-operative federalism." The court is concerned that relying on the doctrine may go beyond the federal or provincial power for which it is being invoked and create legislative "no go" zones where neither level of government regulates. This is not consistent with principles of good governance and evolving federalism and is certainly not very practical. When the court does have to resolve core federalism disputes, it has expressed a preference for relying on the doctrine of "federal paramountcy" over "interjurisdictional immunity."

As we have discussed elsewhere in this report, the implications of this is significant with respect to First Nations evolving governance within federalism. On the one hand, it means that the previously held assumptions with respect to the exclusivity of section 91(24) powers of the federal government may be giving way to room for the application of more provincial laws on First Nations lands and over First Nations people. But on the other hand, it represents an opportunity for greater application of First Nations laws, given the emerging recognition of First Nations law-making powers as part of a broader resetting of the constitutional division of powers in order to make space for Indigenous laws. In short, there should be more appetite for and legal acceptance of First Nations concurrent law-making powers. However, it is still too early to tell. Deep questions regarding the relationship between First Nations law-making powers and the other levels of government have not been seriously tested, or tested at all — neither with respect to sectoral and comprehensive governance initiatives, nor in consideration of the inherent right of self-government under section 35, whether as part of the jurisdictional aspect of Aboriginal title or stand-alone. Where questions of interjurisdictional immunity were raised in the recent *Tsilhqot'in* decision, it was not in consideration of Tsilhqot'in law but was rather a discussion about interjurisdictional immunity between the federal government and its powers under 91(24) and provincial powers under 92 and how theses governments' respective laws-making powers would apply to the Tsilhqot'in's Aboriginal title lands.

In light of these legal developments, of particular significance is that under comprehensive governance arrangements, some self-government agreements are in many ways already breaking down interjurisdictional immunity, with evolving models of governance favouring concurrent jurisdiction when First Nations powers are being "added" into the constitutional mix. That is, there is not a strict section 91/92–type division between First Nations powers and those of either one, or both, of the two other levels of government, and where for all subject matters a First Nation may govern, there is concurrent provincial and/or federal jurisdiction. This is discussed below.

Co-operative Federalism and First Nations

Under comprehensive governance arrangements, the concept of concurrent law-making authority continues to develop. Under these arrangements, both the First Nation and federal and/or provincial governments have jurisdiction over subject matters that a First Nation governs, and consequently multiple laws in the same area can apply. The agreements then set out the rules for priority that will determine which of the laws will prevail in the event of a conflict between the First Nation's law and the other government's law.

To help in understanding how these concepts are working in practice, for each subject matter in the following chapters of this section, where possible, we have set out the rules for which government's

laws have priority in different governance arrangements. In some cases, the rules are found in the self-government agreements. In other cases, they are found in enabling legislation. In some cases, they are found in both. With respect to conflicts between federal laws that support sectoral governance initiatives, it may not always be clear which laws or regulations made under those laws prevail. In some cases, the conflict rules may themselves, in fact, be in conflict (i.e., they both say the law has priority over all other laws). Presumably, if and when this becomes an issue it will need to be addressed at that time. Generally speaking, over time, this and other legal questions or challenges regarding which government's laws apply and prevail in the event of a conflict will be tested in court based on the particular laws involved and in accordance with the evolving legal doctrines and principles described above. As we have seen, the courts will generally try to respect the law-making powers of two different governments and try to find an interpretation that will allow both laws to coexist — all in the spirit of co-operative federalism.

Finally, it will usually be only after the exercise of a law-making power by a First Nation in a particular subject matter is challenged that the First Nation's jurisdiction will be tested. This is why it is important to clearly set out the law-making powers of the First Nation and the relationship between those powers and the law-making powers of both Canada and British Columbia.

DETERMINING WHAT POWERS

Once a First Nation's core institutions of governance are in place (normally in a written constitution), and assuming there is an option to do so, the next step toward governance reform is deciding which subject matters the First Nation will have law-making powers over — whether recognized in a negotiated self-government agreement, or exercised under the *Indian Act*, or through some other mechanism. As discussed above, the range of law-making powers a First Nation will choose to seek or exercise will be determined by a number of factors. These include political and legal considerations such as what powers the First Nation's citizens deem important and will support their government in exercising; the range of powers that Canada (and where applicable the Province) will recognize; and where the common law provides the space for the exercise of jurisdiction as part of the inherent right of self-government, whether as an aspect of Aboriginal title or not. Practical considerations will also come into play: how realistic it is to assume jurisdiction over some subject matters, given issues of capacity in light of the size and location of the First Nation (citizens and others residing on the lands, geography and governance pressures, and so on) and the financial and other resources available to the First Nation.

In some respects, determining the areas of jurisdiction a First Nation government will want to have law-making powers over will be an exercise in determining what it may not want to govern, as much as it is what it does want to govern. In some cases, a First Nation may decide to leave the responsibility to another level of government, whether an aggregation of First Nations governments or the federal or provincial governments. These considerations may lead First Nations to exercise powers incrementally under the *Indian Act* or under sectoral self-government arrangements. In other words, a First Nation can choose to exercise jurisdictions on an issue-by-issue basis before entering into comprehensive governance arrangements. This is what many First Nations are doing, because it is a more manageable way to rebuild their First Nation.

In modern treaty-based self-government arrangements, however, Canada and British Columbia still prefer to include an exhaustive list of the First Nation's law-making powers, whether the First Nation actually exercises or even wants to exercise law-making powers in all those subject matters or not. As a result, in modern treaty negotiations, First Nations consider a range of jurisdictions even if they have no intention of making laws in those areas, simply to ensure that they preserve the jurisdiction for the future. Other arrangements outside of modern treaties are less prescriptive and will generally allow the First Nation to draw down or even negotiate additional law-making powers as it needs to or

when a good policy reason to do so arises in the future — for example, where a court declares that the exercise of a particular law-making power is an aspect of the inherent right of self-government, and the First Nation chooses to exercise this power or, conceivably, is even compelled to exercise it.

Today, the more flexible self-government arrangements referred to above are not constitutionally protected under section 35, unlike those in a treaty, which is partly why Canada and British Columbia seek to have an exhaustive list of powers set out in the treaty — the treaty being in some ways "full and final" and being legally protected at the highest level. Non-constitutionally protected self-government arrangements, on the other hand, whether sectoral or comprehensive, in theory are subject to being changed or even legislated away by Canada (although this is considered highly unlikely).

However, a governance agreement, in whatever form, should make it clear which law-making powers (jurisdictions) must be exercised by the First Nation on the effective date of the agreement and that the First Nation is not required to exercise all the jurisdictions listed. The determination of when non-mandatory jurisdictions can be exercised should be up to the First Nation and will be based on a number of factors, some of which are described below. This is the reason why some First Nations are taking a more incremental approach, even within comprehensive governance arrangements. For example, in some parts of Canada, First Nations are in fact engaging in comprehensive governance negotiations focused on creating the legal space and recognition for the First Nation's constitution and its core institutions of government (and the law-making powers associated with these institutions), along with certain but limited and specific jurisdictions (e.g., just the power to make laws in relation to lands and land management). This is quite a different approach from setting out an exhaustive list of areas where that Nation may exercise law-making powers now or in the future. The full list of powers will be left to another day, jurisdiction by jurisdiction, basically allowing the First Nation's government to develop over time in those areas it needs to govern today but not to the exclusion of those areas in which it might need or want to govern in future but is not ready to govern today. As with sectoral governance initiatives generally, another way to look at this approach is as incremental, not simultaneous, implementation of aspects of the inherent right of self-government.

In keeping with this approach and the concept of co-operative federalism, when deciding the jurisdictions to draw down and exercise law-making powers over, First Nations should consider which level of government is really best suited to make laws in a particular area, as well as that government's responsibilities and liabilities connected with the jurisdiction. A First Nation may want to ensure that it has the necessary capacity (resources, people and administrative structure) to take over jurisdiction in a particular area before choosing to do so. (The issues regarding financing First Nations governance are comprehensively addressed in Section 4 of the report.) In some areas, a First Nation may decide that a particular jurisdiction would be better governed by a larger aggregation of First Nations (e.g., in education and health). In other cases, the choice may be to leave the law-making power with Canada or British Columbia, particularly where the exercise of law-making powers would have little or no net benefit for the First Nation, but would require the expensive and time-consuming duplication of standards, procedures and systems that are already in place (e.g., forestry in the case of Tsawwassen). Where financial and other resources are limited, it is always important to focus on areas where exercising law-making powers can make a real difference to the quality of life of a First Nation's citizens. These are the practical considerations a First Nation will want to consider, even if not always "politically correct." This means looking at self-government not as an emotional "power grab" but as a series of well-considered strategic decisions by a First Nation as to what law-making powers it needs and which government can best govern a particular subject matter and why. The concurrent law model can work in this regard by leaving open the option for a First Nation to make laws in a particular area and ensuring that, where necessary, the First Nation's laws will prevail in the event of a conflict with external government laws.

STRUCTURE OF THE POWERS (JURISDICTIONS) CHAPTERS

For each subject matter considered in the following chapters in this section, we have sought to be consistent in our use of headings, through which we have attempted to reflect the concept of the governance continuum. Where appropriate, we identify outstanding issues between First Nations and the Crown, in addition to work being undertaken on these issues by BC First Nations or First Nations organizations. The general structure for each chapter is as follows:

- *Background* — Essential information on how governments in Canada have addressed the subject matter generally and the core elements of the jurisdiction. This includes a consideration of the constitutional division of powers, a description of any relevant First Nation organization/institution, the legal and political environment, including matters to consider in any negotiations with the Crown, and geographical scope (e.g., on- or off-reserve) and so on.

- *Indian Act Governance* — Governance options available within the subject matter for First Nations under the *Indian Act* (if any).

- ***S**ectoral Governance Initiatives* — Governance options available within the subject matter for First Nations under sectoral governance arrangements (if any). In some chapters, there is also consideration of other initiatives that do not strictly involve the exercise of law-making powers but that are sectoral in nature and relate to activities that in time may have jurisdictional implications. Consideration is given to sectoral governance options in the context of governance over both reserve lands and ancestral lands.

- *Comprehensive Governance Arrangements* — Includes a discussion of how the subject matter has been addressed in comprehensive governance arrangements and how self-governing Nations are governing. Comprehensive governance arrangements in BC (both inside and outside of modern treaty-making) are examined, namely those of Sechelt, Westbank, Nisga'a, Tsawwassen and Maa-nulth. We have also included the Yale and Tla'amin final agreements, both of which at the time of writing had been ratified but not yet implemented.

- *Tables* — Provide pertinent information specific to the subject matter. The first table describes the treatment of the subject matter in each of the comprehensive governance arrangements, setting out the provisions in the arrangements that address the particular subject matter. This table also considers the priority of laws. The second table provides information about which First Nations have exercised jurisdiction over the subject matter. It shows which BC First Nations have made laws or bylaws under the *Indian Act* or through sectoral governance arrangements or comprehensive governance arrangements. This table is quite long, given the number of bylaws or laws that BC First Nations have made. While we have endeavoured to be as accurate as possible in compiling this table, the information should not be considered definitive and does not constitute a "gazette." Finally, we have sometimes included other tables that provide information concerning related activities referred to in the chapter or that we have found to be relevant to the discussion of the subject matter.

- *Resources* — A list of additional resources available to assist First Nations in considering the subject matter further. These are generally divided into three categories: First Nations, provincial and federal. We include addresses of governmental and non-governmental bodies/institutions and associations, along with links to sources of information that readers can access online. Where applicable, each chapter contains citations of federal and/or provincial legislation that are relevant to the subject matter.

PART 1 /// SECTION 3.1

Aboriginal Healers and Traditional Medicine

3.1

ABORIGINAL HEALERS AND TRADITIONAL MEDICINE

3.1

ABORIGINAL HEALERS AND TRADITIONAL MEDICINE

BACKGROUND

Jurisdiction over Aboriginal healers and traditional medicine is an aspect of jurisdiction over health. During self-government negotiations, Canada has generally been unwilling to recognize broad First Nations jurisdiction over health, and indeed some First Nations have questioned whether they want to assume full responsibility for health. Canada has been more inclined to recognize control over Aboriginal healers and traditional medicine. First Nations that have negotiated comprehensive governance arrangements agree that First Nations should at least have jurisdiction over Aboriginal healers and traditional medicine, and all self-government agreements have therefore included at a minimum this aspect of jurisdiction over heath as integral to the distinctive culture of the First Nation. This subject also relates to the intellectual property and knowledge of First Nation peoples concerning traditional medicine. This aspect of jurisdiction is mentioned in Section 3.16 — Heritage and Culture and Section 3.21 — Licensing, Regulation and Operation of Businesses.

To date, there are no examples of First Nation written or published laws addressing Aboriginal healers and traditional medicine in accordance with sectoral or comprehensive governance arrangements, but it is expected that Nations will exercise jurisdiction in this area in due course. There is generally a growing societal trend embracing Indigenous knowledge and methods of healing different from those associated with "Western culture." Canada does not view this jurisdiction as extending to the regulation of products or substances regulated under provincial or federal law or as affecting the regulation of medical or health practitioners requiring licensing or certification under provincial law.

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.

Article 24: UN Declaration

In BC there is support for traditional healers and medicine. The First Nations Health Council has championed adding traditional medicine as a priority to the tripartite First Nations health plans, and the Traditional Healers Advisory Committee was created in 2012 to support and advocate for traditional medicines and practices. Another purpose of this committee, as outlined in the committee's terms of reference, is to "help define what traditional wellbeing looks like and how to make the shift from a 'sickness system' to a 'wellness system' at the community level." The existence of this committee does not resolve issues with respect to the exercise of jurisdiction over Aboriginal healers and traditional medicine. The issue of potential conflict between First Nation and Canadian laws will necessarily arise. Canada sees federal and provincial laws prevailing in this area in the event of a conflict. However, under existing comprehensive governance arrangements, including Nisga'a and Westbank, the Nation's laws prevail.

Some commentators suggest that with respect to this jurisdiction a First Nation may wish to consider whether it is better to formalize arrangements in a law or just leave them as an unregulated traditional practice that could be protected as an Aboriginal right if necessary. The issue of traditional medicines and Indigenous rights has been central to discussions at the United Nations and the World Intellectual Property Organization (WIPO), which is considering a possible "instrument or instruments" to protect traditional knowledge, folklore and genetic resources. This work is ongoing. In March 2014, the WIPO produced the report *Documenting Traditional Medical Knowledge* to "assist traditional medical knowledge holders, government representatives and third-party collaborators to think about issues of intellectual property law specifically related to traditional medical knowledge."

INDIAN ACT GOVERNANCE

Section 81(1)(a) provides bylaw-making powers for a First Nation to provide for the health of residents on-reserve and to prevent the spread of contagious diseases. A few bylaws have been made under section 81(1)(a) in relation to health, but to the best of our knowledge none have been made in relation to traditional medicine. While this jurisdiction is quite broad, it remains to be seen whether the Minister would disallow a significant bylaw made by a First Nation under this authority.

SECTORAL GOVERNANCE INITIATIVES

There is currently no specific sectoral initiative dealing with jurisdiction over Aboriginal healers or traditional medicine. The proper recognition of Aboriginal healers and medicine and First Nations jurisdiction is a matter that has been raised through the Assembly of First Nations and in many other forums, both domestic and international. (See Section 3.16 — Heritage and Culture for further discussion.)

In BC, under agreements between the federal and provincial governments and First Nations, a First Nations Health Council (FNHC) and a First Nations Health Authority (FNHA) have been established. While these agreements are not a recognition of jurisdiction over health care, they are the most comprehensive of their type in Canada and transfer administrative responsibility for non-primary health care to First Nations. The FNHC is the political body that worked with the provincial and federal governments to arrive at a tripartite agreement and that brings political issues forward and oversees the transition of services from First Nations and Inuit Health (FNIH) to the FNHA. The FNHA manages the resources formerly provided to FNIH, plans and delivers services and funding for First Nations health programs, and promotes First Nations issues, among other roles. This means that BC First Nations, largely on a regional basis, will be able to set health priorities for their community members and have resources targeted toward those priorities in a culturally appropriate manner. It does not include influence over emergency and hospital services, and so on, except to provide an opportunity to work with health facilities and practitioners to ensure that First Nations traditions and cultural practices are respected. Since October 2013, the FNHA has assumed design and delivery of health care programs and services to “Indians” that were formally provided by Health Canada (see Section 3.15 — Health). As noted above, traditional medicines and First Nations healers have been identified as an important component of health services in First Nations communities. The Traditional Wellness Strategic Framework (TWSF) notes that the Tripartite First Nations Health Plan contains a commitment that “cultural knowledge and traditional health practices and medicines will be respected as integral to the well-being of the First Nations.”

It is still early days for the BC health transfer and it is not clear whether these administrative arrangements will evolve into recognition of jurisdiction and, if so, whether there would be federal and provincial legislation to support the recognition of more complete control for First Nations over health. Perhaps this could be undertaken through a future sectoral governance initiative similar to those for lands, education and fiscal management. Notwithstanding the direction in which First Nations jurisdiction in this area will evolve, the transfer of First Nations health oversight to the FNHA creates an opportunity to incorporate more traditional methods of treating patients and to move to a system that stresses maintaining good health or “wellness” as opposed to managing “illness.” The TWSR states that “it is a priority to support the incorporation of traditional medicines and practices into health policies, programs and practices and to do this in a way that is safe and relevant for First Nations communities.” The FNHC/FNHA has also recognized the importance of protecting intellectual property rights and acknowledges that “in order to promote the protection of traditional knowledge, traditional practitioners and traditional medicines, there is a need to advocate for the development of intellectual property rights aimed at protecting medicines, traditional foods, and sacred areas.”

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

The *Westbank First Nation Self-Government Agreement* recognizes Westbank's jurisdiction over the practice and practitioners of traditional Okanagan medicine on Westbank Lands. The *Nisga'a Final Agreement* and *Tsawwassen First Nation Final Agreement* recognize First Nation jurisdiction over the authorization of individuals to practise on First Nation land as Aboriginal healers. Both the Maa-nulth and Sechelt agreements are silent on this issue, although Sechelt Indian Band has broad powers over health, which presumably would include the regulation of Aboriginal healers and traditional medicine. Both the Yale and Tla'amin final agreements recognize the Nation's ability to create laws authorizing Aboriginal healers. However, they will not have the authority to regulate medical or health practices that require licensing under federal or provincial law, nor are they able to regulate products or substances already regulated provincially or federally.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	No provisions.	N/A
Westbank	The regulation of the practise (and practitioners) of traditional Okanagan medicine on Westbank Lands does not include the jurisdiction to regulate products or substances that are regulated under provincial or federal laws or affect the regulation of health practitioners that require licensing or certification under provincial laws. (Part XVII, s. 191–192)	Westbank law prevails. (Part XVII, s. 193)
Nisga'a	Nisga'a Lisims Government may make laws with respect to Aboriginal healers. These laws must include measures respecting competence, ethics and quality of practice. Does not include the jurisdiction to regulate products or substances that are regulated under provincial or federal laws. (Ch. 11, s. 86 and 88)	Nisga'a law prevails. (Ch. 11, s. 87)
Tsawwassen	Tsawwassen Government may make laws with respect to Aboriginal healers. These laws must establish standards respecting competence, ethics and quality of practice. Does not include the jurisdiction to regulate products or substances that are regulated under provincial or federal laws or to affect regulation of health practitioners that require licensing under federal or provincial law. (Ch. 16, s. 84–86)	Tsawwassen law prevails. (Ch. 16, s. 87)
Maa-nulth	No provisions.	N/A
Yale	Yale First Nation Government may make laws with respect to Aboriginal healers. These laws must establish standards respecting competence, ethics and quality of practice, and safeguarding personal client information. Does not include the jurisdiction to regulate products or substances that are regulated under provincial or federal laws or to affect regulation of health practitioners that require licensing under federal or provincial law. (s. 3.17.1–3.17.3)	Yale law prevails. (s. 3.17.4)
Tla'amin	Tla'amin Nation may make laws with respect to Aboriginal healers. These laws must establish standards respecting competence, ethics and quality of practice, and safeguarding personal client information. Does not include the jurisdiction to regulate products or substances that are regulated under provincial or federal laws or affect regulation of health practices or practitioners that require licensing under federal or provincial law. (Ch. 15, s. 82–84)	Tla'amin law prevails. (Ch. 15, s. 85)

RESOURCES

First Nations

First Nations Health Council
1205 – 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-913-2080
Toll-free: 1-866-913-0033
Fax: 604-913-2081
info@fnhc.ca

- First Nations Health Council — Traditional Medicine
  www.fnhc.ca/index.php/initiatives/community_health/traditional_medicine/
- First Nations Traditional Models of Wellness [Traditional Medicines and Practices]:
  Environmental Scan in British Columbia FN Health Society (March 2010)
  Summary: www.fnhc.ca/pdf/Traditional_Medicines_Scan_Executive_Summmary.pdf
  Full report: www.fnhc.ca/pdf/Traditional_Models_of_Wellness_Report_FIN-_2010.pdf
- The Traditional Wellness Strategic Framework

Assembly of First Nations — Health
Suite 1600, 55 Metcalfe St.
Ottawa, ON K1R 6L5
Phone: 613-241-6789
Toll-free: 1-866-869-6789
Fax: 613-241-5808
www.afn.ca

Indigenous Physicians Association of Canada (IPAC)
305 – 323 Portage Avenue
Winnipeg, MB R3B 2C1
Phone: 204-219-0099
Fax: 204-221-4849
Email: info@ipac-amic.org
www.ipac-amic.org

Federal

Health Canada
Address Locator 0900C2
Ottawa, ON K1A 0K9
Phone: 613-957-2991
Toll-free: 1-866-225-0709
Fax: 613-941-5366
TTY: 1-800-465-7735
Email: info@hc-sc.gc.ca
www.hc-sc.gc.ca/contact/fniah-spnia/index-eng.php

International

World Intellectual Property Organization (WIPO)
34, chemin des Colombettes
CH-1211 Geneva 20, Switzerland
www.wipo.int

LEGISLATION

Federal

Natural Health Products Regulations (SOR/2003-196)

PART 1 /// SECTION 3.2

Administration of Justice

3.2

ADMINISTRATION OF JUSTICE

3.2

ADMINISTRATION OF JUSTICE

BACKGROUND

The administration of justice is one of the most complex areas that all governments will need to address as strong and appropriate First Nations governance is re-established within Canada. Having access to a system for adjudicating disputes and review that is fair, impartial, cost-effective and quick is essential to the functioning of any organized society. The administration of justice refers to the way societies, through their institutions, enforce, prosecute and adjudicate laws made in accordance with their legal traditions. Another way to characterize the administration of justice is the way societies maintain order and ensure that citizens and others follow the rules that they have established. As a subject matter, the administration of justice cuts across all other subject matters.

Principles of natural justice (see textbox) are today enshrined in the Canadian judicial system as required under the Constitution. While they are typically associated with the history and evolution of the common law (the reliance on past decisions of a court or tribunal — precedents — to inform future decisions), it is helpful to think about the principles of natural justice as one way of expressing the fundamental relationship between individual and collective commitments to justice, and the processes and procedures through which individuals and governments deal with disputes, conflicts and matters of crime and punishment. Societies throughout history and across humanity have recognized that justice has both substantive and procedural elements, and speaks not only to what we do as individuals and as groups but also to how our institutions and governments must act. While different societies express these dimensions of justice in a range of ways, one finds across history and across peoples a preoccupation with the procedural dimensions of justice and fairness in how people are treated by governments.

Natural Justice

The term "natural justice" is generally understood to have its genesis within the common law, as specifically referring to certain procedural rights that individuals have in the administration of justice. When people speak of the principles of natural justice, they often refer to concepts such as the duty to act fairly, the need for decision-makers to be unbiased, and the need for hearings to be fair (including such things as the rights to notice, representation, and the opportunity to be heard). Courts have described the principles of natural justice as "fair play in action." Elements of the principles of natural justice have been described by one famous jurist as follows:

> [One must] know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them... Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other... (Lord Denning, 1962, quoted in the Supreme Court of Canada)

Natural justice is reflected in the principles of good governance found in the institutions of any well-run government. First Nations citizens demand no less of their own institutions in this area and will be concerned about how their Nations deal with adjudication under their laws and how justice will be administered post–*Indian Act*. In Canada, the Constitution explicitly provides both the federal and provincial governments with jurisdiction in the area of justice. By virtue of being fundamental to the functioning of Aboriginal governments to govern effectively, presumably there is also constitutional space within Canada for the administration of justice by Aboriginal peoples in accordance with Indigenous legal traditions as they are evolving. Certainly, all negotiated sectoral self-government initiatives address administration of justice issues, to the extent that they need to, as do all comprehensive governance arrangements. In addition, First Nations continue to rely on ancient institutions for enforcement of social norms, rules and laws and for dispute resolution, to a greater or lesser degree depending on the Nation.

Indigenous Dispute Resolution Mechanisms

Historically, and in accordance with Indigenous legal traditions, Indigenous Nations had various mechanisms to resolve disputes and settle differences and to return society to equilibrium, depending on the Nation's traditions. For example, on the west coast of BC and among the Kwakwaka'wakw peoples, differences between parties were typically brought to the big house at a Potlatch. At the Potlatch, in an open forum and in front of hundreds of witnesses, "crimes" or "breaches" of laws and rules respecting social order and norms intended to address actions or behaviour forbidden by the collective, were addressed; once resolved, they were never to be spoken of again. Like this example in the Potlatch, many of the Indigenous legal traditions favour ways to ensure that social pressure is brought to bear through consensus-building or shaming and as reflected in clan or kinship responsibilities. In most systems, the primary objective is to ensure that a person can still live within the group — there being no "prisons." In some cases, however, where a person cannot be brought back into the group, the ultimate sanction might be banishment from the group; where people rely on community for their very existence, banishment is the most severe of punishment. While it is important not to overgeneralize Indigenous legal traditions, as traditions vary between Nations, the key point to keep in mind is that the administration of justice under Indigenous legal traditions may involve approaches that are fundamentally different from those within the Western legal traditions generally used in Canada (e.g., the English "common law tradition" and French "civil law tradition").

In our contemporary world, when thinking about the administration of justice, we typically think of criminal justice and the enforcement of the *Criminal Code*. Administration of justice is, however, considerably broader than criminal matters and involves adjudication of civil, health and safety, and regulatory matters — matters that are addressed by contemporary First Nations laws, whether made under the *Indian Act* or under First Nations jurisdiction in a sectoral agreement or comprehensive governance arrangement. In addition, there are review mechanisms for laws and decisions made by First Nations governments or bodies to ensure that they conform to required procedures and fall within the jurisdiction or authority of the decision-maker. In the area of First Nations administrative law, there are a number of exciting and promising developments in the administration of justice that are discussed in this chapter and throughout the report.

Division of Powers

Under the *Constitution Act, 1867*, the administration of justice is divided between the federal and provincial governments. The federal government has jurisdiction related to criminal law through the operation of section 91(27):

> 91(27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

The Provinces pick up the responsibility for the balance of the system, with broad and exclusive powers to administer justice through the operation of sections 92(14) and 92(15):

> 92(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

> 92(15) The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects

Generally, therefore, it is the provinces that are responsible for the administration of justice, including policing, the provincial courts, and legislation relating to the administration of justice. First Nations jurisdiction with respect to the administration of justice cuts across the jurisdiction of both Canada and the provinces.

In 1971, the federal government established its own court, the Federal Court of Canada, under the authority of section 101 of the *Constitution Act, 1867*, for the "better administration of the laws of Canada." It is a successor to the Exchequer Court of Canada, established in 1875. In BC, we have the Provincial Court, the Supreme Court of BC and the BC Court of Appeal, all created under their own statutes, each with specific purposes and jurisdiction.

With respect to criminal justice matters, at this time the federal government does not recognize or agree that First Nations should have jurisdiction in this area. This is quite different from the United States, where recognized tribes do have some jurisdiction over criminal matters with respect to tribal members and in some cases over others committing offences within their reservations. There is a fundamental difference between Canada and the United States regarding criminal law generally. In Canada, legislation of criminal laws is largely federal, although enforcement is largely provincial. In the United States criminal laws are largely legislated by state, not at the federal level. This difference in tradition has no doubt influenced how the administration of justice with respect to Aboriginal peoples in Canada has been approached in governance arrangements. In Canada, we are accustomed to all criminal law being "one size fits all" and federal under our Constitution. This is not the case in the United States, including with respect to tribal justice systems.

Nevertheless, while not having recognized jurisdiction over criminal matters, First Nations in Canada are increasingly becoming involved in Canadian judicial processes as they relate to criminal infractions, through mechanisms such as alternate sentencing programs, sentencing circles and other partnership initiatives. While at this time these mechanisms are administrative arrangements and First Nations do not exercise jurisdiction, they are important developments in the administration of justice as it relates to First Nations peoples and governments. They are discussed further below.

Developing appropriate First Nations justice systems that reflect Indigenous legal traditions and that can work within the broader justice systems in Canada to meet contemporary needs and First Nation governance priorities is a challenge and an evolving area of law. It is complicated by the fact that First Nations law-making powers can extend from simple municipal-type bylaws to complex matters normally dealt with at the provincial or federal level. While First Nations systems for resolving disputes in accordance with Indigenous legal traditions are still used, if a Nation is seeking recognition of its broad control over the administration of justice, it will probably require either further direction from the courts supporting the operation of different legal traditions within Canada or agreement through negotiations with Canada and the province.

Administration of Justice by First Nations

Conceptually, is it useful to consider three different ways in which First Nations and First Nations people are approaching the questions of the administration of justice (whether criminal or administrative) within Canada and in BC particularly — namely:

- Participation within existing provincial/federal institutions
- Establishment of new "Indigenous" provincial/federal institutions
- Rebuilding First Nations' institutions.

Which approach is favoured depends on a number of factors, not least of which are cost and access, and all approaches are demonstrated along the governance continuum. In considering the approach that First Nations will take, all look first for a system for the administration of justice that is available and that will work for them.

Participation within Existing Provincial or Federal Institutions

Some First Nations rely on existing provincial and federal institutions and are looking to ensure greater First Nation involvement in the provincial and federal justice systems — for instance, by ensuring that there are a greater number of First Nations lawyers trained in the non-Indigenous legal traditions as well as in Indigenous legal traditions. There are now many First Nations people who are practising lawyers and have been called to the bar in provinces and territories across Canada. There is also an increasing number of Aboriginal judges, although the number remains quite small. Indeed, there has never been an Aboriginal person appointed to the Supreme Court of Canada. Conceivably, having an Aboriginal presence on the Supreme Court bench could ensure that Indigenous legal traditions are considered as part of the Canadian evolving multi-juridical legal traditions of this country, in much the same way as the required Quebec appointees bring their perspectives on civil law legal traditions. There are also those who support more Aboriginal people being appointed to other adjudicatory bodies and tribunals in addition to the courts.

Part of the rationale for having more First Nations people participating in or appointed to the institutions of the existing systems of administration of justice is that some First Nations are implementing self-government and enforcing their laws (for practical reasons such as cost, efficiency and credibility) through the use of non-Indigenous courts — for example, where infractions of First Nations bylaws or laws are prosecuted in provincial or federal court, or the court hears disputes arising under a First Nations bylaw or law and enforces them or enforces orders made by a First Nation board or tribunal. When First Nations use the non-Indigenous court system in this way, it is important for the court and officers of the court to understand the First Nation's bylaw or law and apply it correctly. In some cases, the bylaws and laws will be similar to those they are used to seeing (e.g., laws dealing with commercial transactions, residential tenancy, traffic,). However, in other situations the policy considerations that guided the drafting of the law may be quite different from those addressing similar matters but enacted by non-Aboriginal governments and which they may be more familiar with (e.g., with respect to the division of matrimonial property, child custody, trespass, and so on).

Establishment of New "Indigenous" Provincial or Federal Institutions

There has been a move toward creating unique Aboriginal institutions within the existing justice systems, bodies that are essentially delegated powers to address an aspect of the justice system and are not established under First Nations jurisdiction. For example, provincial "community courts" that deal with sentencing matters have been established in the Lower Mainland and in Kamloops. A similar court, although not in BC, is the Tsuu T'ina peacekeeper court. While not established under First Nations jurisdiction, these are nevertheless "Indigenous" institutions, in that they bring Indigenous perspectives to the system. And although they currently have limited authority, they have an important function in addressing the rehabilitation of offenders within communities and ensuring appropriate sentencing and follow-up. These are discussed more fully below. What is significant about these models is that they do not seek to create a completely separate justice system, but rather to build new Indigenous institutions to handle aspects of the justice system as they apply to Aboriginal peoples.

Just as special-purpose courts have been created, so too have First Nation police forces, which are established and governed in accordance with the *Police Act* under provincial jurisdiction. This option is available to Nations under comprehensive governance arrangements as part of modern treaty-making. There is also a sectoral policing initiative with Stl'atl'imx peoples that basically follows the same model, having reached the agreement with Canada and British Columbia by a different route.

Rebuilding First Nations Institutions

The third approach is for First Nations, under their own jurisdiction or authority, to establish independent courts, tribunals, boards, and other adjudicatory bodies to consider their own bylaws and laws and to resolve disputes. The experience here remains limited and is, for the most part, restricted to bodies created under sectoral governance initiatives or as recognized under comprehensive governance arrangements. The only stand-alone and fully recognized Aboriginal "court" that has so far been established in Canada under comprehensive governance arrangements is that of the Teslin Tlingit of Yukon (see textbox below). It should be noted that where a First Nation establishes a court or tribunal under its own authority, it does not necessarily mean that the court is disconnected from the broader system of justice within Canada (e.g., decisions of the court may be appealable to other courts in Canada and ultimately to the Supreme Court of Canada). Further, the scope and extent of the power to establish such bodies is typically set out in agreements between the Crown and the Aboriginal group. It should also be noted that none of the sectoral governance arrangements in Canada provide for a full "court" like that of the Teslin Tlingit; similarly, while providing for boards and tribunals to hear disputes, none of the comprehensive governance arrangements in BC provide for a full "court."

The Enforcement, Prosecution and Adjudication of First Nations Laws

For any government, there are three fundamental aspects of the administration of justice, with respect to both criminal matters and regulatory offences under administrative law, where the violation of a law is alleged:

1) Enforcement (Policing)
2) Prosecution
3) Adjudication

The Difference between Criminal Law and Administrative Law

Criminal law and administrative law are both categories of "public law" — those laws preoccupied with the relationship between governments and individuals, as well as matters of significant concern to society. Public law is distinct from private law, which deals with matters of relationships between individuals, such as contracts.

Criminal law is concerned with acts that the society has determined must be sanctioned — including through the coercive power of the state, such as imprisonment — because of their impact on society and the harm they cause. Governments enforce criminal laws through police and other means, and prosecute their violation. Such prosecutions are on behalf of society as a whole, as represented by the government.

Administrative law is focused on how governments use and exercise their decision-making powers. Key issues that administrative law deals with include whether the action of a government authority or agency consistent with the law (e.g., is it consistent with legislation passed by a parliament?) and whether the government actor or agency implementing the law, is acting and making decisions in a fair and reasonable manner. As such, administrative law is concerned with how legal powers are exercised, and provides individuals with opportunities and remedies to address certain unlawful acts. Systems of administrative law play an important role in monitoring the actions of governments, and contribute to ensuring that a government system can be sustained and function responsibly. In Canada, one of the main tools of administrative law is judicial review — the ability of citizens to challenge certain types of administrative decisions of government actors and agencies, such as those that are taken pursuant to powers granted under legislation.

Enforcement (Policing)

Enforcing First Nations laws is an important consideration: without enforcement, laws may lose their ability to regulate and shape conduct of governments and individuals. As part of governance reform, First Nations will want to consider enforcing their laws. Who carries this out and who pays for it? Communities with sizeable economic development opportunities and non-citizen populations may have different considerations from those Nations whose populations are predominantly citizens.

Policing is very expensive. First Nations will want to ensure that they have adequate resources to provide the service needed for their circumstances. When considering issues of "enforcement," one might think first about imposing observance of the law and "punishing" those who break the law, but it is more than this. The role of modern enforcement is also to educate people about the law, encourage compliance with the law, and prevent breaches of the law — not simply punish people.

In most provinces, the RCMP provides police services to First Nations communities through Provincial Police Service Agreements (PPSA). PPSAs have to comply with the respective provincial police legislation, with exceptions to provide for federal legislation (e.g., *Canada Labour Code*, complaints and discipline). Policy for First Nations Community Police Service (FNCPS) enforcement is determined through Public Safety Canada and the RCMP, working with First Nations through the tripartite agreement process.

In BC, policing on First Nations lands is provided predominantly by the RCMP, with some services being provided by the police services of adjacent municipalities. However, there are two First Nations–administered policing services in BC (see below). In addition to police services, many First Nations have bylaw enforcement personnel, and some have "guardians" and "watchmen," who might be employed to look after sacred or special sites of the Nation, which are typically located off-reserve but within the Nation's ancestral lands. For example, the Haida watchman program looks after the spiritual, archaeological and historical sites throughout Haida Gwaii.

How policing under self-government arrangements works depends on whether it is under the BC treaty-making model or not, and who is providing the policing services (e.g., RCMP, municipal police force, First Nation police force). Under treaty arrangements, Nations have the option of creating municipal police forces on the same terms and conditions as a local or municipal government (essentially the First Nations–administered policing services model). In other cases, existing arrangements may remain the same or are left open to future agreements. Canada's approach to First Nations policing is set out in the First Nations Policing Policy (Public Safety Canada). A handbook on the policy is available.

***The* Province of British Columbia Provincial Police Service Agreement:** Policing on-reserve is typically provided by the RCMP and is not a First Nations responsibility under the *Indian Act*. Unlike many provinces, BC has no provincial police force. Consequently, through the BC *Police Act*, (R.S.B.C. 1996, c. 367), the RCMP is authorized to act as the provincial police force. In jurisdictions where there is no municipal police force, the RCMP provides policing services in accordance with the *Province of British Columbia Provincial Police Service Agreement* (April 1, 1992), including on reserves. This agreement, with minor changes, was renewed in 2012 and runs to 2032.

Although this agreement is the mechanism through which police services are provided on-reserve, it contains no specific mention of First Nations. Where the population of a municipality exceeds 5,000 people, the municipality may either set up its own municipal police force or come under the *Province of British Columbia Municipal Police Force Agreement* and have the RCMP provide services as modified and paid for in accordance with that agreement. Generally speaking, where the population of a municipality exceeds 5,000, there are different rules for cost-sharing of police services, which places a greater responsibility on the Province and consequently on local governments for paying for the RCMP services. Where a municipal police force provides services to a First Nation, there will typically be an agreement between that First Nation and the municipal police force. However, the RCMP provides by far the most policing services on First Nations lands in BC today.

RCMP First Nations Community Policing Services: Public Safety Canada, through the First Nations Policing Program (FNPP), funds First Nations Community Police Service (FNCPS) officers, and legacy programs such as the Aboriginal Community Constable Program, and the Band Constable Program

for First Nations. These programs provide supplemental law enforcement to First Nations communities through Community Tripartite Agreements (CTA). The RCMP provides the FNCPS officers and the program is managed provincially through the Division of Aboriginal Policing Services. The National Aboriginal Policing Services Branch provides support on the First Nations Policing Policy to its partners in the policing agreements section of Public Service Canada.

On April 1, 2014, Canada and British Columbia signed a revised framework agreement for the use of the RCMP FNCPS in BC. As outlined in this framework agreement, Canada, the Province and a First Nation community, or a group of First Nation communities, can enter into a CTA for the provision of a RCMP FNCPS. The CTA is different from the Provincial Police Service Agreement discussed above.

These CTAs fund a limited number of additional officers, based on the number of "Indians" living on-reserve, and create an ongoing and working relationship between the local police force and a First Nation. To be clear, these agreements are supplemental to the basic police services contract (e.g., *Criminal Code* enforcement, 911, emergency response, investigations). For 2014, 108.5 officers were authorized through CTAs to provide enhanced policing services to approximately 130 First Nations communities in BC. The provincial share of funding the FNCPS is 48 percent and the federal share is 52 percent.

The RCMP's responsibility is essentially to enforce the *Criminal Code* (R.S.C. 1985, c. C-46) and other federal and provincial laws, which can include *Indian Act* bylaws that are considered federal "regulations" under the *Interpretation Act* (R.S.C. 1985, c. I-21). However, the RCMP typically determines how policing is delivered, based on available resources. The reality in First Nations communities is that bylaws are rarely, if ever, enforced. Some Nations are contemplating variations on the standard agreement for self-governing Nations — where the law-making powers of the Nation extend significantly beyond *Indian Act* bylaw powers — with the RCMP explicitly agreeing to enforce First Nations laws.

First Nations–Administered Policing Services: Public Safety Canada also funds self-administered tribal police departments. While First Nations police forces, established through agreements between Canada, a province and a First Nation, are quite common in other parts of Canada, this is not the case in BC. There are two First Nations–administered policing services in BC: Stl'atl'imx Tribal Police Service (STPS) and Kitasoo-Xaixais Public Safety Department. Two others, Tsewulton and Ditidaht First Nation Public Safety and Policing Services, closed in 2000 and 2004 respectively. These police services operate in a manner similar to an independent municipal police department in BC. The service is governed by a police board with representation — usually a member of chief and council — from each of the communities served. All officers are appointed under the BC *Police Act* and are either experienced or graduates from the Police Academy of the Justice Institute of British Columbia.

The STPS was the first tribal police service in BC when it was established in December 1999 and evolved from a security program implemented by the Lillooet council in 1986. In 1992, a memorandum of understanding was signed by seven Stl'atl'imx Nation communities, the federal solicitor general and the attorney general of BC, which established the peacekeeping program as a tribal policing pilot project. The MOU included a protocol agreement with the RCMP, which, as the provincial police force, retained jurisdictional authority in the participating communities. Modifications were made to the initial MOU, including the signing on of additional Stl'atl'imx Nation communities. In 1999, the STPS was established as a designated policing unit and police force, with full jurisdictional authority under the *Police Act* (s. 4.1–4.2). A five-year tripartite agreement was signed by the 10 participating Stl'atl'imx communities and the federal and provincial governments. The STPS-RCMP Protocol Agreement was amended to reflect the increased role of STPS. The STPS continues to provide policing services in the 10 participating Stl'atl'imx communities. In 2012, the STPS had an authorized strength of 8 police officers. (The table below, entitled "First Nations Police Services in Canada," provides a complete list of First Nations police services across Canada.)

Bylaw Enforcement Officers: In addition to RCMP or municipal police officers or their own officers, some First Nations have bylaw enforcement officers to enforce their regulatory bylaws (e.g., noise, unsightly premises, traffic, licensing), matters usually addressed by local or municipal governments. As a general rule, these officers have limited powers and do not carry guns. They cannot enforce *Criminal Code* offences and cannot arrest or detain people. For the most part, they cite offences and issue tickets. However, bylaw officers do play an important role in educating people about First Nations laws and in reporting violations, creating a law enforcement presence on the ground in communities. Since Canada does not financially support bylaw officers, First Nations that employ such officers find their own resources to pay for them, often from property tax revenues.

Justice Sector Reviews: There is a significant amount of ongoing work looking at how enforcement services are being provided generally in Canada and with respect to First Nations. Specifically, Public Safety Canada is re-examining its policies respecting the First Nations Policing Program to ensure that they reflect current law enforcement needs in First Nations communities. This work is being undertaken as a result of the findings and recommendations of the federal Auditor General, described in Chapter 5, "First Nations Policing Program — Public Safety Canada," of the *Report of the Auditor General of Canada, Spring 2014*. In BC, the Ministry of Justice is also involved in justice reform initiatives, reviewing all aspects of the provincial justice system and aimed at modernizing and transforming justice services, including enforcement. The hope is to reduce delays, make the system less procedural, and ultimately reduce costs. Finally, the RCMP's Aboriginal Policing Services is also reviewing its policies to ensure that they are meeting First Nations needs, and the National Aboriginal Police Services is working with Public Safety Canada as a partner in its policy development.

Prosecution

When a government, including a First Nations government, makes laws, someone needs to prosecute infractions. First Nations have been and are considering who should prosecute their laws and how this will be paid for. There are different options.

With respect to the options for prosecuting *Indian Act* bylaw infractions, there are a number of administrative issues to consider. These include having provincial Crown prosecutors prosecute them in provincial courts, or even having a First Nations prosecutor to get the court registrar to place a matter on the provincial court list. There have been discussions over the years as to how to make prosecutions under the *Indian Act* more efficient. The reality today, unfortunately, is that few *Indian Act* bylaw infractions are actually enforced by the RCMP or bylaw officers and then prosecuted by the First Nation thereafter. Whether this stems from the absence of better administrative arrangements or from other factors is not clear.

In the case of sectoral or comprehensive governance arrangements, depending on its size, a Nation may appoint its own prosecutor, who may be a lawyer on retainer or an in-house prosecutor. In other cases, the service might be provided by Canada or British Columbia. This is normally a matter to be negotiated in the sectoral or comprehensive governance arrangement. Regardless, whoever conducts the prosecution must be mindful of the *Charter of Rights and Freedoms* and the rules of natural justice in conducting the prosecution (see below).

With some notable exceptions, at this point in the evolution of modern First Nations government, and wherever a Nation might be on the governance continuum, few First Nations are prosecuting violations of their laws. While this may be an undeveloped area, this reality needs to be addressed, as those living and doing business on-reserve expect that violators of community law will be prosecuted. In some instances, depending on the type of infraction, the reason for prosecutions being rare might be a lack of appropriate venues for prosecution (e.g., the court, tribunal or other body where a person is "judged").

Adjudication

Whether a Nation is governing under the *Indian Act* or is self-governing, it is important to know which court to go to for enforcement its bylaws and laws. The court must be able to properly interpret and apply the Nation's law. In the past, there have often been issues with which court has jurisdiction to hear cases involving First Nations laws. As a general rule, *Indian Act* bylaw violations are prosecuted in provincial court. Matters of an administrative nature are also generally dealt with in provincial court. All sectoral and comprehensive governance arrangements have provisions specifying which body (tribunal or court) will hear prosecutions for the violation of First Nation laws. By default, some agreements and arrangements refer to the "court of competent jurisdiction," which can lead to confusion. Where possible, it is good to clearly identify which court will hear what issues. Whatever the adjudicating entity, in order to have public respect and legal validity, it must meet basic natural justice and fairness requirements (i.e., speedy information on charges, absence of bias, opportunity to be heard, trial without unreasonable delay, innocent until proven guilty, etc.).

In Canada today, with the exception of the Yukon self-government arrangements, no First Nations or Aboriginal groups have had the jurisdiction to establish an Indigenous court recognized. There is also currently no general agreement with Canada for recognition of a First Nation court beyond the limited powers of a justice of the peace appointed under section 107 of the *Indian Act* to hear minor *Criminal Code* and First Nation bylaw offences occurring on-reserve — and even then, Canada has only ever appointed a few such justices, and none since the mid-1990s. While it is of some usefulness, section 107 is not seen as the best form of recognition of First Nations' jurisdiction to adjudicate violations of their laws. Many Nations want a court exclusively established under First Nations jurisdiction and recognized by all governments in Canada.

Recognizing that First Nations need appropriate and available venues to prosecute violations and hear cases under their bylaws and laws, some people prefer the option of establishing local community courts specific to a Nation and dealing only with its laws. In all such cases, the jurisdiction of the court would need to be carefully considered. Another option is to improve the justice of the peace system and create a regulatory framework applicable in a First Nation context. There are a few examples of Nations relying on their Aboriginal right of self-government to establish their own courts, where, for administrative certainty, the "judges" are cross-appointed by the federal government as justices of the peace (e.g., the Akwesasne Mohawk Court) and other adjudicative bodies. However, there remains the challenge of getting Canada to formally recognize such bodies and provide financial support for their administration.

Another option is the creation of a specialized First Nations court to deal with all First Nation prosecutions. In the past, there has been discussion of establishing either a First Nations court (under provincial superior court) or a special federal court under section 101 of the Constitution to deal with issues arising out of the exercise of jurisdiction by First Nations. There is merit to the idea that the court would gain experience and practice in dealing with First Nations law. However, given the diversity of First Nations and the range of bylaw- and law-making powers, its efficiency could be questioned. Options for establishing a First Nations court or courts were also substantively set out in Bill S-212, *First Nations Self-Government Recognition Act* (2012).

While a First Nation court established under First Nations jurisdiction should respect and follow rules of natural justice and fairness, its procedures, layout and other matters do not necessarily need to mirror other Canadian courts. The Canadian court system is often alien to First Nations citizens and designing one's own justice system can address these challenges. A First Nation court can reflect a Nation's traditions, practices and customs in its set-up and proceedings and allow participants to feel safer and more comfortable. For example, a fair court proceeding does not require the placement of the judge on a raised bench or the often intimidating procedural formality. First Nations have the opportunity to create their own truly fair and accommodating justice system.

Provincial sentencing courts for Aboriginal offenders: While we have not yet seen the establishment of a First Nations court in BC under First Nations jurisdiction, there are now three "courts" that operate as institutions of the provincial court system to handle the sentencing of Aboriginal offenders: in Kamloops, New Westminster and Duncan. These courts do not have any authority to try cases, but rather deal with the sentencing side of the provincial justice system. In all circumstances, cases are referred to the community courts from the provincial courts. Their popularity is growing, given the need to consider the circumstances of Aboriginal offenders in sentencing and meeting the requirements of the "Gladue test" (see textbox).

The focus of these courts is on restorative justice — through healing and getting people back into community and living productive and healthy lives. The courts often have their own unique format and look, and during the proceedings include community input, particularly from elders, who assist the process by sharing traditional teachings and making sentencing recommendations to the court.

The sentencing goals of these courts are to strengthen both the offender and the community and to incorporate a healing plan. The courts typically handle bail hearings, sentencing hearings and mediation of family court matters and are accessible to offenders who self-identify as Aboriginal and are intending to plead guilty to the charges they face. Of note is how quickly and often Aboriginal offenders are inclined to plead guilty, compared with non-Aboriginal offenders. Applicants must also produce a "Gladue report" that provides personal history details. In accordance with *Gladue*, judges must make special considerations when sentencing or setting bail for an Aboriginal person.

While not specifically a First Nations governance initiative, these courts do provide an opportunity for proceedings to take place in a less overwhelming atmosphere that better reflects First Nations perspectives on sentencing, reparation and the importance of healing both individuals and the community.

Administrative Boards and Tribunals: In addition to the focus on violations of a First Nation's law (prosecuting offences under a First Nation's laws), there are other areas where the adjudication of disputes or providing review mechanisms needs to be considered by a First Nation when developing its systems for the administration of justice.

Many First Nations now control their own elections and citizenship codes (see Section 3.6 — Citizenship and Section 3.8 — Elections). In these areas, there is a need for adjudication of disputes (election appeals, applications for citizenship, appeals of rejection of citizenship applications, etc.). First Nations establishing their own election or citizenship codes have generally created boards, committees or tribunals to carry out these functions. The rules guiding such bodies need not be complicated but should follow natural justice in allowing individuals the opportunity to be heard, with decisions made by an unbiased body.

There are other regulatory areas where a Nation may want to make laws (licensing of businesses, issuance of building permits, health and safety certifications, residential tenancy, etc.). Sections 81 and 83 of the *Indian Act* provide bylaw-making powers for a council in many of these areas. In addition, section 83 of the *Indian Act* provides property tax powers that require assessments and property taxation, and a mechanism for appeal and review of these decisions is needed (see Section 3.29 —Taxation). Sectoral and comprehensive governance arrangements reflect and expand on many of these powers. As a result, appeal and review bodies for these matters should be recognized as part of a Nation's jurisdiction and considered in any implementation plan for a bylaw or law, whether under the *Indian Act* or otherwise.

Judicial Review: Finally, other review mechanisms, such as judicial review, should be considered. Judicial review refers to one of the avenues through which individuals can seek remedies for government actions or decisions that they feel are unlawful. Typically, in countries such as Canada,

The Gladue Test

In *R. v. Gladue*, [1999] 1 SCR 688, the Supreme Court of Canada confirmed that the purpose of section 718.2(e) of the *Criminal Code* is to address the historical over-representation of Aboriginals in the criminal justice system and that the court can look to mitigating factors when sentencing. This direction applies to Aboriginals, regardless of place of residence or lifestyle. As a result of *Gladue* and the cases that have followed, the court and court officials have a positive obligation to consider systemic factors that bring the accused before the court. Judges may rely on the assistance of counsel, probation officers with pre-sentence reports or other means, but in any case must take into account the history of the accused before sentencing. Through applying the *Gladue* test, there is a greater likelihood that the use of jail terms for Aboriginal people may be reduced and restorative justice remedies applied. The principles and reasoning in *Gladue* were recently reaffirmed by the Supreme Court of Canada in *R. v. Ipeelee*, [2012] 1 SCR 433.

judicial review is a challenge to how a government actor or agency has exercised a power granted to it under a law (such as a statute). If that government actor or agency is acting beyond the authority it has been granted, or in a manner that is not fair or reasonable, that action may be challenged in court. In other words, judicial review is one of the mechanisms used to ensure that the machinery of government is acting lawfully — as, consistent with the principle of the rule of law, governments must also follow the law. For example, judicial review is one of the central avenues First Nations have used to seek redress for the Crown failing to respect Aboriginal title and rights, including failing to consult and accommodate. Judicial review is also a means for ensuring that governments act consistently, and not in an arbitrary manner — and having avenues such as judicial review available to citizens is one way of maintaining respect for and effectiveness of governments. Currently, the decisions or actions of First Nations governments may be subject to judicial review in a federal or provincial court, through various agreements and legislation if a challenge is brought forward by someone affected by that decision. Most of the comprehensive governance arrangements address this subject and provide for judicial review mechanisms. Some provide that the provincial *Judicial Review Procedure Act* (R.S.B.C. 1996, c. 241) applies to the First Nation's governing body. Another approach might be to have federal court review mechanisms apply. As First Nations continue to advance their jurisdiction and governance regimes, they may seek to develop and have recognized other legal institutions and approaches through which individuals may challenge their decisions and actions. However, Nations must always be aware of the complexity of these systems and the costs involved. Accordingly, reliance on provincial or federal court review procedures may prove to be a viable route, at least during the initial phase of re-establishing a Nation's justice systems.

Overall, when considering the administration of justice, Nations need to ensure that there is quick, fair and efficient access to adjudication under their laws and that the costs are manageable, both for the individuals involved and for the Nation administering the justice system.

Considerations when Establishing Systems for the Administration of Justice

Application of the Charter of Rights and Freedoms

One key consideration in developing any system of administration of justice involves the application of the *Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11), which enshrines protections for the rights of the individual. Canada's position in self-government negotiations is clear: that recognition of a Nation's governance powers (including administration of justice) involves a commitment to be bound by the charter.

This can cause problems for First Nations, because the charter may not always fit with Indigenous legal traditions and practices that favour collective over individual rights. At the same time, however, First Nations citizens, while respecting collective rights, have also come to expect protection of their individual rights as Canadians. There is therefore a need to balance these interests.

The need to find balance is clearly recognized in the charter itself. Section 25 provides that the charter shall not be interpreted or applied in a way that abrogates or derogates from the Aboriginal or treaty rights of Aboriginal peoples, including rights in the Royal Proclamation of 1763 or in a land claims agreement. While there have not been many rulings specific to the application of the charter to First Nations, some legal scholars have suggested that section 25, by providing recognition of Aboriginal rights, acts as a shield against the inappropriate application of the individual rights reflected in the charter. Thus, section 25 might be understood as a mechanism that ensures that the interpretation of the charter must take collective rights into account.

Given the constitutional nature of the charter, the explicit acknowledgement in section 25 of the charter of the uniqueness of First Nations circumstances and the significance given to the charter

by the courts, First Nations working to develop justice systems do so based on the reasonable assumption that courts will probably apply the charter to a First Nation's justice system with due regard to section 25. As First Nations develop their justice systems, they are necessarily mindful of finding the balance needed and determining ways to make section 25 work in practice. In many ways, section 25 can be viewed as a constitutional intersection between Indigenous legal traditions and Western legal traditions.

First Nations also need to be aware that as of June 2011, the *Canadian Human Rights Act* became applicable to First Nations governments operating under the *Indian Act*. The act also became applicable to First Nations governments governing outside of the *Indian Act* in accordance with comprehensive governance arrangements. Significantly, the *Canadian Human Rights Act* recognizes the place of Indigenous legal traditions and customary law. Where a complaint is made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, the act must be applied in a manner that respects First Nations legal traditions and customary laws. Notably, the act specifically speaks to the "balancing of individual rights and interests against collective rights and interests" so long as they are consistent with the principle of gender equality.

The Canadian Human Rights Commission has produced a handbook for First Nations on how the act applies and what First Nation governments need to consider.

Accessibility of Law

The rule of law is the legal principle, in Western legal traditions, that it should be the law that governs a nation, not the arbitrary decisions of individual government officials, whether elected, appointed or otherwise chosen, including civil servants. The rule of law implies that all citizens are subject to the laws of the nation, including those who make the laws. No one is held to be above the law. The rule of law is diminished when societies basically fail — for instance, because of social apathy, citizen ignorance of the law, or corruption. This can also happen where there is a lack of corrective mechanisms for dealing with administrative abuse (e.g., no independent judiciary with a rule-of-law culture, no ability to petition a grievance, or lack of regular elections). Along with the development of the rule of law, evolved traditions focused on law being written, accessible, publicly known and justiciable.

However, Indigenous legal traditions do not necessary involve the writing of laws or the writing down of decisions made in gatherings. Rather, there are often oral traditions for understanding the law of the group, where multiple witnesses in the collective remember important times and events, including what in Western traditions may be seen decisions or "precedents." Given the complexity of contemporary societies, laws need to be accessible and known, and this has meant that First Nations are having to grapple with how to achieve this in a manner that is respectful of the oral traditions and other Indigenous practices. In today's world, where customary values are embodied in First Nations institutions and procedures, they must be understandable to the citizens and all those affected by the laws. In the case of a modern institution, they must also be clear and understandable to whatever body is adjudicating First Nations law (e.g., courts or tribunals), regardless of whether it is a First Nations institution or an institution that is a part of the broader system of justice within Canada. This applies to all aspects of governance and law, whether prosecutions under First Nations laws, challenges to decisions, laws made by First Nations governments, or interpretation of those laws if third parties are relying on them.

Enactment of Laws

Before consideration is given to administering and enforcing a law, a First Nation must first make or enact the law. The way in which a law is enacted and its contents are important, as these elements may themselves become the subject of a challenge or review proceedings. Procedures for law enactment

are usually set out in the Nation's core institutional documents, often in its constitution (see Section 2.4 — The Constitution), and follow principles of openness, transparency and accountability. Law-enactment procedures should be strictly observed to minimize, when the law is enforced or decisions are made under it, the likelihood of challenges to its validity based on how it was made.

Drafting of Laws

People need to know what laws apply to them, and all governance arrangements include provisions for laws to be publicly available. First Nations governments need to consider the drafting quality of their laws. While there are precedents for laws in many of the sectoral governance initiatives (e.g., model land codes and financial management laws), there will be great diversity in the laws made in many areas. This can be seen in the hundreds of ordinances already enacted and set out in the tables found at the end of the various chapters in Section 3. Sample laws are helpful, but cannot be simply adopted without analysis of their suitability to an individual Nation's circumstance. Drafting laws is difficult. All of the provinces and the federal government have experienced legal teams that draft legislation, regulations and other key documents. Some First Nations are developing this expertise, but for the most part remain too diversified and have limited resources. There has been talk of establishing a body to assist First Nations in drafting laws, once the policy outline for the law has been developed in the community. This merits further discussion.

Record-Keeping

Meticulous record-keeping is required in any court system, so that precedents can guide future decisions and appeals will be well grounded. Keeping records can be a much more expensive function than some might imagine. While cost should not be a deciding factor in establishing a court or tribunal, it does add to the attraction of having general courts that are well versed in and willing to apply First Nation law. The importance of record-keeping is also related to questions of accessibility of law, discussed above. In addition, with all of the approaches First Nations are taking with respect to ensuring viable systems for the administration of justice, as described in this chapter, there is also the need for a First Nation's adjudicative body's decision to be recognized beyond its geographical boundaries — to give "teeth" to a ruling.

Cost of Running a Justice System

Running a police force and prosecuting laws and adjudicating them is expensive. Despite the costs, of course, all governments must find ways to enforce their laws or there will be anarchy. Nevertheless, First Nations must be mindful of these costs when embarking upon self-government and when considering their options for establishing systems for the administration of justice. The costs of financing First Nations governments are discussed in detail in Section 4 — Financing First Nations Governance. However, it should be noted that, in implementing self-government, First Nations have faced hurdles when they seek to use and rely on external institutions to enforce, prosecute and adjudicate their laws.

With respect to policing, as discussed above, there has been a reluctance on the part of the RCMP to enforce First Nations bylaws and laws, if they will enforce them at all, which means that this is left to community bylaw or law enforcement officers. Further, some Nations have encountered hurdles when seeking to have the BC courts adjudicate their bylaws and laws and enforce orders of administrative bodies, because of cost, among other factors. For example, and although ultimately the Provincial Court was required to hear matters emanating from Westbank First Nation law, the administrative judge of the court made these telling comments in an earlier judgment involving Westbank, *Waterslide v. Bolduc (Westbank First Nation)* [2006] CNLR 319:

> It is not reasonable to imagine … the BC legislature accepted a potential for there to be a capacity for jurisdiction to be "conferred or imposed" on judges of the Provincial Court by every one of the First Nations that are enacting by-laws under the *Indian Act*, or pursuant to another Agreement or Act promulgated by the government of Canada, with the attendant very real potential for a plethora of different laws with no assurance of consistency between those laws and with the potential for substantive new demands for provincial justice resources.

Indeed, this matter required the intervention of the Attorney General of BC, with representations made to the court that it was, in fact, the intention of the *Westbank First Nation Self-Government Agreement* that the Provincial Court would be hearing matters under Westbank law because there was no where else for them to be heard practically.

On a similar note, and in addition to the political desire to establish an adjudicatory body that would better ensure the application of Indigenous legal traditions and practices, part of the reason for the Teslin people setting up their own court was a reluctance on the part of the territorial courts to hear their cases. In practice, though, in accordance with the agreement to establish the court entered into under their self-governance arrangements as a part of the Yukon Treaty, the two legal systems in the Yukon are to a substantial degree coordinated and the Yukon Supreme Court will hear appeals from the Teslin Court in some circumstances (e.g., a challenge under the *Charter of Rights and Freedoms*, or a situation where the Teslin Court exercised authority beyond its jurisdiction).

What this experience shows us is that, while in some cases there may be reluctance, for whatever political or other reasons, to recognize broad First Nations jurisdiction with respect to the administration of justice (as is the case in BC), or even where it is recognized (Yukon), there is also not always a willingness for First Nations to have access to alternatives in the non-Aboriginal system. This is obviously troubling, and something First Nations, federal and provincial policy-makers and negotiators must be mindful of when considering self-government options. Whatever approach a First Nation takes, in order for self-government to work, there must be access to a fully functioning justice system.

INDIAN ACT GOVERNANCE

Under the *Indian Act*, a First Nation can include enforcement provisions in its bylaws, with maximum penalties on summary conviction of $1,000 and six months imprisonment. Canada and the First Nation prosecute infractions, although, as stated above, this is rare. Except for matters expressly reserved for the federal court under the *Indian Act*, and except for challenges to a council's jurisdiction under the *Indian Act*, provincial courts can hear cases on "Indians" and "Lands reserved for Indians." They can also hear cases based on customary law, whether that law is recognized under an agreement with the Crown or not, although such cases are also uncommon and somewhat difficult to try given the unfamiliarity of the court with Indigenous legal traditions what constitutes customary law.

Nations can appoint bylaw officers under the bylaw-making power, but the authority under the *Indian Act* is neither specific nor clear. Offences under the *Indian Act* are created in section 30, trespass; section 81(2) and (3), enforcement of bylaws; section 90(3), restriction on transfer of property; section 91, trading; section 92, trading without a licence; and section 93, removal of material from reserves.

Under section 107 of the *Indian Act*, the governor in council may appoint justices of the peace with the powers and authority regarding any offence under the *Indian Act* or under the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering, and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian. There is currently a moratorium on appointing justices under this section.

SECTORAL GOVERNANCE INITIATIVES

There is no specific sectoral initiative addressing the administration of justice per se as an exercise of First Nations jurisdiction, although several sectoral governance initiatives specifically address the justice aspects of the subject they are considering and all initiatives have some administration of justice component.

Framework Agreement on First Nation Land Management and the *First Nations Land Management Act*

The *Framework Agreement on First Nation Land Management* (1996) (Framework Agreement) and the *First Nations Land Management Act* (S.C. 1999, c. 24) (FNLMA) provide for the enforcement of First Nations land laws, including environmental laws (sections 19 and 24 of the Framework Agreement and sections 20(3), 21(1)(2), 22, 23 and 24 of FNLMA). Specifically, section 19.1 of the Framework Agreement sets out that:

> 19.1 to enforce its land code and its First Nation laws, a First Nation will have the power to
> (a) establish offences that are punishable on summary conviction;
> (b) provide for fines, imprisonment, restitution, community service, and alternate means for achieving compliance; and
> (c) establish comprehensive enforcement procedures consistent with federal law, including inspections, searches, seizures and compulsory sampling, testing and the production of information.

With respect to environmental protection the Framework Agreement sets out that:

> 24.3 The First Nation environmental protection standards and punishments will have at least the same effect as those in the laws of the province in which the First Nation is situated.

Further, the Framework Agreement recognizes that a Nation that has made a land code can appoint justices of the peace to enforce the Nation's laws, including adjudication of offences:

> 19.3 Persons may be appointed by the First Nation or the Governor in Council to act as justices of the peace for the purposes of enforcement. If no justice of the peace is appointed, then First Nation laws will be enforced through the provincial courts.

This is an important power, one of the few examples of recognition of First Nation administration of justice powers. If no justices of the peace are appointed for a First Nation, its laws will be enforced through a court of competent jurisdiction of the province in which its land is situated.

Under the First Nations land management initiative, First Nations are considering a number of strategies with respect to the administration of justice, including First Nation law enforcement officers (including environment) and/or other police services; summary conviction and ticketing procedures, and working with provinces in implementing such systems; courts (e.g., First Nation justices of the peace or use of provincial courts); prosecution (including costs of prosecution); and punishment (fines, collection, other orders).

One of the strategies involves operational First Nations adopting a system similar to that under the federal *Contraventions Act* (S.C. 1992, c. 47). The *Contraventions Act* allows the federal government to designate federal statutory offences as "contraventions," so they can be processed using a ticketing

system, instead of the summary conviction process included in the *Criminal Code*. The concept is that operational First Nations in a province would each adopt a similar model. For this concept to work, it is assumed that First Nation enforcement laws would be substantially the same for all First Nations in each province. Further, an administrative agreement would need to be negotiated with each province to implement First Nation laws using the provincial courts and enforcement system. The negotiation of an agreement, as well as the communication and training required of court personnel and enforcement officers, are all fundamental conditions for the successful implementation of this concept. It is anticipated that BC could be a pilot province for this initiative, given the number of operational First Nations in the province. However, 12 years after its adoption, the federal *Contraventions Act* is still not operational in some jurisdictions, in large part because provincial governments have been unwilling to focus the time and resources needed to work with the federal government to implement the act. For various reasons, a provincial government may conclude that the implementation of the act is not a priority and they will not allocate the required resources. First Nations may face similar resistance. However, BC is one province that has worked with Canada to implement the *Contraventions Act*. The justice of the peace option is still available, and some, or many, First Nations may wish to explore it further. None has done so to date.

For more in-depth discussion of the Framework Agreement, see Section 3.20 — Lands and Land Management.

***The* First Nations Fiscal Management Act**

Another example of justice powers in a sectoral governance initiative is found in the *First Nations Fiscal Management Act* (S.C. 2005, c. 9) (FNFMA). Under this act, the First Nations Tax Commission acts as a quasi-judicial body, in that it can hear and make a ruling on whether a First Nation's local revenue law is being properly administered, as well as on issues arising from the implementation of the act. First Nations also have the power to establish administrative appeal bodies under the FNFMA (e.g., assessment appeal boards). For a more in-depth discussion of the FNFMA, see Section 3.11 — Financial Administration.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All of the comprehensive governance arrangements address the various aspects of the administration of justice considered above.

Tsawwassen First Nation

The Tsawwassen legislature has enacted some 25 laws, many of which regulate the activities of Tsawwassen citizens and entities and other parties on Tsawwassen lands and establish certain obligations that must be met. Tsawwassen is responsible for the administration and enforcement of these laws. The legislature establishes processes and procedures to enforce Tsawwassen laws, including determining the guilt of parties charged with offences. Tsawwassen also establishes its own appeal procedures, including those for administrative decisions. The legislature has passed an *Administrative Review and Judicial Proceedings Act*, which establishes processes and procedures and creates a Judicial Council. Under many Tsawwassen laws, the Judicial Council hears cases and reviews or appeals of decisions or actions of the Tsawwassen government or its employees. The Judicial Council also has authority to encourage the use of consensual alternative dispute resolution methods in an effort to reduce reliance on the court system.

Under the *Administrative Review and Judicial Proceedings Act*, the Judicial Council's final orders will be enforced by the Provincial or Supreme Courts of British Columbia, as if they were orders of either of those courts. Some final orders of the Judicial Council may be appealed to the British Columbia

First Nations Justice — The Teslin-Tlingit Model

In February 2011, the already self-governing Teslin-Tlingit (since 1995) reached an administration of justice agreement with AANDC and the Yukon government, including the establishment of the Teslin Tlingit Justice Council (composed of five clan leaders) and the Peacemaker Court.

The Justice Council appoints the peacemakers. The Peacemaker Court prosecutes violations of Teslin-Tlingit legislation, can impose financial penalties (up to $5,000, with the exception of as much as $300,000 for environmental offences), impose jail terms of up to six months, and resolve disputes based on traditional processes.

The Peacemaker Court was designed to have two types of services — consent-based dispute resolution and adjudication and appeal services. It can also hear administrative appeals and conduct reviews. Its decisions may be appealed to the Supreme Court of the Yukon Territory. Criminal or national security cases are not included.

Yukon also has a First Nation Reintegration Program that assists inmates in transitioning back into society. The goal is to reduce recidivism and the repetition of offences.

Supreme Court. This includes administrative decisions where Tsawwassen law provides a right of appeal. Where there is no right of appeal to the Supreme Court, the order or decision of the Judicial Council is final. The act provides for the appointment of a Tsawwassen First Nation prosecutor, responsible for prosecutions under Tsawwassen laws. The Judicial Council also has the power of judicial review, which is the power to determine if Tsawwassen laws are valid under the Tsawwassen Constitution and treaty. These decisions may be appealed to the courts of British Columbia. The Judicial Council was put to its first real test in an election appeal following the 2013 election and functioned as intended.

Tsawwassen may appoint enforcement officers, including by contract with outside police forces. If Tsawwassen establishes its own police force, the force would be a municipal force governed by provincial rules in accordance with the *Police Act*.

Nisga'a Nation

While the Nisga'a have not yet drawn down all their powers with respect to the administration of justice as set out below, they have established a Nisga'a Administrative Review Board under the *Nisga'a Administrative Decisions Review Act*. The board can review decisions of Nisga'a officials if a Nisga'a enactment assigns it the authority to do so and can consider whether decisions were fairly made. The board cannot become a substitute decision-maker. The same board has authority to hear matters concerning elections (nominations, running of the poll, etc.). The Nisga'a government has authority to create "offences" punishable by summary conviction. The Nisga'a have also adopted the *Nisga'a Offence Act* (NLGSR 2007, c. 2), which establishes a ticketing system for contraventions of Nisga'a law. This act applies to an offence that is specified in a Nisga'a enactment to be an offence punishable under the act (e.g., *Nisga'a Fisheries and Wildlife Act* (NLGRS 2012), *Nisga'a Forest Act* (NLGRS 2012)). Unless the Nisga'a create something different, a Nisga'a prosecutor will prosecute such offences in provincial court. Agreements can be entered into with other governments relating to the enforcement of Nisga'a laws, provided that questions of cost and control are satisfactorily addressed. Anyone can oppose the validity of a Nisga'a law. In the Nisga'a example, a separate Nisga'a institution has not been created, and any challenge to the validity of a law would go to the BC Supreme Court.

Westbank First Nation

Westbank has enacted approximately 40 laws. These typically include standard provisions for offences, setting maximum penalties in accordance with the *Westbank First Nation Self-Government Agreement*. In addition, there are extraordinary offences and enforcement powers for environmental protection infractions, but these have not been exercised. Westbank has appointed law-enforcement officers to enforce its laws. The RCMP is also responsible for enforcing Westbank law. Prosecution under Westbank law is in the provincial court, with a Westbank prosecutor. Westbank has an in-house legal counsel who acts as prosecutor for most infractions. In addition, Westbank has established a number of special-purpose adjudicative bodies or offices. A ticketing and administrative structure has been established under *WFN Notice Enforcement Law No. 2008-02* and *WFN Dispute Adjudication Law No. 2008-01*. These laws provide for a more efficient and cost-effective way to hear disputes concerning infractions of Westbank law that are of a municipal nature (e.g., unsightly premises, noise, parking). This system obviates the need to have these types of disputes heard in provincial court. Under the *WFN Residential Premises Law*, Westbank has established an "adjudicator" who can hear landlord and tenant disputes, these matters being appealable to provincial court. Adjudicator decisions are registered as orders of the court. Westbank has also established administrative appeal procedures for reviewing decisions of the administration with respect to program and service delivery. This less formal process is set out not in law but in a policy of the Nation. Finally, under its property assessment bylaws, which are still made under the *Indian Act*, Westbank has established an Assessment Appeal Board, before which ratepayers can challenge the valuation of their interests in Westbank Lands.

Maa-nulth

The member communities that are signatories to the *Maa-nulth First Nations Final Agreement* make their laws individually, although frequently the laws will cover similar subjects and use similar language. Regarding administration of justice, they have each created enforcement acts, while Huu-ay-aht also has a criminal convictions act, a tribunal act and an offences and law enforcement act. The enforcement acts speak to offences, enforcement, compliance, ticketing and review. They do not list actual infractions and penalties. A Maa-nulth legal team assists the communities when they are drafting laws. The Maa-nulth constitution leaves it to the full Maa-nulth council to enact laws.

Yale and Tla'amin

Yale and Tla'amin, both have language in their final agreements similar to Tsawwassen that will afford them the opportunity to administer justice in a range of areas, providing it remains consistent with Canadian law. It remains to be seen what institutions they develop or create.

Table — Comprehensive Governance Arrangements

	ENFORCEMENT (POLICING)	PROSECUTION	ADJUDICATION	APPEAL MECHANISMS	CONFLICT OF LAWS
Sechelt	No provisions.	The *Sechelt Indian Band Self-Government Act* does not identify responsibility for prosecuting matters arising from Sechelt laws.	The *Sechelt Indian Band Self-Government Act*. does not state which court has jurisdiction to enforce Sechelt laws or hear disputes with respect to Sechelt laws. Provincial and federal laws of general application apply to the Sechelt Indian Band and its members. Therefore, a review of the relevant federal or provincial legislation will determine which court has jurisdiction to enforce Sechelt laws or hear disputes with respect to Sechelt laws. (s. 37–38)	No provisions.	N/A
Westbank	The Westbank First Nation has jurisdiction to appoint and assign duties to officials for the enforcement of Westbank law on Westbank Lands and appoint officials as commissioners for the taking of oaths. Where no officials have been appointed to enforce Westbank laws, the Royal Canadian Mounted Police are responsible for enforcing offences under Westbank laws. (Part XVIII, s. 195–196)	Westbank First Nation can retain its own prosecutor, enter into an agreement with Canada to arrange for federal agents to prosecute the offence, or enter into an agreement with Canada and the province to arrange for a provincial prosecutor. (Part XVIII, s. 200)	The Provincial Court of BC has jurisdiction to adjudicate prosecutions involving Westbank laws. The summary conviction procedures of Part XXVII of the *Criminal Code* apply to prosecution of offences of Westbank law. (Part XVII, s. 201)	Appeals from decisions of the Provincial Court regarding the enforcement of Westbank laws would effectively be governed by relevant provincial legislation that provides for the establishment and operation of this court.	Westbank law prevails. (Part XVII, s. 203)

Table — Comprehensive Governance Arrangements... *continued*

	ENFORCEMENT (POLICING)	PROSECUTION	ADJUDICATION	APPEAL MECHANISMS	CONFLICT OF LAWS
Nisga'a	The Nisga'a Lisims Government has authority to establish a police board and a police service with the authority to enforce Nisga'a laws, the laws of BC, the criminal law and other federal laws within Nisga'a Lands. (Ch. 12, s. 1, 2.b, 3)	The Nisga'a Lisims Government is responsible for prosecuting all matters arising from Nisga'a laws, including appeals. (Ch. 12, s. 51)	The Nisga'a have authority to establish a court that would have jurisdiction to adjudicate prosecutions under Nisga'a laws; hear and decide disputes arising under Nisga'a laws between Nisga'a citizens on Nisga'a Lands; review administrative decisions of Nisga'a Public Institutions and impose penalties and other remedies under Nisga'a laws, BC laws or the laws of Canada in accordance with generally accepted principles of sentencing. An order of the Nisga'a Court may be registered in the BC Supreme Court and once registered, will be enforceable as an order of the BC Supreme Court. (Ch. 12, s. 30, 38, 41 and 49) Until a Court is established, the Nisga'a prosecutions under Nisga'a laws will be heard in the Provincial Court of BC. (Ch. 12, s. 31)	The Supreme Court of BC has authority to hear appeals from any decisions of the Nisga'a Court, including prosecutions under Nisga'a laws; reviews of administrative decisions; and disputes between Nisga'a citizens on Nisga'a lands arising under Nisga'a laws. (Ch. 12, s. 45, 46, 47)	No Provisions.
Tsawwassen	The Tsawwassen First Nation does not have the authority to establish a police force. (Ch. 16, s. 140(a)) However, Tsawwassen can negotiate the provision of federal or provincial enforcement officials or police forces by Canada or BC. (Ch. 16, s. 138); pursue the establishment of a police force under provincial law (Ch. 16, s. 141); or appoint its own enforcement officials. (Ch. 16, s. 139)	The Tsawwassen First Nation is responsible for all aspects of any prosecution under Tsawwassen Law, including appeals. (Ch. 16, s. 148)	Tsawwassen does not have authority to establish a court. (Ch. 16, s. 140(c)) At Tsawwassen's request, Canada and BC would be willing to discuss and explore options for the establishment of a court, other than a provincial court with inherent jurisdiction or a federal court. (Ch. 16, s. 142) Proceedings to enforce Tsawwassen laws must be brought before the Supreme Court of BC. (Ch. 16, s. 145) The Provincial Court of BC has jurisdiction to hear prosecutions of offences under Tsawwassen law. (Ch. 16, s. 146) The Provincial Court or Supreme Court of BC, as the case may be, has jurisdiction to hear disputes between individuals under Tsawwassen law. (Ch. 16, s. 150)	Appeals from decisions of the Provincial Court or Supreme Court of BC regarding the enforcement of Tsawwassen laws would effectively be governed by relevant provincial legislation that provides for the establishment and operation of these courts.	Federal or provincial law applies in the case of enforcement of Tsawwassen law. (Ch. 16, s. 144)

Table — Comprehensive Governance Arrangements... *continued*

	ENFORCEMENT (POLICING)	PROSECUTION	ADJUDICATION	APPEAL MECHANISMS	CONFLICT OF LAWS
Maa-nulth	The Maa-nulth First Nations do not have the authority to establish a police force. (s. 13.32.3(a)) Maa-nulth First Nations may make laws to appoint its own enforcement officials. (s. 13.32.1(a)) Maa-nulth First Nations can negotiate the provision of federal or provincial enforcement officials or police forces by Canada or BC, and pursue the establishment of a police force under provincial law (s. 13.32.2 and 13.32.3)	Each Maa-nulth First Nation is responsible for the prosecution of all matters arising from a Maa-nulth First Nation law of the applicable Maa-nulth First Nation Government. (s. 13.33.6)	Maa-nulth does not have authority to establish a court. (s. 13.33.8) The Provincial Court has jurisdiction to hear prosecutions of offences under Maa-nulth laws and disputes between individuals under Maa-nulth laws, if those disputes are within the jurisdiction of the Provincial Court under federal or provincial law. (s. 13.33.1 and 13.33.4) The BC Supreme Court has jurisdiction to hear disputes between individuals under Maa-nulth laws, if those matters are within the jurisdiction of the Supreme Court under federal Law or provincial law. (s. 13.33.5)	Appeals from decisions of the Provincial Court or Supreme Court of BC regarding the enforcement of Maa-nulth laws would effectively be governed by relevant provincial legislation that provides for the establishment and operation of these courts.	Federal or provincial law applies in the case of enforcement of Maa-nulth First Nations law. (s. 13.32.6)
Yale	Yale First Nation does not have the authority to establish a police force. (s. 3.33.4) Yale First Nation can negotiate for the enforcement of Yale First Nation law by a police force or federal or provincial enforcement officials and pursue the establishment of a police force under provincial law. (s. 3.33.2 and 3.33.4)	Yale First Nation is responsible for the prosecution of all matters arising from Yale First Nation law. (s. 3.34.4)	Yale First Nation does not have the authority to establish a court. (s. 3.34.6) The Provincial Court of British Columbia has jurisdiction to hear prosecutions of offences under Yale First Nation law. (s. 3.34.1) The Provincial Court of British Columbia or the Supreme Court of British Columbia, as the case may be, has jurisdiction to hear legal disputes arising between individuals under Yale First Nation law. (s. 3.34.3)	Appeals from decisions of the Provincial Court or Supreme Court of BC regarding the enforcement of Yale First Nation laws would effectively be governed by relevant provincial legislation that provides for the establishment and operation of these courts.	Federal or provincial law applies in the case of enforcement of Yale First Nation law. (s. 3.33.7)
Tla'amin	Tla'amin does not have the authority to establish a police force. (Ch. 15, s. 156) Tla'amin can negotiate for the enforcement of Tla'amin law by a police force or federal or provincial enforcement officials and pursue the establishment of a police force under provincial law. (Ch. 15, s. 153 and 156)	The Tla'amin Nation is responsible for the prosecution of all matters arising from Tla'amin law. (Ch. 15, s. 168)	The Provincial Court of British Columbia has jurisdiction to hear prosecutions of offences under Tla'amin law. (Ch. 15, s. 161) The Provincial Court of British Columbia or the Supreme Court of British Columbia has jurisdiction to hear legal disputes arising between persons under Tla'amin law. (Ch. 15, s. 167) The Tla'amin Nation law does not have the authority to establish a court. (Ch. 15, s. 170)	Appeals from decisions of the Provincial Court or Supreme Court of BC regarding the enforcement of Tla'amin laws would effectively be governed by relevant provincial legislation that provides for the establishment and operation of these courts.	Federal or provincial law applies in the case of enforcement of Tla'amin law. (Ch. 15, s. 155)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(c) Observance of Law and Order			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Gwa'sala-'Nakwaxda'xw Nation	1994.01	LAW AND ORDER	Bylaw Respecting a Judicial Council
Bylaws — Section 81(1)(r) Summary conviction of a fine or imprisonment for a term or both for violation of a bylaw made			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Cowichan	2009-01	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting The Ban Of Sale, Possession And Use Of Fireworks
Halfway River First Nation	Unnumbered	ANIMAL CONTROL	Bylaw Respecting Cattle Control
Lower Kootenay	Unnumbered	PENALTY PROVISIONS	Bylaw Respecting Penalties
Musqueam	Unnumbered	CONSTRUCTION	Bylaw Respecting Health And Safety Of Rented Residential Property
Soda Creek	2010.01	ANIMAL CONTROL	Bylaw Respecting The Care And Control Of Animals
Soda Creek	2010.02	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Open Air Fires
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Huu-ay-aht First Nation		Criminal Convictions Regulation (Code Of Conduct And Conflict Of Interest Act)	
Huu-ay-aht First Nation		Criminal Convictions Regulation Elections	
Huu-ay-aht First Nation		Offence and Law Enforcement Act	
Huu-ay-aht First Nation		Compliance Notice and Ticket Amendment Regulation	
Ka:'yu:'k't'h'/Che:k'tles7et'h First Nation		Enforcement Act	
Nisga'a Lisims Government	2007/02	Nisga'a Offence Act	
Sechelt Indian Band	1987-01	Documents At Meetings	
Sechelt Indian Band (SIGD)	1988-17	Actions & Executions	
Toquaht Nation		Enforcement Act	
Tsawwassen First Nation		TFN Administrative Review And Judicial Proceedings Act	
Tsawwassen First Nation	Nov 2009	Judicial Clerk Regulation	
Tsawwassen First Nation	Mar 2011	Administrative Review And Judicial Proceedings Regulation	
Tsawwassen First Nation	Jun 2009	TFN Judicial Council Rules Of Procedure	
Tsawwassen First Nation	Jun 2010	Consolidated Rules Of Procedures	
Tsawwassen First Nation	Apr 2009	TFN Laws Enforcement Act	
Tsawwassen First Nation	059-2009	TFN Ticket Regulation	
Tsawwassen First Nation	051-2013	Enforcement Officer Regulation	
Uchucklesaht Tribe		Enforcement Act	
Ucluelet First Nations		Enforcement Act	
Ucluelet First Nations	40/2014	Enforcement Framework Amendment Act No.1	
Westbank First Nation	2008-01	WFN Dispute Adjudication Law	
Westbank First Nation	2008-02	WFN Notice Enforcement Law	
Westbank First Nation	Dec 2008	WFN Law Penalty Schedule	

Table — Canadian First Nations Police Services

CANADIAN FIRST NATIONS POLICE SERVICES	
British Columbia	Kitasoo Xaixais Tribal Police Service
	Stl'atlimx Tribal Police
Alberta	Blood Tribe Police Service
	Lesser Slave Lake Regional Police Service
	Louis Bull Police Service
	North Peace Tribal Police Service
	Tssu T'ina Nation Police Service
Saskatchewan	File Hill First Nations Police Service
Manitoba	Dakota Ojibway Police Service
Ontario	Akwesasne Mohawk Police Service
	Anishinabek Police Service
	Batchewana First Nation
	Georgina Island First Nations Police Service
	Lac Seul Police Service
	Mnjikaning Police Service
	Nishnawbe-Aski Police Service
	Six Nations Police
	Treaty Three Police Service
	Uccm Anishnaabe Police
	Wikwemikong Police Service
Quebec	Akwesasne Police Service
	Barriere Lake First Nations Police Service
	Betsiamites First Nations Police Service
	Chisasibi First Nations Police Service
	Eagle Village Kipawa First Nations Police Service
	Eastmain First Nations Police Service
	Essipit First Nations Police Service
	Gesgapegiag First Nations Police Service
	Kahnawake First Nations Police Service
	Kativik First Nations Regional Police Service
	Kawawachicamach First Nations
	Kitigan Zibi Anishinabeg First Nations Police Service
	La Romaine First Nations Police Service
	Lac Simon First Nations Police Service
	Listuguj First Nations Police Service
	Manawan First Nations Police Service
	Masheuiatsh First Nations Police Service
	Mingan First Nations Police Service
	Mistissini First Nations Police Service
	Montagnais De Scheferville First Nations Police Service
	Natashquan First Nations Police Service
	Nemaska First Nations Police Service
	Obedjiwan First Nations Police Service
	Odanak First Nations Police Service
	Ouje-Bougoumou First Nations Police Service

Table — Canadian First Nations Police Services... *continued*

Quebec... *continued*	Pakua Shipi First Nations Police Service
	Pikogan First Nations Police Service
	Timiskaming First Nations Police Service
	Uashat Mak Mani-Utenam First Nations Police Service
	Waskaganish First Nations Police Service
	Waswanipi First Nations Police Service
	Wemindji First Nations Police Service
	Wemotaci First Nations Police Service
	Wendake First Nations Police Service
	Whapmagoostui First Nations Police Service
	Winneway First Nations Police Service
	Wolinak Frist Nations Police Service

Table — RCMP First Nations Community Policing Service (FNCPS)

RCMP FIRST NATIONS COMMUNITY POLICING SERVICE (FNCPS)	
British Columbia First Nation Community Tripartite Agreements (CTA) to June 2012	
DETACHMENT	**COMMUNITIES PARTICIPATING**
100 Mile House	Canim Lake
Agassiz	Scowlitz, Kwantlen, Soowahlie, Shxw'ow'hamel, Seabird Island, Chawathil, Kwaw-Kwaw-Apilt, Sts'ailes, Cheam
Ahousaht	Ahousaht
Alexis Creek	Alexis Creek, Xeni Gwet'in, Stone
Anahim Lake	Ulkatcho
Bella Coola	Nuxalk
Burns Lake	Burns Lake, Cheslatta, Lake Babine, Nee-Tahi-Buhn, Skin Tyee, Wet'suwet'en
Campbell River	Cape Mudge, Campbell River, Homalco
Chase	Neskonlith, Little Shuswap Lake
Chetwynd	West Moberly, Saulteau
Cranbrook	?Akisq'nuk, Lower Kootenay, St. Mary's, Tobacco Plains
Dease Lake	Tahltan, Iskut, Dease River
Enderby	Spallumcheen
Fort Nelson	Fort Nelson, Prophet River
Fort. St. James	Tl'azt'en, Nak'azdli
Fort St. John	Blueberry River, Doig River, Halfway River
Kamloops	Kamloops, Whispering Pines/Clinton, Skeetchestn
Kelowna	Westbank
Kitimat	Kitamaat
Ladysmith	Chemainus
Lake Cowichan	Ditidaht
Lax Kw'alaams	Lax Kw'alaams
Lisims/Nass Valley	Gitwinksihlkw, Laxqalts'ap, New Aiyansh, Gingolx
Lytton	Lytton, Skuppah, Kanaka Bar, Cooks Ferry, Nicomen, Siska
Mackenzie	McLeod Lake
Massett	Old Massett
Nanaimo	Nanaimo (Snuneymuxw), Nanoose
New Hazelton	Gitanmaax, Kispiox, Gitwangak, Gitsegukla, Gitanyow, Hagwilget Village, Glen Vowell
North Cowichan/Duncan	Cowichan
Penticton	Penticton

Table — RCMP First Nations Community Policing Service (FNCPS)... ***continued***

DETACHMENT	COMMUNITIES PARTICIPATING
Port Alberni	Huu-ay-aht, Hupacasath, Tseshaht, Uckucklesaht
Port Hardy	Kwakiutl, Gwa'sala-'Nakwaxda'xw, Quatsino
Port McNeill (Tahsis)	Ka:'yu:'k't'h'/Che:k'tles7et'h
Powell River	Sliammon
Prince Rupert	Gitxaala, Hartley Bay, Kitasoo
Queen Charlotte	Skidegate
Quesnel	Red Bluff, Nazko, Alexandria, Kluskus
Sidney/North Saanich	Pauquachin, Tsartlip, Tsawout, Tseycum
Sunshine Coast	Sechelt
Surrey	Semiahmoo
Takla Landing	Takla Lake
Terrace	Kitsumkalum, Kitselas
Tsay Keh	Tsay Keh Dene, Kwadacha
Vanderhoof	Saik'uz
Vernon	Okanagan
West Shore	Songhees, Esquimalt
Williams Lake	Canoe Creek, Esketemc, Williams Lake, Soda Creek

RESOURCES

First Nations

Aboriginal Human Resource Council
708 – 2nd Avenue North
Saskatoon, SK S7K 2E1
Phone: 306-956-5360
Toll-free: 1-866-711-5091
Fax: 306-956-5361
www.aboriginalhr.ca

Indigenous Bar Association
#9, 9785 – 152B Street
Surrey, BC V3R 9W2
Phone: 604-951-8807
Fax: 604-951-8806
www.indigenousbar.ca

Native Court workers and Counseling Association of British Columbia
207 – 1999 Marine Drive
North Vancouver, BC V7P 3J3
Phone: 604-985-5355
Toll-free: 1-877-811-1190
Fax: 604-985-8933
Email: nccabc@nccabc.net
www.nccabc.ca

Stl'atl'imx Tribal Police Service (STPS)

Lillooet Department
879 Main St – PO Box 488
Lillooet, BC V0K 1V0
Phone: 250-256-7784
Fax: 250-256-4600

Lil'wat Department
357 IR #10 Road, PO Box 5
Mount Currie, BC V0N 2K0
Phone: 604-894-6124
Fax: 604-894-6185

Email: chief.officer@stlatlimxpolice.ca
www.stlatlimxpolice.ca

Union of BC Indian Chiefs

Vancouver Office
500 – 342 Water Street
Vancouver, BC V6B 1B6
Phone: 604-684-0231
Fax: 604-684-5726
www.ubcic.bc.ca

- Draft BC First Nations Justice Action Plan: www.ubcic.bc.ca/files/PDF/JusticePlan.pdf

Provincial

British Columbia Arbitration and Mediation Institute

203 – 1530 56th St.
Tsawwassen, BC V4L 2A8
Phone: 604-736-6614
Toll-free: 1-877-332-2264
Fax: 604-736-6611
Email: info@bcami.com
www.bcami.com

The Continuing Legal Education Society of British Columbia (CLEBC)

500 – 1155 West Pender Street
Vancouver, BC V6E 2P4
Phone: 604-669-3544
Fax: 604-669-9260
Toll-free: 800-663-0437
www.cle.bc.ca

- *Aboriginal Administrative Law: The New Realities* (BC CLE 2009, $110) — includes several articles on emerging issues, including enforcement, arising from *Westbank First Nation Self-Government Agreement* and the Nisga'a and Tsawwassen Treaties: www.cle.bc.ca/onlinestorev2test/productdetails.aspx?pid=B5022509

Criminal Justice and Legal Access Policy Division

Justice Services Branch
Ministry of Attorney General
PO Box 9222 Stn Prov Govt
Victoria, BC V8W 9J1
Email: CriminalJusticeReform@gov.bc.ca
www.criminaljusticereform.gov.bc.ca/en/

First Nations Courts in BC
General inquiries:
Phone: 604-601-6074
Toll-free: 1-877-601-6066

Cknúcwentn — First Nations Court
Kamloops Court House
455 Columbia Street
Kamloops, BC V2C 6K4
Phone: 250-828-4344

Duncan Court
238 Government Street
Duncan, BC V9L 1A5
Phone: 250-746-1258

New Westminster Court
651 Carnarvon St.
New Westminster, BC V3M 1C9
Phone: 604-660-8522

Justice Institute of British Columbia (JIBC)
715 McBride Boulevard
New Westminster, BC V3L 5T4
Phone: 604-525-5422
Toll-free: 1-888-865-7764
Fax: 604-528-5518
Email: infodesk@jibc.ca
www.jibc.ca

Ministry of Justice (BC)
PO Box 9290 Stn Prov Govt
Victoria, BC V8W 9J7
Phone: 250-356-0149
Fax: 250-387-6224

- *Modernizing British Columbia's Justice System* — Green Paper (Minister of Justice and Attorney General, 2012): www.ag.gov.bc.ca/public/JusticeSystemReviewGreenPaper.pdf

Centre for Restorative Justice
School of Criminology
Simon Fraser University
Burnaby, BC V5A 1S6
Phone: 604-291-4294
Email: cfrj@sfu.ca
www.sfu.ca/crj

- Sentencing Circles for Aboriginal Offenders in Canada: Furthering the Idea of Aboriginal Justice within a Western Justice Framework, by Melanie Spiteri

Vancouver's Downtown Community Court
211 Gore Ave.
Vancouver, BC V6A 0B6
Phone: 604-660-9722
Fax: 604-660-9714
Email: CommunityCourt@gov.bc.ca
www.ag.gov.bc.ca/community-court/

Federal

Aboriginal Affairs and Northern Development Canada
BC Regional Office
Governance and Capacity Development
Suite 600 – 1138 Melville Street
Vancouver, BC V6E 4S3
Phone: 604-775-5100
Toll-free: 1-800-567-9604
Fax: 604-775-7149
TTY: 1-866-553-0554
Email: infopubs@aandc-aadnc.gc.ca

- Backgrounder: Historical Context: Administration of Justice Agreements
  www.aadnc-aandc.gc.ca/eng/1305291803313/1305291849835

The Aboriginal Justice Strategy
Aboriginal Justice Directorate
Department of Justice
284 Wellington Street
Ottawa, ON K1A 0H8
Toll-free: 1-866-442-4468
Fax: 613-957-4697
Email: ajs-sja@justice.gc.ca
www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html

- Aboriginal Justice Strategy and Aboriginal Courtworker Programs in Canada:
  www.justice.gc.ca/eng/fund-fina/gov-gouv/acp-apc/location-emplace/index.html
- Canadian Aboriginal Justice Strategy Emphasizes Community Involvement:
  www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/index.html
- Community-Based Justice Programs — British Columbia:
  www.pssg.gov.bc.ca/crimeprevention/justice/

Alternative Dispute Resolution (ADR) Institute of Canada
Suite 405 – 234 Eglinton Avenue East
Toronto, ON M4P 1K5
Phone: 416-487-4733
Toll-free: 1-877-475-4353
Fax: 416-487-4429
Email: admin@adrcanada.ca
www.adrcanada.ca

Canadian Human
Rights Commission
344 Slater Street, 8th Floor
Ottawa, ON K1A 1E1
Toll-free: 1-888-214-1090
TTY: 1-888-643-3304
Fax: 613-996-9661

Department of Justice

- Review of Implementation of the *Contraventions Act* (2010): www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/10/ca-lc/cae.pdf

Ministry of Public Safety
& Solicitor General

- *Province of British Columbia Provincial Police Service Agreement* (April 1, 2012), Ministry of Public Safety and Solicitor General: www.pssg.gov.bc.ca/policeservices/shareddocs/police-agreement-provincial-2012.pdf
- *Framework Agreement on First Nation Land Management*, 1996: http://labrc.com/wp-content/uploads/2014/03/Framework-Agreement-Amendment-5-edited.pdf

Public Safety Canada
269 Laurier Avenue West
Ottawa, ON K1A 0P8
Phone: 613-944-4875
Toll-free: 1-800-830-3118
www.publicsafety.gc.ca

- Overview of the First Nations Policing Policy: www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/brgnl-plcng/index-eng.aspx
- 2009–2010 Evaluation of the First Nations Policing Program: www.publicsafety.gc.ca/cnt/rsrcs/pblctns/vltn-frst-ntns-plcng-2009-10/index-eng.aspx

Royal Canadian
Mounted Police
RCMP Aboriginal Policing Services
Community, Contract and Aboriginal Policing Directorate
1200 Vanier Parkway
Ottawa, ON K1A 0R2
Phone: 613-993-8443
Email: aborig@rcmp-ccaps.com
www.rcmp-grc.gc.ca

SELECT LEGISLATION

Provincial

- *Police Act* (R.S.B.C. 1996, c. 367)
- *Judicial Review Procedure Act* (R.S.B.C. 1996, c. 241)

Federal

- *Canadian Charter of Rights and Freedoms*, section 2, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11
- *Contraventions Act* (S.C. 1992, c. 47)
- *Criminal Code* (R.S.C. 1985, c. C-46)
- *First Nations Fiscal Managment Act* (S.C. 2005, c. 9)
- *First Nations Land Management Act* (S.C. 1999, c. 24)

PART 1 /// SECTION 3.3

Adoption

3.3

ADOPTION

3.3

ADOPTION

BACKGROUND

Throughout time, Nations have had many different ways to "adopt" or bring people into their group, whether by family, clan or Nation. In some cases, for example, adoptions on the West Coast were conducted through the potlatch, by tribal or family agreements, or through circle ceremonies giving children to others as an act of generosity (for instance, if the adoptive parents had lost or could not have their own children). In Canada, jurisdiction over adoption in the modern era is generally exercised by the provinces. BC has enacted the *Adoption Act* (R.S.B.C. 1996, c. 5). Canada has made no specific laws in relation to adoption under its constitutional authority for "Indians, and Lands reserved for Indians." However, under the *Indian Act*, Canada does recognize "customary adoption," which is reflected in the definition of "child." The definition of child includes "a legally adopted child and a child adopted in accordance with Indian custom." In BC, the Ministry of Children and Family Development (MCFD) has developed a customary adoption policy that sets out what must be provided to demonstrate that a customary adoption has taken place.

Canada's position with respect to self-government is that broad First Nation jurisdiction over adoption should not be recognized in comprehensive governance arrangements. However, recent treaty arrangements do provide First Nations with some law-making powers over adoption. This is an important subject, as First Nations laws can include traditional adoptions reflecting cultural practices not sanctioned under provincial laws.

Canada's reluctance to recognize broad First Nations jurisdiction over adoption is partly tied to funding concerns and the number of registered status Indians under the *Indian Act*. Presumably, if a First Nation can make adoption laws, people ineligible for adoption under provincial and federal laws (and policies) or not wishing to be adopted under these laws and policies, could be adopted under the First Nation's law, and thereby potentially obtain status (persons legally adopted are entitled to status as the children of the individual(s) adopting them).

Jurisdiction over adoption is linked to the subject matter of Child and Family, which includes child welfare. In BC, the provincial government has recognized a more open custom adoption process in its *Adoption Act*. This provision is used specifically in relation to children in provincial care or where the parents have voluntarily placed their children for adoption. One of the Ministry of Children and Family Development's stated objectives is to try to ensure that First Nations children in care are raised with Aboriginal families whenever possible, thereby keeping them connected with their extended family and community. For the province, custom adoption provides greater choice when considering permanency options for Aboriginal children in continuing care. Custom adoption in BC is defined as "the cultural practices of Aboriginal peoples to raise a child, by a person who is not the child's parent, according to the custom of the First Nations and/or Aboriginal community of the child." Custom adoption has the same effect as an adoption order when the court makes a declaration pursuant to an application under the *Adoption Act*. BC courts have identified factors to consider when they declare that a custom adoption has occurred. These include:

- consent of the birth and adopting parent(s)
- the child having been voluntarily placed with the adopting parent(s)
- the adopting parent(s) are indeed Aboriginal or First Nation or entitled to rely on Aboriginal custom
- the rationale for custom adoptions is present, and

- the relationship created by custom is understood to create fundamentally the same relationship as that resulting from an adoption order under Part 3 of the *Adoption Act*.

Adopting First Nations children

Provincial adoption agencies are aware of the often unique circumstances involved when adoption is contemplated for a First Nations child and follow specific procedures. There are currently four adoption agencies in BC, and although they may have different management approaches, all will honour First Nations cultural priorities. That said, First Nations adoptions through an agency are not all that common. For example, in 2012, the Sunrise Family Services Society in North Vancouver (Sunrise) completed 73 adoptions and only three were for First Nations children.

In the case of Sunrise, when a First Nations child is up for adoption, the agency will first try to find a family with First Nations heritage. Further, all First Nations adoptions require a cultural plan and most are "open," meaning there is still ongoing interaction with the birth parents. Interestingly, because of their experiences with First Nations children, Sunshine also helps prepare cultural plans for children from other ethnic minorities being adopted.

Of course, First Nations children who are adopted retain their legal rights as an Aboriginal person through the operation of federal, provincial or First Nation law. To the extent that they are aware of these rights and benefits, they are explained to the prospective parents so they may understand what rights the child may have and any programs and services that may be available to them.

In many regards, recognition under provincial statute of custom adoptions is recognition of Indigenous legal traditions, if only tacitly, with respect to family matters. Notwithstanding this recognition, it may not be well known that custom adoptions are recognized under provincial statute, and set out relatively simply under the act:

> 46 (1) On application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.
>
> (2) Subsection (1) does not affect any Aboriginal rights a person has.

Along with recognizing custom adoptions, the BC *Adoption Act* contains details about the standards for adopting First Nations children and, in its Process Leading to Adoption regulations, requires an adoption agency to "make reasonable effort" to discuss an Aboriginal child's adoption with a designated representative of the "band" or Nation where that child is a member. The act also makes specific reference to the fact that, for Aboriginal children, the "best interests of the child" include preserving the child's cultural identity.

According to a 2012 report, *Report of the Working Group on Customary Adoption in Aboriginal Communities*, BC is the only province that has incorporated formal recognition of customary adoption in law. However, the report also noted that the law's wording is problematic because the court's power can be limited through the use of words like "may" rather than "shall" and because it raises questions of whether the province has the legislative authority to establish the effects of customary adoption in its legislation. While custom adoptions are not aggressively promoted by MCFD, the courts are nevertheless very willing to recognize them and typically only require an elder to appear before a judge to explain the traditional procedure and provide affidavits showing that those procedures took place.

In order to assist adoption agencies and the provincial court in making determinations with respect to what is or is not a "custom" adoption, short of a First Nation having more broadly recognized jurisdiction over adoption though a sectoral or comprehensive self-government arrangement, it would be beneficial for each Nation to codify its adoption practices/customs and approve them through the appropriate governing body. Some communities, such as Cowichan Tribes, have done just this,

introducing an adoptions committee and program to ensure that children from its communities remain connected and that there is community involvement in adoptions proceedings.

INDIAN ACT GOVERNANCE

There are no powers over adoption under the *Indian Act*, for either the Minister or the First Nation. However, under the *Indian Act*, persons legally adopted are entitled to be registered as Indians.

SECTORAL GOVERNANCE INITIATIVES

Other than to the extent that the provincial government provides for custom adoption under its laws and will look to the customary practices of a First Nation, there are no current or contemplated sectoral governance initiatives dealing with adoption.

Cowichan Tribes Adoption policy ensures children remain connected to family, community, culture

The Cowichan Tribes Adoption Committee (CTAC) was developed to replace the MCFD's Exceptions Committee, and its role includes providing cultural guidance in developing and implementing cultural ceremonies; supporting the implementation of an adoption policy and protocol; supporting program development by providing a cultural context; considering recommendations for adoption made by social workers of the Tribe's Lalum'utul Smun'eem agency; and providing support to the adoption team for its plans or offering suggestions for alternative plans. Cowichan only has approval to undertake an adoption process on the reserve.

The process for Cowichan is to first find either immediate or extended family members to adopt the child. If that is unsuccessful and others step forward, the CTAC determines whether the prospective adoptive parents are suitable. Approval is followed by a SAFE study. That report is then forwarded to the province for approval. While Cowichan does not do custom adoptions, a ceremony is held when a child is adopted. The Tribal process also places more emphasis on culture and it is felt that families are more comfortable working with a First Nation than with the ministry.

Lalum'utul' Smun'eem's approach to cultural agreements is to have a commitment from the adoptive parents ensuring that they keep Cowichan children connected to the extended family, membership, culture and community and have them sign a cultural contract. The cultural contract outlines numerous obligations of the adoptive parent/s to ensure that they are actively involved in cultural planning for Cowichan children and are also involved in the custom adoption ceremony. The cultural contract respects community tradition and outlines the roles and responsibilities of Cowichan Tribes, who will ensure that the adoptive family is aware of cultural events. The adoptive parent(s) will receive a copy of the Cowichan Tribe's newsletter and are obligated to share cultural resource information with the family, and the family will be visited at least once every six months.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

The treaty agreements provide for some jurisdiction over adoption of citizens. Tsawwassen has enacted a *Children and Families Act* that includes rules for adoption of Tsawwassen citizens (*Children and Families Act* (Tsawwassen), s. 24–27). The act establishes:

a) principles for programming and regulations for the health, safety and well-being of children
b) that the family is the primary influence for a child's growth and development and must be supported
c) that the best interests of children will always be the first priority, and support services will be directed at prevention and keeping children from entering care
d) that child protection will continue to be MCFD's responsibility, but the Tsawwassen First Nation manager will work closely with the ministry to ensure that children get the best possible services, and
e) that the Nation will provide adoption support services, including information about adoption and alternatives.

The *Westbank First Nation Self-Government Agreement* does not provide for jurisdiction over adoption (BC was not a party to the negotiations). As treaty negotiations have continued, more comprehensive agreements concerning adoption have been included. Both the Yale and Tla'amin final treaties provide the Nations with law-making powers when the adoption of their children or children being adopted into their families is considered.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	No jurisdiction.	N/A
Westbank	No jurisdiction.	N/A
Nisga'a	Nisga'a has jurisdiction over the adoption of Nisga'a children. Laws must provide that the best interests of the child be the paramount consideration and require BC and Canada to be provided with records of all adoptions occurring under Nisga'a laws. Nisga'a law applies over the adoption of a Nisga'a child residing off Nisga'a Lands where the parent/guardian of the child consents to the application of Nisga'a law or a court dispenses with that requirement. (Ch. 11, s. 96–97)	Nisga'a law prevails. (Ch. 11, s. 99)
Tsawwassen	Tsawwassen has law-making authority over: (a) the adoption of Tsawwassen children in British Columbia, (b) adoption in BC by Tsawwassen members of children who reside on Tsawwassen Lands, and (c) adoption in BC of children of Tsawwassen members. There are provisions that the best interests of the child be the paramount consideration, that notice be provided to the province, and that consent of parent/guardian be obtained for Tsawwassen law to apply unless a court dispenses with that requirement. (Ch. 16, s. 55–65)	Tsawwassen law prevails. (Ch. 16, s. 63)
Maa-nulth	Each Maa-nulth First Nation has law-making authority over: (a) the adoption of children from that Maa-nulth First Nation; (b) adoption in BC by Maa-nulth First Nation members of children who reside on Maa-nulth First Nation Lands; and (c) adoption in BC of children of Maa-nulth members. There are provisions that the best interests of the child be the paramount consideration, that notice be provided to the province, and that consent of parent/guardian be obtained for Maa-nulth law to apply unless a court dispenses with that requirement. (s. 13.15.1–13.15.11)	Maa-nulth law prevails. (s. 13.15.9)
Yale	Yale First Nation Government may make laws with respect to adoptions in British Columbia for: (a) Yale First Nation Children and (b) Children who reside on Yale First Nation Land to be adopted by Yale First Nation members (s. 3.14.2) There are provisions that the best interests of the child be the paramount consideration, that notice be provided to the province, and that consent of parent/guardian be obtained for Yale First Nation law to apply unless a court dispenses with that requirement. (s. 3.14.3 and 3.14.6)	Yale First Nation law prevails. (s. 3.14.8)
Tla'amin	The Tla'amin Nation may make laws in relation to: (a) adoptions of Tla'amin Children in British Columbia and (b) adoptions by Tla'amin Citizens of Children who reside on Tla'amin Lands. (Ch. 15, s. 62) There are provisions that the best interests of the child be the paramount consideration, that notice be provided to the province, and that consent of parent/guardian be obtained for Yale First Nation law to apply unless a court dispenses with that requirement. (Ch. 15, s. 63 and 66)	Tla'amin law prevails. (Ch. 15, s. 68)

Table — BC First Nations' Laws/Bylaws in Force

COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Tsawwassen First Nation	April 3, 2009	Children And Families Act

RESOURCES

First Nations

Cowichan Tribes
5760 Allenby Road
Duncan, BC V9L 5J1
Phone: 250-748-3196
Fax: 250-748-1233
Email: contactus@cowichantribes.com

- Tribal adoption information:
  www.cowichantribes.com/member-services/children-and-families/adoptions-program/

Provincial

Ministry of Children and Family Development
Representative for Children and Youth
Mary Ellen Turpel-Lafond
Suite 201, 546 Yates Street
Victoria, BC V8W 1K8
Phone: 250-356-6710
Toll-free: 1-800-476-3933
Fax: 250-356-0837
Email: rcy@rcybc.ca
www.rcybc.ca

Adoptive Families Association of British Columbia (AFABC)
200 – 7342 Winston Street
Burnaby, BC V5A 2H1
Phone: 604-320-7330
Fax: 604-320-7350
www.bcadopt.com

Sunrise Family Services Society
Suite 102 – 171 West Esplanade
North Vancouver, BC V7M 3J9
Phone: 604-984-2488
Toll-free: 1-888-984-2488
Fax: 604-984-2498
Email: www.sunriseadoption.com/contact-us
www.sunriseadoption.com/home

Federal

AANDC — Customary Adoption Policy
Terrasses de la Chaudière
10 Wellington
Ottawa, ON K1A 0H4
Fax: 1-866-817-3977
Toll-free: 1-866-553-0554
Email: InfoPubs@ainc-inac.gc.ca
www.ainc-inac.gc.ca

The First Nations Child and Family Caring Society of Canada (FNCFCSC)
Suite 401, 309 Cooper Street
Ottawa, Ontario, K2P 0G5
Phone: 613-230-5885
Fax: 613-230-3080
Email: info@fncaringsociety.com
Twitter: @CaringSociety

- The FNCFCSC publishes *The First Peoples Child and Family Review*
- See: Why is Adoption Like a First Nations Feast? : Lax Kw'alaam Indigenizing Child Adoptions in Child Welfare. http://journals.sfu.ca/fpcfr/index.php/FPCFR/article/view/178/147
- 2012 Report of the Working Group on Customary Adoptions in Aboriginal Communities: www.justice.gouv.qc.ca/English/publications/rapports/pdf/rapp_adop_autoch_juin2012-a.pdf

SELECT LEGISLATION

- *Adoption Act* (R.S.B.C. 1996. c.5)

PART 1 /// SECTION 3.4

Agriculture

3.4

AGRICULTURE

3.4

AGRICULTURE

BACKGROUND

The federal government historically had intentions to turn certain First Nations peoples into "farmers." Not surprisingly, this colonial policy was pursued quite aggressively on the prairies and was reflected in the terms of the numbered treaties that provided treaty signatories assistance with agricultural machinery. The policy was pursued less vigorously in BC. Indeed, in BC, most of the reserves created by the Reserve Commissioners in the 19th century were so small that farming was not really a viable option. Nevertheless, BC First Nations have, to some extent, used their limited reserve lands for agricultural or ranching purposes, particularly those First Nations located in the interior of the province. With the first declaration of Aboriginal title in the 2014 Supreme Court decision in *Tsilhqot'in Nation v. British Columbia* (2014 S.C.C. 44), where the Nation's beneficial interest in title land was territorial and found to be a significant tract of land (some 1,700 square km, representing approximately 45 percent of the ancestral lands claimed in the case), this will no doubt change the approach that First Nations take to agriculture and ranching. After all, the Tsilhqot'in are themselves a ranching people and there are many other BC Nations, again primarily in the Interior, that may see increasing agricultural production or ranching activities over their ancestral lands in the future.

Osoyoos Indian Band — Nk'Mip Vineyards

The Osoyoos Indian Band, part of the Okanagan Nation, is situated in one of Canada's premier agricultural and tourism regions, and is one of the few First Nations in BC with a sizable reserve land base. Their 32,000 acres offer opportunities in agriculture, eco-tourism, and commercial, industrial, and residential development, which today includes Nk'Mip Vineyards.

With an ideal agricultural climate for premium grape production, and a clear vision, Nk'Mip Vineyards is growing quality fruit for award-winning wines, including wines produced by the First Nation's own winery of the same name. Nk'Mip was one of the South Okanagan's first vineyards and is now also one of the largest vineyard acreages in the Okanagan Valley, with over 300 acres of prime vinifera. In fact, Osoyoos has a long history of growing grapes, with the first planted in 1968. New varieties of grapes are being planted each year to meet current market demands. Varietals grown include Cabernet Sauvignon, Merlot, Pinot Noir, Pinot Blanc, Pinot Gris, Cabernet Franc, Sauvignon Blanc, and Chardonnay. The winery is capable of producing 18,000 cases of wine (162,000 litres) annually. About 60 percent of its wines are red and 40 percent are white. Last year, the winery sold 50,000 bottles and achieved gross sales of 1.4 million, with a profit of 337,000 thousand dollars.

The BC Agricultural Council (BCAC), a non-profit non-governmental organization, represents over 14,000 BC farmers and ranchers and close to 30 farm sector associations from all regions of the province. Its mission is "to continually improve the social, economic and environmental sustainability of BC Agriculture." The BC Agricultural Research and Development Corporation (ARDCorp) as a wholly owned subsidiary of the BCAC, with a mandate to lead innovation and deliver resources to improve the long-term profitability of BC farmers and ranchers.

The BC First Nations Agriculture Association (BCFNAA) has been established to support BC First Nations in advancing their agricultural interests. The BCFNAA stresses that Aboriginal agriculture is different in many ways from Western-style farming and should be recognized as such and encouraged as a potential economic driver in First Nations communities. In addition to the BCFNAA, there is the Aboriginal Agriculture Education Society of British Columbia (AAESBC), a charity created in 2005 to aid in providing practical agricultural training services to First Nations and other students in BC. In

2012, the AAESBC created Aljam Community College to provide agricultural training not currently offered by any other education institution in BC. The college offers agricultural training programs for an array of careers in the agricultural industry, and in this way promotes and supports Aboriginal agriculture businesses in BC.

With respect to governing agriculture, in most cases this subject matter will come up in comprehensive governance negotiations. Agriculture is linked to land management, environment, licensing, regulation and operation of businesses and taxation.

Division of Powers

Both federal and provincial governments exercise jurisdiction over agriculture under the *Constitution Act, 1867*. Provincial laws have effect in a province so long as they do not conflict with any act of the Parliament of Canada. This does not happen often, as in reality federal jurisdiction in this area is exercised only with respect to the movement, import and export, and pricing of agricultural products. The extent to which a First Nation may seek specific recognition of such powers or exercise jurisdiction in this area will in large part reflect the scale of agricultural activities on its lands and whether it involves growing crops or ranching. The necessity to consider governance arrangements with respect to agriculture and ranching may become more pronounced as parties look to resolve questions about how Aboriginal title lands are both managed and governed.

With respect to on-reserve governance, sections 33 and 71 of the *Indian Act* and the related definitions in section 2 remain as potential impediments to First Nations control of agriculture and ability to benefit from agricultural production on-reserve. Removal of the application of these sections is desirable (see below).

Negotiating Agriculture

Both Canada and British Columbia support First Nations jurisdiction over agriculture in self-government arrangements moving beyond the *Indian Act*. However, while First Nations can exercise and are exercising jurisdiction over agriculture, Canada has an interest in seeing that provincial and federal health and safety standards for farm products are maintained. It is therefore unlikely that Canada would recognize First Nations jurisdiction over agriculture without the requirement that a First Nation meet or beat such standards in its law. To date, no agreement with a First Nation includes jurisdiction to set these standards, and the question remains as to whether a First Nation would actually want this power and responsibility. Where agriculture is to be addressed in governance negotiations with the Crown, the degree to which the province may become involved in negotiations is unclear, but provincial standards and laws may also have to be addressed. Taking over control of land management can provide the basis for a First Nation to control on-reserve agricultural development. This is how a number of post–*Indian Act* jurisdictional arrangements have addressed agriculture, rather than as a separate head of power.

Agricultural Land Reserve

An issue that First Nations may confront in discussing agriculture in BC is the application of the provincial Agricultural Land Reserve (ALR) and the role of the Agricultural Land Commission (ALC), created under the provincial *Agricultural Land Commission Act* (S.B.C. 2002, c. 36). Through the ALC, certain lands in BC are designated for agricultural purposes and cannot, without considerable effort and persuasion, be used for any other purpose. The stated purpose of this land regime is to ensure that there will always be agricultural land. While the ALR does not apply on-reserve, First Nations have had to address its application during treaty negotiations regarding the transfer of ALR lands to their jurisdiction. This is also the case outside of treaty negotiations, when First Nations seek to add land

in the ALR to their existing reserve land base. The question of the application of the ALR with respect to Aboriginal title lands will also need to be addressed in those situations where Aboriginal title is declared or recognized in areas that are currently in the ALR.

Other Policy Issues to Consider

First Nations agriculture in BC faces other issues as well. Of great importance to any agricultural enterprise is, of course, ensuring an adequate water supply to irrigate crops or supply livestock. The BCFNAA has recommended that a program be put in place to ensure that there are standards protecting water supplies, whether they are wells, rivers, lakes or creeks.

Further, while the BC Ministry of Agriculture has established the Environmental Farm Plan (EFP) Program (2013–2018), intended to encourage producers from all parts of the province to adopt beneficial management practices that enhance agricultural sustainability and contribute to a cleaner, healthier environment, the program does not have a dedicated First Nations' component. The EFP Program is delivered by ARDCorp to complement and enhance the current environmental stewardship practices of producers, but only its members deliver and police the program. Under the EFP Program and an associated program, Beneficial Management Practices (BMP), farmers voluntarily request an assessment of their adherence to current environmental standards. Risks are identified and funding is available to help reduce environmental risks.

Another area to consider is the need for affordable capital for First Nation producers, which may be available to farmers through programs in place off-reserve. Under the Canadian Agricultural Loans Act Program, farmers can borrow as much as $500,000 for the purchase of land and construction or improvement of buildings, and up to $350,000 for other purposes. Aggregated loans of up to $3 million are available for agricultural co-operatives, and the federal government guarantees 95 percent repayment to the lender. There is also the First Nations Finance Authority, which provides long-term financing for the purposes of First Nations governments (e.g., capital infrastructures); while not a direct source of financing for Aboriginal producers, this could be a source of capital investments made by a First Nation government in support of agricultural pursuits (e.g., building access roads, irrigation channels, water storage, etc.).

Currently, the federal/provincial/territorial policy framework for Canada's agriculture and agri-food sector is called Growing Forward 2. Growing Forward 2 is the basis for cost-shared programs aimed at helping the agriculture sector in Canada to become more competitive and innovative. In BC, the federal and provincial governments have a planned investment of $426.9 million in Growing Forward 2 from 2013 to 2018. Some First Nations in BC have taken advantage of funding support available through this program to undertake community assessment programs and to support First Nations agricultural business development.

INDIAN ACT GOVERNANCE

Under the *Indian Act*, in addition to the public works and zoning powers under sections 81(f) and (g) respectively, though which a First Nation may regulate water works and other public works as well as zone lands for agricultural purposes, a First Nation can specifically make bylaws in two areas with respect to agriculture: the trespass of cattle and matters related to pounds for animals (s. 81(1)(e)) and beekeeping and poultry-raising (s. 81(1)(k)). This is one area of *Indian Act* jurisdiction where BC First Nations have been very active in making bylaws, though not addressing agriculture so much as related domestic animal control over, for example, cats and dogs. (These bylaws are discussed and included in Section 3.25 — Public Order, Safety and Security.)

Other references to agriculture in the *Indian Act* include sections 32 and 33, on the sale and barter of produce, but these apply only to reserves in Saskatchewan, Manitoba and Alberta. These provisions

are paternalistic and prohibit a "band" or a "member" from selling animals or crops unless the Indian Agent approves. All self-government arrangements do away with these sections, regardless of whether the Nation assumes jurisdiction over agriculture. These sections should have been repealed years ago. As of February 4, 2010, however, all bands and their members in Manitoba, Saskatchewan and Alberta were declared exempt from the operation of these sections (SOR/2010-28).

Section 71 of the *Indian Act* refers to the Minister's powers to operate farms on reserves. There may also be some regulatory power over agriculture open to the federal government through one of the subjects listed in section 73 of the *Indian Act*. Where a First Nation has delegated land management powers over land under sections 53 and/or section 60 of the *Indian Act*, this power can include acting in the place of the Minster in relation to administering interests in reserve lands, including interests related to agricultural uses of reserve land.

SECTORAL GOVERNANCE INITIATIVES

The *Framework Agreement on First Nation Land Management* (1996) and the *First Nations Land Management Act* (S.C. 1999, c. 24) recognize First Nations jurisdiction over agricultural land on-reserve, but do not set out specific jurisdiction over agriculture. The application of those sections of the *Indian Act* dealing with agriculture on reserve lands is removed for First Nations with land codes (sections 32, 33 and 71). There are no specific sectoral governance initiatives addressing agriculture in BC.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

Westbank First Nation has specific jurisdiction over agriculture. Notably, under the *Westbank First Nation Self-Government Agreement*, in the event of a conflict between a Westbank law and a federal or provincial law, the federal or provincial law prevails to the extent of the conflict. The *Tsawwassen First Nation Final Agreement* and *Yale First Nation Final Agreement* address agriculture as an aspect of land use planning and zoning. Although other modern BC treaties do not specifically address jurisdiction over agriculture, to the extent that agriculture is an aspect of land management, these Nations have jurisdiction under their land provisions.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	No separate treatment of agriculture in the *Sechelt Indian Band Self-Government Act* but aspects covered as a component of land management.	N/A
Westbank	Westbank First Nation has jurisdiction in relation to agriculture on Westbank Lands. Does not include interprovincial or international trade or commerce. (Part XIII, s. 141 and 144)	Westbank law prevails. (Part XIII, s. 142)
Nisga'a	No separate treatment of agriculture but aspects would be addressed generally in the context of lands and legal status and capacity.	N/A
Tsawwassen	Tsawwassen Government may exercise authority over agriculture on Tsawwassen Lands through their jurisdiction over land use planning, zoning and development. (Ch. 6, s. 4)	Tsawwassen law prevails. (Ch. 6, s. 5)
Maa-nulth	No specific provisions, but aspects would be addressed under land management powers.	N/A
Yale	No specific provisions, but aspects would be addressed under land management powers.	N/A
Tla'amin	No specific provisions, but aspects would be addressed under land management powers.	N/A

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(e) Animal Control (Non-Domestic)			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
?Akisq'nuk First Nation	2	CONTROL OF ANIMALS	To Provide For The Protection Against And Prevention Of Trespass By Cattle. (Domestic Animals)
Adams Lake	1	CONTROL OF ANIMALS	Protection Against And Prevention Of Trespass By Cattle And Other Domestic Animals, The Establishment Of A Pound, And Appointment Of A Poundkeeper
Haisla Nation	Unnumbered	TRAFFIC, ANIMAL, NOISE, NUISANCE, FIREARMS, FIRE	Bylaw Respecting Traffic, Animal Control, Nuisance, Noise, Firearms, Fire Protection, Emergency Program, Smoke Alarms (General Provisions That Include All These Subjects) Amendments
Halfway River First Nation	2009.01	ANIMAL CONTROL	Bylaw Respecting Cattle Control
Little Shuswap Lake	1	CONTROL OF ANIMALS	Protection Against And Trespass By Cattle And Other Domestic Animals, The Establishment Of A Pound, The Appointment Of A Poundkeeper
Nazko First Nation	4	CONTROL OF ANIMALS	Pound Bylaw To Prevent Trespass Of Cattle Between June 1st And Sept. 30 Any Year (Domestic Animals)
Neskonlith	1	CONTROL OF ANIMALS	Protection Against And Prevention Of Trespass By Cattle And Other Domestic Animals, Establishment Of A Pound, Appointment Of A Poundkeeper
Nuxalk Nation	10	CONTROL OF ANIMALS	Protection Against And Prevention Of Trespass By Cattle And Other Domestic Animals, Establishment Of A Pound, The Appointment Of A Poundkeeper
Osoyoos	1	CONTROL OF ANIMALS	Protection Against And Prevention Of Trespass By Cattle And Other Domestic Animals, The Establishment Of A Pound Etc.
Skeetchestn	1	CONTROL OF ANIMALS	Protection Against And Prevention Of Trespass By Cattle And Other Domestic Animals, Establishment Of A Pound, The Appointment Of A Poundkeeper
Skeetchestn	1	ANIMAL CONTROL	Bylaw Respecting Livestock
St. Mary's	1	CONTROL OF ANIMALS	Protection Against And Prevention Of Trespass By Cattle And Other Domestic Animals, Establishment A Pound Etc.
Tk'emlups te Secwepemc	1	CONTROL OF ANIMALS	Protection Against And Prevention Of Trespass By Cattle And Other Domestic Animals, Establishment Of A Pound, The Appointment Of A Poundkeeper
T'Sou-ke First Nation	1978-1	CONTROL OF ANIMALS	Protection Against And Prevention Of Trespass By Cattle And Other Domestic Animals On The Reserve
Tobacco Plains	1982-2	CONTROL OF ANIMALS	Bylaw Concerning The Trespass Of Cattle (Domestic Animals)
Bylaws — Section 81(1)(q) Ancillary powers			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Halfway River First Nation	—	ANIMAL CONTROL	Bylaw Respecting Cattle Control
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Sechelt (Shíshálh) First Nation	1996-05	SIGD Animal Control	
Tsawwassen First Nation	082-2009	TFN Animal Control Regulation	
Westbank First Nation	2005-05	WFN Animal Control Law	

RESOURCES

First Nations

Aljam Community College
7410 Dallas Drive
Kamloops, BC V2C 6H3
Phone: 778-469-5040
Fax: 778-469-5030
Email: info@aljamcommunitycollege.com
www.aljamcommunitycollege.com

First Nations Agriculture Association
7410 Dallas Drive
Kamloops, BC V2C 6H3
Phone: 778-469-5040
Fax: 778-469-5030

First Nations Finance Authority
Suite 202 – 3500 Carrington Road
Westbank, BC V4T 3C1
Phone: 250-786-5253
Toll-free: 1-866-575-3632
Fax: 250-768-5258
Email: info@fnfa.ca
www.fnfa.ca/en/fnfa/

Provincial

British Columbia Cattlemen's Association
4 – 10145 Dallas Drive
Kamloops, BC V2C 6T4
Phone: 250-573-3611
Fax: 250-573-5155
Email: info@cattlemen.bc.ca
www.cattlemen.bc.ca

British Columbia Agriculture Council
230 – 32160 South Fraser Way
Abbotsford, BC
Phone: 604-854-4454
Toll-free: 1-866-522-3477
Fax: 604-854-4485
Email: www.bcac.bc.ca/contact-us
www.bcac.bc.ca

British Columbia Agriculture Research and Development Corporation
230 – 32160 South Fraser Way
Abbotsford, BC
Phone: 604-854-4483
Toll-free: 1-866-522-3477
Fax: 604-854-4485

Email: www.bcac.bc.ca/contact-us
www.bcac.bc.ca

Ministry of Agriculture
First Nations Business Development Team
PO Box 9120 STN PROV GOVT
Victoria, BC V8W 9E2
Phone: 250-387-5121
Email: FNAGRIC@gov.bc.ca

- *First Nations Agricultural Needs Assessment Guide*: www.agf.gov.bc.ca/busmgmt/FNAGRI/FirstNationsAgricultureNeedsAssessment.pdf
- *Planning for Agriculture in First Nations Communities*: www.agf.gov.bc.ca/busmgmt/FNAGRI/PlanningForAgriculture_FirstNationCommunities.pdf

Provincial Agricultural Land Commission
133 – 4940 Canada Way
Burnaby, BC V5G 4K6
Phone: 604-660-7000
Fax: 604-660-7033
www.alc.gov.bc.ca

Federal

Agriculture and Agri-Food Canada
1341 Baseline Road
Ottawa, ON K1A 0C5
Toll-free: 1-855-773-0241
TDD/TTY: 613-773-2600
Fax: 613-733-1081
Email: info@agr.gc.ca
www.agr.gc.ca/eng/home/?id=1395690825741

SELECT LEGISLATION

Provincial

- *Agricultural Land Commission Act* (S.B.C 2002, Chapter 36)

Federal

- *First Nations Land Management Act* (S.C. 1999, c. 24)
- *Canadian Agriculture Loans Act* (R.S.C 1985, c. 25 (3rd Supp.)

COURT DECISIONS

Federal

- *Tsilhqot'in Nation v. British Columbia* (2014 SCC 44)

PART 1 /// SECTION 3.5

Child and Family

3.5

CHILD AND FAMILY

3.5

CHILD AND FAMILY

BACKGROUND

Child and family services are normally a provincial responsibility. However, under section 91(24) of the *Constitution Act, 1867*, the federal government can assume responsibility for child welfare and family matters in relation to Indians, but there is no specific federal legislative authority under which this federal responsibility could be carried out. While the *Indian Act* sets out rules regarding the property of children and their education, the act does not speak to the welfare of the child or of the family. In the absence of a federal law in this area, provincial child welfare is considered a law of general application and thus applicable under section 88 of the *Indian Act*. Where the federal government has assumed a role in child and family matters for Indians, it has done so under provincial policy. In order to provide and fund services in this area, Aboriginal Affairs and Northern Development Canada (AANDC) relies heavily on partnerships with provincial bodies and agencies to deliver programs to First Nations in cases where the Nation is not carrying out these responsibilities under administrative arrangements. AANDC also introduced a new information management system in 2013 that is intended to reduce the reporting requirements from First Nations child service agencies, while at the same time allowing the federal government to better track the $600 million that it provides annually for services.

Historically, First Nations, whether through family, clan or Nation, exercised control over the welfare of those who were members of the group based on Indigenous legal traditions and systems for maintaining social order. In many scholars' opinion, there is a compelling legal argument that jurisdiction over child and family is a subject matter that would meet the "integral to the distinctive culture" test for proving a right of self-government, although this matter has not been tested in a Canadian court. Post-contact, the experiences of First Nations peoples through policies of the Crown that sought to "remove the Indian from the child" or that placed outside agencies in charge of First Nations welfare have been very destructive. Not surprisingly, child and family services are a very sensitive issue for First Nations communities. It remains a controversial area for public policy debate and an area that is evolving as First Nation seek greater control over child welfare either to administer provincial programs or ultimately resume jurisdiction. Perhaps more than any other, this is a jurisdiction where questions of self-administration as opposed to self-government become apparent, as all governments with a say in these matters look to make policy in the best interests of the child while having differing perspectives on what that means or how it is achieved. The debate over self-administration or self-government is intensified when one considers that, despite the fact that most Nations are now under some arrangement with the province to administer provincial child and family programs in First Nations communities, First Nations children in BC still account for more than 50 percent of the children in care, while accounting for only eight percent of the child population under age 19.

One of the most controversial aspects of child welfare policies is the removal and subsequent placement of children. Most Nations do not want their children placed in non-Aboriginal homes, for fear that they will lose their association with their culture and traditions. In Canada, provincial welfare systems are generally based on a European model of caregiving, with children predominately raised in nuclear families. For First Nations communities, caregiving is provided through extended families and the community. It has often been said by our leaders that it "takes a whole community to raise a child." All parties to discussions on child and family issues agree that decision-making must reflect and meet the "best interests of the child." However, the determination of what policies and laws apply to First Nations, and who is responsible for them, continues to evolve along a continuum of governance. This subject matter is linked to health, social services, adoption, and heritage and culture.

As a result of jurisdictional confusion or overlap, while questions of who has jurisdiction are being resolved, there are gaps in the care and the funds provided to First Nations people. Consequently, all jurisdictions, including First Nations, are working to close these gaps by implementing what is called "Jordan's Principle." Jordan's Principle states that the government of first contact will arrange for a child to receive appropriate care and contains a mechanism for addressing funding disagreements. The BC government committed to Jordan's Principle in 2009, and a tripartite table (British Columbia, Canada and the First Nations Child and Family Wellness Council [FNCFWC]) engaged in a process to implement it. Since the Beadle case in Nova Scotia in 2013 — where the Pictou Landing First Nation successfully argued at trial that it was the government of first contact, and the federal government appealed — the federal government has not come to the joint table. Canada initially appealed the federal court decision in the Beadle/Pictou Landing case; however, on July 11, 2014, Canada gave notice of discontinuance of this appeal. While this action on the part of Canada could mean a renewed willingness on its part to meet jointly to discuss implementation of Jordon's Principle, the province's decision to discontinue funding of the FNCFWC in 2013 means that First Nations in BC will have to reconsider how they wish to be represented at a joint table.

Jordan's Principle is a "child first" principle to resolve jurisdictional disputes within, and between governments, regarding payment for government services provided to First Nations children with multiple or complex medical needs. Under this principle, where a jurisdictional dispute arises between governments regarding payment for services for a First Nations child, the government of first contact must pay for the services without delay or disruption. The paying government can then refer the matter to jurisdictional dispute mechanisms. Jordan's Principle is named in honour of Jordan River Anderson, a young First Nations boy with complex medical issues who died in hospital because the provincial (Manitoba) and federal governments both refused to pay for his home care with each claiming the other was responsible. Because of this unnecessary wrangling, Jordan died at age 5 having never spent a day of his life in his family home.

As the example of the Beadle case demonstrates, paying for child and family programs has been and really is a key issue between governments and often revolves around on- and off-reserve residence. Despite funding issues, both Canada and British Columbia have agreed in comprehensive governance arrangements that a First Nation's laws would be paramount. This is in keeping with the federal approach to support increased First Nations control over child and family matters.

Over the last 20 years, Canada's approach has been to promote and support provincial and First Nations' child and family agencies that are required to meet provincial standards. Through delegation agreements, the provincial director of child protection gives authority to qualified Aboriginal agencies and their employees to administer all or part of the *Child, Family and Community Service Act* (R.S.B.C. 1996, c. 46) (CFCSA). The extent of responsibility assumed by each agency is the result of negotiations between the ministry and the First Nations community served by the agency, and the level of delegation provided by the director. The majority of First Nations are involved in child and family services through Delegated Aboriginal Authorities (DAAs), provincially regulated bodies that deliver services either within communities, off-reserve or both on- and off-reserve. DAAs in BC have been somewhat at a disadvantage over the years, as the original process for establishing a DAA was a minimum population of 801 children within the service area (since increased to 1,000). However, this policy was regularly ignored in BC because of the small size and large number of individual First Nations, and BC has a number of agencies serving smaller population bases. These agencies work under funding formulas that are not adjusted for economies of scale; hence, smaller agencies tend to spend a larger percentage of their budget on non-service-related expenditures (e.g., administrative staff or maintaining office space) rather than providing direct service. The federal government has announced that it will no longer approve agencies that cannot meet the minimum threshold. This has raised concern for many communities that may be unable to have their own agency or will have to work with other First Nations whose traditions and cultural practices may be different.

While the federal government funds DAAs — using a formula-driven model based on the number of children in care — the agencies themselves are subject to provincial laws and regulations, specifically the CFCSA. Social workers are delegated by the province, not the First Nation. Historically, First Nations have had little say in the appointment of social workers in their communities or the way they practise, but this is changing with agreements that give Nations input and/or approval over the social workers and outline who they must report to in the community and the procedures they must follow.

According to the Ministry of Children and Family Development's website, to date more than 140 "bands" in BC are represented by agencies that either have, or are actively planning for, delegation agreements to manage their own child and family services. Currently, there are 23 delegated

agencies with various levels of delegation: 4 can provide voluntary services and recruit and approve foster homes; 9 have the additional delegation necessary to provide guardianship services for children in continuing care; and 10 (including one Metis organization) have the delegation required to provide full child protection, including the authority to investigate families and remove children.

While this transfer of administrative responsibility has generally been considered positive, First Nations must also recognize that simply administering another government's program does not provide all the answers and that the delegation process was intended as an interim step toward self-governance when it was first put in place almost 30 years ago. A number of First Nation placements have gone badly, even when First Nations people were managing provincially delegated authorities. We also need to keep in mind that DAAs have to subscribe to the provincial model and are bound by the CFCSA.

In June 2002, Aboriginal leaders came together at a joint meeting and signed the Tsawwassen Accord in response to the growing number of Aboriginal children in care and the Province's decision to delegate most functions of the Ministry of Children and Family Development (MCFD) to new "blended regional authorities" using the same five regional boundaries as the provincial health ministry (Fraser, Vancouver Coastal, Vancouver Island, Interior and the North). Aboriginal leaders rejected these "blended authorities" and asserted their inherent jurisdiction over their children and families. Instead, they supported "regional Aboriginal authorities," to which the Minister would delegate certain administrative powers. After six years of planning, and with two regions — Vancouver Island and Fraser — moving to the penultimate step in drawing down jurisdiction, the provincial government cancelled the Aboriginal authority process in 2009 (the non-Aboriginal authority process was discontinued several years earlier).

As the authority process ended, two things occurred. Chiefs from throughout BC gathered and created the FNCFWC to aid in further discussions with provincial ministries that had responsibility for various services to children and families, specifically MCFD but also the Attorney-General, the Ministry of Aboriginal Relations and Reconciliation, and so on. Secondly, MCFD announced a new program known as "Indigenous Approaches," which allowed any Nation or group of Nations working co-operatively to create community-driven initiatives to address children and family issues across the spectrum, originally with an eye toward governance and jurisdiction. The Indigenous Approaches organizations approached their work from a variety of perspectives. Some were strictly interested in governance and jurisdiction, others mixed governance initiatives with services, and still others examined their traditional laws and cultural activities with a view to "delivering services" — either internally or through social workers — in ways that respected their culture and traditional teachings.

In 2011, Indigenous Approaches groups were informed that MCFD would no longer fund governance and jurisdiction initiatives, and all projects would now have to focus on direct service delivery. Then, in January 2014, both the FNCFWC and the Indigenous Approaches organizations were defunded, following the release of the BC Representative for Children and Youth's report, *When Talk Trumped Service: A Decade of Lost Opportunity for Aboriginal Children and Youth in B.C.* This report raised a number of very important questions for reflection. (How do we best deliver programs and services to children and families? What are the best ways to work together? How do we share experiences and keep children at the centre of the work?) The report also sparked debate among and between many First Nations leaders, communities, and organizations who felt the report was unbalanced in that it targeted First Nations efforts without adequately examining the policy and programming of the provincial government, which they argued contributed to many of the identified challenges or issues. The report offered strong criticism of the province's role in some instances. However, a year later, discussion, including critical next steps with regard to children and families, and in particular implementation of recommendations in the report, is still required. The report made five recommendations:

1. That the government of British Columbia, with the leadership of the Attorney General, develop an explicit policy for negotiation of jurisdictional transfer and exercise of governmental powers over child welfare;

2. That the Ministry of Children and Family Development take immediate action to suspend open-ended initiatives in its ministry related to Aboriginal governance and organization of child welfare services, develop a clear public policy for delivery of services to Aboriginal children including the roles and operational requirements for delegated Aboriginal Agencies, and re-profile funds to support those much-needed direct services;

3. That MCFD take the lead in developing a clear plan for B.C. to close the outcomes gap for Aboriginal children and youth across government ministries including Education and Health as well as other service-delivery organizations, with clear targeted outcomes and performance measures that would be applicable on- and off-reserve, and encompass all Aboriginal children and youth regardless of where they reside;

4. That MCFD immediately undertake a review of its senior leadership team and develop an action plan to ensure that Aboriginal leaders with expertise in effective child welfare service provision are represented on that team and that an Aboriginal perspective in the ministry's decision-making process reflects the fact that a majority of the children and families the ministry serves are Aboriginal;

5. That MCFD begin to publicly report semi-annually on the safety and well-being of Aboriginal children receiving services, especially children in care, whether those services were provided through the ministry, a contracted agency, or a delegated Aboriginal Agency.

The BC government cited Recommendation 2 as its rationale for defunding Indigenous Approaches and replacing them with a one-time, one-year program to be known as Aboriginal Service Innovations. The current program, running for the 2014/15 fiscal year, was open to any First Nations organization; however, the qualification guidelines were far more restrictive than in the past and allowed moneys to be provided only for services related to at-risk children and youth or to efforts designed to bring children out of care and back to their communities. The province and MCFD remain reluctant to discuss governance and jurisdiction, much less relinquish them, despite the RCY's recommendation that it do so through the Attorney General's office. It also remained to be seen (as of October 2014) whether the provincial government would implement any or all of the other four recommendations in the report.

Canada, through AANDC, has regularly pledged its support but continues to fund on-reserve First Nations children and family services at rates below the province's and has had little involvement in any negotiations beyond areas within its immediate mandate (e.g., the Enhanced Prevention Focused Approach). For the most part, discussions on children and families with the federal government have focused on these funding inequities and specifics such as Jordan's Principle, rather than on governance and jurisdiction. An ongoing case launched by First Nations Child and Family Caring Society (FNCFCS) is challenging the federal government's inequitable or non-existent funding in areas such as child and youth mental health. The FNCFCS argues that the federal government must fund services on-reserve to the same level that they are funded off-reserve by provincial governments. Their figures show the inequity as more than 20 percent.

For the most part, outside of treaty negotiations First Nations have not been successful in achieving recognition of jurisdiction over child and family services, although a number of administrative arrangements have been entered into. The ability of First Nations governments to draw down this particular jurisdiction is further challenged by limited funding for implementation and the broader necessary First Nation–Crown fiscal relationship, which is explored in further detail in Section 4 — Financing First

Nations Governance. Despite challenges, jurisdiction in this area remains a political priority for First Nations in BC, and the expectation is that more First Nations will in future assume jurisdiction over child and family services, either through regional initiatives or individually and as part of either sectoral or comprehensive governance arrangements.

While MCFD continues to say that the Province recognizes the right of First Nations governments to exercise jurisdiction over child and family services, at times it is not clear whether this support is more for administrative-type arrangements than for law-making authority (except in the context of treaty negotiations). In delivering its own child and family services, the Province has indicated its commitment to working collaboratively to implement changes and new approaches to improve the care, safety and well-being of Aboriginal children and families and, in particular, with its support for the "Indigenous Approaches" initiatives, but then pulled back because of problems in implementing and monitoring the success of such programs in the wake of the Turpel-Lafond's report.

Today, the provincial government really only provides protective, custody and placement services on-reserve and with respect to Aboriginal children and youth living off-reserve. At this time, preventive services for children and families on-reserve are often still undeveloped, unless a First Nation has moved into this area. However, the federal government has recognized this problem to a certain extent and through 2013 was actively engaged in discussions with DAAs, the FNCFWC, First Nations leaders and MCFD on a new funding formula known as the Enhanced Prevention Focused Approach (EPFA). Under EPFA, which has subsequently been delayed in BC for at least two years, funding would be provided using a formula that includes prevention, supplanting the former regulations contained in section 20-1 of the *Indian Act* that provide funding based solely on the number of children in care. While EPFA has proved imperfect in the six Canadian provinces where it is currently used, it is seen as a step forward by agencies and community organizations looking to provide prevention funding rather than focusing almost exclusively on intervention (often involving child removal and protection through foster care or adoption).

A 2012 AANDC analysis of EPFA in Saskatchewan and Nova Scotia (*Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia for the First Nations Child and Family Services Program*) concluded that First Nations agencies continued to face challenges in finding qualified staff, paying at rates comparable to provincial levels, and overcoming geographical and weather-related travel conditions and distance; had not seen caseloads reduced to the recommended level; and were still — due to lack of First Nations capacity — faced with hiring people who needed to upgrade their cultural knowledge and competency. However, the report also found that there was an increased awareness of prevention services and people were accessing those services. This had a positive impact: it is believed that prevention services were keeping families together. Unfortunately, the report also found the demand for core protection services was affecting the ability to deliver prevention programming. The report recommended greater coordination between federal programming in the areas of economic development, health promotion, education and cultural integrity to address community well-being and foster positive long-term outcomes.

In looking at issues of jurisdiction and administrative control, First Nations will want to consider current administrative arrangements for their communities and whether and when to assume greater administrative control and ultimately jurisdiction. The most effective way to meet the needs of the child will be the primary consideration.

The *Indian Act* does provide limited bylaw-making powers to councils to provide for children who reside with citizens of the Nation on-reserve. Some First Nations have tried to use the bylaw-making powers under section 81(1)(a) of the *Indian Act* to enact child welfare laws. With the exception of Spallumcheen Indian Band, all of these initiatives have been disallowed. The Spallumcheen Bylaw displaces both federal and provincial law-making authority.

Nations are looking at exercising not just the authority to administer provincial programs but increased jurisdiction and law-making in this important area. In view of provincial developments, it is now being suggested that there may be a need for both federal and provincial legislation that recognizes culturally based services and the ability to create and implement culturally based work. And in this regard, a sectoral self-government initiative may be proposed. Beyond such an initiative, some communities with comprehensive governance arrangements under modern treaties are already placing emphasis on their ability to be more creative in policy development with respect to social jurisdictions such as child and family. As a result, they are looking to other models of child care, including best practices that reflect Indigenous traditions and values.

First Nations that have negotiated comprehensive governance arrangements have powers over child welfare in accordance with the terms of their self-government agreements. However, control over child welfare is an important subject for any First Nation considering governance beyond the *Indian Act*. Communities will need to consider the extent to which they are prepared and able to assume jurisdiction and/or administrative responsibility and the extent to which Canada and, where appropriate, British Columbia agrees. As with other social development–related issues, Nations will want to consider the appropriate institution or level of government for providing these important services, to what extent the Nation would be involved in delivering them, and the role of regional organizations and bodies. There are a number of considerations, in particular the potential for conflict between individual and community interests in the area of child welfare.

The questions your community may ask in considering whether to administer or govern child welfare include:	
Q:	How is child welfare currently governed within our community and who is responsible for program design and delivery?
Q:	What role should the chief and council (the governing body) have in decisions regarding child welfare within the community, and to what extent is the local administration involved in child welfare?
Q:	Is there a separate agency or department of our community that will assume the responsibility?
Q:	What agreements are in place for our community with respect to child welfare?
Q:	How extensive are child welfare issues in our community?
Q:	How many children are in care or under supervision in our community?
Q:	What relationship do we have with local ministry officials who may be responsible for child welfare in our community?
Q:	How are issues of privacy and confidentiality maintained?
Q:	How satisfied are our citizens with the current level of service?
Q:	What is the trend for child welfare in our community? Are the numbers in care or under supervision increasing or decreasing? Is the child welfare situation in our community improving or declining based on the number of children in care or under supervision?
Q:	Notwithstanding who has jurisdiction, what improvements to program design and service delivery would our community desire?
Q:	Can our community deliver a system that ensures the safety and well-being of the children?

INDIAN ACT GOVERNANCE

There is no specific bylaw-making power for child and family services, although section 82 (para. 2) does provide some basis for this authority. There is only one bylaw in force under the *Indian Act* with respect to child welfare: the Spallumcheen Indian Band Council (Splats'in First Nation) has direct authority for the protection of children who are members of the "band" and residing on-reserve. There are no provisions setting out the federal role in this regard. There are no regulation powers.

SECTORAL GOVERNANCE INITIATIVES

There are no sectoral initiatives addressing or contemplating addressing First Nations jurisdiction over child welfare. However, as mentioned above, there are 23 delegated agencies providing child and family services under provincial authority to Aboriginal people both on- and off-reserve.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All of the treaty agreements provide for jurisdiction over child and family services. On the effective date, the Tsawwassen First Nation enacted a law in this area delegating responsibility back to the provincial and federal governments, with the intention of making policy changes with respect to programs and services in the future. There is an expectation among some Nations with comprehensive governance arrangements that their increased jurisdiction and control will allow them to design more creative programs and policies with respect to this power (jurisdiction). While having adequate resources to undertake programming is always an issue, there are nevertheless opportunities under these arrangements, where the provincial and federal governments no longer maintain control, for Nations to be innovative. Where Nations have jurisdiction under comprehensive governance arrangements, there is typically a requirement for the First Nation to give the provincial and federal governments notice in advance of exercising such jurisdiction. In the case of Tsawwassen, the timeframe is six months.

The Nisga'a's intent was to see all children returned to the Nation. However, Nisga'a has not drawn down the services because of a lack of financial support to provide them. Both the Yale and Tla'amin final agreements contain similar language to those of the Tsawwassen and Maa-nulth.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	Sechelt Council has law-making powers over child welfare. (s. 14(1)(h))	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)
Westbank	No jurisdiction. Westbank intends to enter into future negotiations to set out jurisdictional arrangements for child welfare. (Part XXIV, s. 222(d))	
Nisga'a	Nisga'a may make laws with respect to Child and family services on Nisga'a Lands; may negotiate agreements with BC with respect to Nisga'a children not on Nisga'a Lands. (Ch. 11, s. 89–92)	Nisga'a law prevails. (Ch. 11, s. 91)
Tsawwassen	Tsawwassen Government may make laws with respect to Child Protection Services for Tsawwassen children on Tsawwassen Lands and may negotiate agreements with BC with respect to Tsawwassen children not on Tsawwassen Lands and children who are not Tsawwassen children but reside on Tsawwassen Lands. (Ch. 16, s. 68 and 74)	Tsawwassen law prevails. (Ch. 16, s. 70)
Maa-nulth	A Maa-nulth First Nation may make laws with respect to Child Protective Services for children of a Maa-nulth First Nation living on the applicable Maa-nulth First Nation Lands and may negotiate agreements with respect to a Maa-nulth First Nation child who resides off its Maa-nulth First Nation Lands or children who are not a Maa-nulth First Nation child who reside on Maa-nulth First Nation Lands. (s. 13.16.2) A Maa-nulth First Nation may make laws with respect to Child Care services. (s. 13.18.1)	Maa-nulth law prevails in situation of child protection. (s. 13.16.6) Federal or provincial law prevails in situation of child care. (s. 13.18.2)
Yale	Yale First Nation Government may make laws with respect to Child Protection Services for Yale First Nation Families resident on Yale First Nations Land and may enter into an agreement with respect to a Yale First Nation child who resides off Yale First Nation Lands or children who are not Yale First Nation child who reside on Yale First Nation Lands. (s. 3.16.1 and 3.16.6) Yale First Nation may make laws with respect to child care services. (s. 3.22.1)	Yale First Nation law under 3.16.1 prevails. (s. 3.16.5) Federal or provincial law prevails in situation of child care. (s. 3.22.2)
Tla'amin	The Tla'amin Nation may make laws in relation to Child Protection Services on Tla'amin Lands for children of Tla'amin families and may enter into an agreement with respect to children of Tla'amin families who reside off Tla'amin Lands or children who are not members of Tla'amin families who reside on Tla'amin Lands. (Ch. 15, s. 73 and 79) Tla'amin may make laws with respect to child care services. (Ch. 15, s. 99)	Tla'amin law prevails. (Ch. 15, s. 78) Federal or provincial law prevails with respect to child care services. (Ch. 15, s. 100)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(a) Health			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Seabird Island	2008	HEALTH	Bylaw Respecting Community Wellness
Spallumcheen	003-1980	HEALTH	Bylaw For The Care Of Children
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Tsawwassen First Nation	Apr 3, 2009	Tsawwassen First Nation Children and Families Act, 2009	

Table — Child and Family Organizations

PROVINCIAL AUTHORITY		
ABORIGINAL ORGANIZATION	**AFFILIATED COMMUNITIES**	**OPERATIONAL STATUS**
Fraser Valley Aboriginal Children and Family Services Society, Formally Xyolhemeylh Child and Family Services (Fraser Region)	• Aitchelitz • Chawathil • Cheam • Kwantlen • Leq'a:mel • Popkum • Seabird Island • Shxw'ow'hamel • Shxwhá:y Village • Skawahlook • Skowkale • Skwah • Soowahlie • Squiala • Sumas • Tzeachten • Yakweakwioose	Child Protection C6
Knucwentwecw Society (Interior Region)	• Canim Lake • Canoe Creek • Soda Creek • Williams Lake	Child Protection C6
Ktunaxa/Kinbasket Child and Family Services Society (Interior Region)	• Columbia Lake/?Akisq'nuk • Lower Kootenay • Shuswap • St. Mary's • Tobacco Plains	Child Protection C6
Lalum'utul' Smun'eem Child and Family Services (Vancouver Island Region)	• Cowichan	Child Protection C6
Nlha'7kapmx Child and Family Services Society (Interior Region)	• Cook's Ferry • Kanaka Bar • Lytton • Nicomen • Siska • Skuppah	Child Protection C6

Table — Child and Family Organizations... ***continued***

ABORIGINAL ORGANIZATION	AFFILIATED COMMUNITIES	OPERATIONAL STATUS
Nuu-chah-nulth Tribal Council Usma Family and Child Services, or Usma Nuu-Chah-Nulth (Vancouver Island Region)	• Ahousaht • Ditidaht • Ehattesaht • Hesquiaht • Huu-ay-aht • Ka:'yu:'k't'h'/ Che:k'tles7et'h • Mowachaht/Muchalaht • Hupacasath • Nuchatlaht • Tla-o-qui-aht • Toquaht • Tseshaht • Uchucklesaht • Ucluelet	Child Protection C6
Scw'exmx Child and Family Services Society (Interior Region)	• Coldwater • Lower Nicola • Nooaitch • Shackan • Upper Nicola	Child Protection C6
Secwepemc Child and Family Services Agency (Interior Region)	• Adams Lake • Bonaparte • Kamloops • Neskonlith • North Thompson • Skeetchestn • Whispering Pines	Child Protection C6
Vancouver Aboriginal Child and Family Services Society (VACFSS) (Vancouver Coastal Region)	• Vancouver Urban (Vancouver/Richmond)	Child Protection C6
Ayas Men Men Child and Family Services (Squamish Nation) (Vancouver Coastal Region)	• Squamish	Guardianship C4
Carrier Sekani Family Services (North Region)	• Burns Lake • Cheslatta • Lake Babine • Nadleh Whut'en • Nee-Tahi-Buhn • Skin Tyee • Stellat'en • Saik'uz • Takla Lake • Wet'suwet'en • Yekooche	Guardianship C4
Gitxsan Child and Family Services Society (North Region)	• Gitanyow • Gitsegukla • Gitwangak • Glen Vowell • Kispiox	Guardianship C4

Table — Child and Family Organizations... ***continued***

ABORIGINAL ORGANIZATION	AFFILIATED COMMUNITIES	OPERATIONAL STATUS
Kw'umut Lelum Child and Family Services (Vancouver Island Region)	• Stz'uminus (Chemainus) • Halalt • Lake Cowichan • Lyackson • Malahat • Nanoose • Penelakut • Qualicum • Snuneymuxw	Guardianship C4
Nezul Be Hunuyeh Child and Family Services Society (North Region)	• Nak'azdli • Tl'azt'en	Guardianship C4
NIL/TU,O Child and Family Services Society (Vancouver Island Region)	• Beecher Bay • Pauquachin • Songhees • Tsartlip • Tsawout • T'Sou-ke	Guardianship C4
Nisga'a Child and Family Services (North Region)	Citizens Of The Nisga'a Lisims Government Including Villages Of: • Gingolx (Kincolith) • Gitlakdamix • Lakalzap • Gitwinksihlkw	Guardianship C4
Northwest Inter-Nation Family And Community Services Society (North Region)	• Hartley Bay • Iskut • Kitamaat • Kitkatla • Kitselas • Kitsumkalum • Lax Kw'alaams • Metlakatla • Tahltan	Guardianship C4
Surrounded by Cedar Child and Family Services (Vancouver Island Region)	• Victoria Urban	Guardianship C4
Laichwiltach Family Life Society	• Campbell River Indian Band • Cape Mudge Band • Komox Indian Band • Homalco • Klahoose • Kwakiah • Mamalilikulla-Qwe'Qwa'Sot'Em	In Planning Stages
Nenan Dane zaa Deh Zona Family Services Society	• Blueberry River • Doig River • Fort Nelson • Halfway River • Prophet River • (Dene Tsaa tse K'Nai) • Salteaux • West Moberly Including Communities Of: • Dawson Creek • Pouce Coupe • Kelly Lake	In Planning Stages

Table — Child and Family Organizations... ***continued***

ABORIGINAL ORGANIZATION	AFFILIATED COMMUNITIES	OPERATIONAL STATUS
Office of Wet'suwet'en Society	• Moricetown • Hagwilget	In Planning Stages
Okanagan Nation	• Lower Similkameen • Okanagan • Osoyoos • Penticton • Upper Nicola • Upper Similkameen	In Planning Stages
Desniqi Services Society (Interior Region)	• Alexandria • Alexis Creek (Tsi Del Del) • Anahim (Tl'etinqox) • Nemiah (Xeni Gwet'in) • Stone (Yunesit'in) • Toosey (Tl'esqotin) • Ulkatcho	Start-Up
Haida Family and Child Services Society (North Region)	• Old Massett Village Council • Skidegate Band	Voluntary Services C3
Heiltsuk Kaxla Child and Family Service Program (Vancouver Coastal Region)	• Heiltsuk	Voluntary Services C3
K'wak'walat'si ('Namgis) Child and Family Services (Vancouver Island Region)	• 'Namgis • Tlowitsis-Mumtagalia	Voluntary Services C3

RESOURCES

First Nations

(BC) Aboriginal Child Care Society
Suite 102, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-913-9128
Fax: 604-913-9129
Email: reception@acc-society.bc.ca
www.acc-society.bc.ca

BC First Nations Early Childhood Development Council
Suite 113, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-925-6087
Fax: 604-925-6097
Toll-free: 1-877-422-3672
Email: info@fnesc.ca
www.fnesc.ca/ecd/ecd.php

- Taking Action for Our Children: A BC First Nations Early Childhood Development Framework (BC First Nations Early Childhood Development Council, 2009)
  www.fnesc.ca/Attachments/ECD/ECD%20Consultation%20Document%20Dec%2017%2009.pdf

First Nations Child and Family Caring Society of Canada
Suite 302, 251 Bank Street
Ottawa, ON K2P 1X3
Phone: 613-230-5885
Fax: 613-230-3080
Email: info@fncaringsociety.com

- Provides research to promote FN research capacity, disseminate research materials, conduct research projects and policy workshops
- Presentations at community, provincial and national conferences. Information resources, website, FNCFCS newsletters, highlighting best practice in First Nations child and family services. Maintains comprehensive FN child welfare database and online journal.
- Jordan's Principle
  www.fncfcs.com/jordans-principle
- Child Welfare Resources
  www.fncaringsociety.com/touchstones-hope-gallery-and-resources
  www.fncaringsociety.com/publications/search

First Nations Health Council
Suite 1205, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-913-2080
Fax: 604-913-2081
Toll-free: 1-866-913-0033
Email: info@fnhc.ca
www.fnhc.ca

- Transformative Change Accord: First Nations Health Plan (BC Assembly of First Nations, First Nations Summit, Union of BC Indian Chiefs, Province of British Columbia, 2007)
  www.fnhc.ca/pdf/TCA_FNHP.pdf
- Tripartite First Nations Health Plan (BC Assembly of First Nations, First Nations Summit, Union of BC Indian Chiefs, Government of Canada, Province of British Columbia, 2008)
  www.fnhc.ca/pdf/TripartiteFNHealthPlan.pdf

Indigenous Perspectives Society
(formerly the Caring for First Nations Children Society)
664 Granderson Road
Victoria, BC V9B 2R8
Phone: 250-391-0007
Toll-free: 1-800-342-4155
Fax: 250-391-0002
Email: info@cfncs.com
www.cfncs.com

Indigenous Adult & Higher Learning Association (IAHLA)
Suite 113, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-925-6087
Toll-free: 1-877-422-3672
Fax: 604-925-6097
www.fnesc.ca/iahla

Union of B.C. Indian Chiefs
Suite 500, 342 Water Street
Vancouver, BC V6B 1B6
Phone: 604-684-0231
Fax: 604-684-5726
Email: ubcic@ubcic.bc.ca
www.ubcic.bc.ca/

- CALLING FORTH OUR FUTURE: Options for the Exercise of Indigenous Peoples' Authority in Child Welfare
  www.ubcic.bc.ca/files/PDF/ubcic_ourfuture.pdf
- Tsawwassen Accord, (June 10–11, 2002)
  www.ubcic.bc.ca/files/PDF/Tsawassen_Accord.pdf

BC Association of Aboriginal Friendship Centres
Vancouver Island Home Office
200 – 7725 Tetayut Road
Saanichton, BC V8M 2E4
Phone: 250-388-5522
Toll-free: 1-800-990-2432
Fax: 250-388-5502
Email: frontdesk@bcaafc.com
www.bcaafc.com/

- A Framework for "Standing Up For Our Children"
  (BC Association of Aboriginal Friendship Centres, February 2009)
  www.bcaafc.com/images/stories/PDFs/bcaafc_cfs_framework2.pdf

Provincial

BC Representative for Children and Youth
Head Office, Victoria
Suite 201, 546 Yates Street
Victoria, BC V8W 1K8
Telephone: 250-356-6710
Fax: 250-356-0837

See: *When Talked Trumped Service: A Decade of Lost Opportunity for Aboriginal Children and Youth in BC*,
www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/when_talk_trumped_service.pdf

Ministry of Children and Family Development
PO Box 9770 Stn Prov Govt
Victoria, BC V8W 9S5
Phone (General Inquiries): 250-387-7027
Toll-free: 1-877-387-7027
Email: mcf.correspondencemanagement@gov.bc.ca
www.gov.bc.ca/mcf/

- Delegated Child and Family Service Agencies
  www.mcf.gov.bc.ca/about_us/aboriginal/delegated/index.htm
  www.mcf.gov.bc.ca/about_us/aboriginal/delegated/pdf/agency_list.pdf
- Ministry of Child and Family Development 2014/15 – 2016/17 Service Plan,
  www.bcbudget.gov.bc.ca/2014/sp/pdf/ministry/cfd.pdf

Federal

Aboriginal Affairs and Northern Development Canada (BC Region)
Suite 600, 1138 Melville St.
Vancouver, BC V6E 4S3
Phone (toll-free): 1-800-567-9604
Fax: 1-866-817-3977
TTY (toll-free): 1-866-817-3977
Email: Infopubs@aandc-aadnc.gc.ca

- First Nation Child and Family Services Information Management, Frequently Asked Questions: www.aadnc-aandc.gc.ca/eng/1384453787409/1384453816388
- National Social Programs Manual: www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-HB/STAGING/texte-text/hb_sp_npm_mnp_1335464147597_eng.pdf
- Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia for the First Nations Child and Family Services Program: www.aadnc-aandc.gc.ca/eng/1382098076520/1382098176246 - chp3

SELECT LEGISLATION

- *Child, Family and Community Service Act* (R.S.B.C. 1996, c. 46)

PART 1 /// SECTION 3.6

Citizenship

3.6

CITIZENSHIP

3.6

CITIZENSHIP

BACKGROUND

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 9: UN Declaration

As discussed in Section 2.2 — The Citizens, the institution of citizenship and determining who belongs to the group to which governance arrangements apply is central to any Nation-building discussion. There is perhaps no greater exercise of self-determination than determining who is a legally a part of the group — a "citizen." Historically, of course, a Nation exercised control of the group and "citizenship" through myriad mechanisms reflecting its diverse culture and traditions. This included both matrilineal clan and patrilineal kinship systems, as well as hereditary systems. Citizenship was more flexible and could be gained through birth, marriage, adoption and residency. Citizenship carried certain responsibilities; for men, this generally meant providing food and protection, and for women, it included domestic needs, education and, sometimes, clan leadership or leadership selection. Post-contact, in an effort to administer "Indian" peoples, the Crown, primarily through the *Indian Act*, has sought to define who belongs to a Nation through the establishment of "bands" created under that act and the categories of "members" and "person registered as Indians (status)". Thus, under the *Indian Act*, citizenship went from a community's recognition of "citizenship" or belonging to the group (e.g., "Syilx" in Okanagan, which is quite literally a demand that people be part of a unified group, or "Gitksan," [People of the Skeena River] in Nisga'a) to a legal status conferred by a colonial government.

First Nations Populations in BC *(as of the 2011 Census)*
Number of people identifying as First Nations: 155,200
BC percentage of First Nations people in Canada: 18.2
Percentage of the BC population: 3.5
Number of First Nations communities in BC: 203
Average number of members per community: 764
First Nations languages native to BC: 43 (Nehiyawewin, Anishnaubemowin, Chinuk Wawa, Dalkeh, Dane-Zaa, Danezāgé', Den k'e, Dene K'e, Diitiidʔaatx̱, Éy7á7juuthem, Gitsenmix, Hailhzaqvla, Hul'q'umi'num' / Halq'eméylem / hən̓q̓əmin̓əm, Knutaxa, Kwakwala, Lhechelesem, Łingít, Nedut'en, Nəx"sƛ'aɣ̓əmúcən, Nicola, Nisga'a, Nłeʔkepmxcínm, Nqlispélišcn, Nsyilxcən, Nuučaan̓uł, Nuxalt, Oowekyala / 'Uik̓ala, Pəntl'áč, Secwepemctsin, SENĆOŦEN / Malchosen / Lkwungen / Semiahmoo / T'Sou-ke, She shashishalhem, Ski:xs, Sḵwx̱wú7mesh sníchim, Sm̓algyax̱, St̓át̓imcets, Tāłtān, Tse'khene, Tsilhqot'in, Tutchone, Wetalh, Witsuwit'en, X̱aad Kil / X̱aaydaa Kil (Haida), enaksialak̓ala / a''islak̓ala)
Largest communities by membership (as of April 2014 — AANDC registration*): Cowichan: **4,744** Squamish: **4,092** Lax Kwa'laams: **3,670**
Smallest communities by membership (as of April 2014 — AANDC registration*): Popkum: **10** New Westminster: **12** Kwiakah: **22**
** According to the AANDC Web site, 22 BC First Nations have their census data included as part of their regional area and their membership numbers are not available through AANDC.*

Today, notwithstanding the legal right of Nations to determine who is a citizen of that Nation, there is a spectrum of options for exercising jurisdiction over determining who is a part of the Nation, depending on what type of governance arrangements a Nation is subject to. The options support Nations in working through the complex legal and political issues of determining citizenship as they rebuild and move away from governance under the *Indian Act*. In these cases, it is clear that such determinations

of citizenship are both recognized by the Crown and viewed as legitimate by the citizens (they are voted on or brought into effect by ratification processes agreed to by the Nation transitioning away from the *Indian Act*). These options range from making a membership code under the *Indian Act* as to who should belong to the "band of Indians" to powers for determining full citizenship in the Nation as part of comprehensive governance arrangements (both inside and outside of modern treaty-making). Alternatively, some Nations choose to simply declare, in a constitution or other instrument, who is a citizen, notwithstanding whether this is a part of a comprehensive governance arrangement. The certainty this provides in moving forward is dependent on how well the Nation can enforce its rules for citizenship and, in particular, the degree to which there may be inconsistences between rules for citizenship in the Nation and rules for being a "member" of a band and for being registered as an "Indian," and the respective rights and responsibilities of person under each of these categories. As a result of the differences in rights and responsibilities, transitioning away from the *Indian Act* in favour of Nation rebuilding creates numerous challenges that communities must work through.

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 35: UN Declaration

In many cases an acceptable membership code for a "band" under the *Indian Act* may be problematic for a Nation or a group of "bands" moving to more comprehensive governance arrangements with the Crown or for representation by a Nation in court. This is particularly the case where the appropriate unit of government for new governance arrangements may not be based on the *Indian Act* "band." In most instances, Nations moving beyond the *Indian Act* have had to deconstruct their *Indian Act* reality and the rules for belonging to a "band" and then reconstruct them as part of the separate and new legal entity recognized and established under new governance arrangements.

Outside of negotiations with the Crown, some Nations are pursuing litigation as a means to support the legal argument that citizenship is a fundamental aspect of self-determination and is a jurisdiction that falls under the inherent right of self-government (and is consequently protected under section 35 of the *Constitution Act*). On the litigation front, and while not specifically related to First Nations self-government and a Nations ability to decide who its citizens should be, there have also been court cases that address the determination of who is entitled to registration by Canada as an "Indian" under the *Indian Act*. In response to litigation brought about by persons who were denied registration as "Indians" under the *Indian Act* because of discriminatory provisions in the *Indian Act*, in December 2012 the federal government enacted the *Gender Equity in Indian Registration Act* (S.C. 2010, c. 18). The act amended the *Indian Act* to ensure that eligible grandchildren of women who lost their status by marrying a non-registered male are entitled to register as an Indian. The federal government has estimated that 45,000 people would be able to register for status that would previously have been disallowed.

After the *Gender Equity in Indian Registration Act* was passed, the government provided an opportunity for comment and First Nations organizations and communities from across Canada offered input. The Assembly of First Nations (AFN) helped facilitate this broad dialogue with gatherings and online surveys. After assessing the information received, the AFN recommended that there be further institutional and capacity support to assist First Nations in reasserting their jurisdiction; that Canada begin joint work with the AFN to develop jurisdiction options; that Canada undertake immediate action to end the discrimination inherent in the *Indian Act*; and that the federal government limit its role to providing support to First Nations, not redefining them. To date there has been no action on the recommendations.

Questions of membership and citizenship are fundamentally tied to what political unit of governance is being populated — that is, which level or order of First Nation government and what powers or jurisdiction they hold. In some cases, a community that constitutes a part of a broader Nation (linguistically and culturally) may have its own rules for membership or citizenship, as well as having rules at the Nation level for who is citizen of the larger Nation. Nations, in part or in whole, will need to sort out where these divisions lie, with consideration given to how the rules for membership/citizenship are compatible or not: are the rules for being a member of a community ("band") different than the rules

for being a citizen of the Nation and if so why? Are all members of the "band" automatically citizens of the Nation and if not, why, and so on? What are the respective rights and responsibilities of being a citizen/member of a community/"band" and of being a citizen of a Nation? These are all questions that First Nations communities and larger Nations are grappling with as they deconstruct the *Indian Act* reality and rebuild legitimate institutions of governance, including citizenship rules.

Nations that have developed constitutions outside of negotiating comprehensive arrangements with the Crown typically, as one would expect, also include provisions respecting citizenship. The practical implications of these ordnances varies depending upon the degree to which they are viewed as legitimate by the people to whom they are expected to apply and the degree to which they compel action and can be enforced. In many regards, this can be assessed by asking to what degree those rules are affecting the rights and responsibilities of persons who are subject to them (e.g., what are the "on the ground" impacts on people's day-to-day lives, such as on voting rights, sharing in the property of the Nation, access to programs and services, taxation treatment, application of on- and off-reserve decision-making)?

INDIAN ACT GOVERNANCE

Membership under the *Indian Act* is determined in accordance with sections 5 to 14, specifically sections 6, 7, 10, 11 and 12. First Nations have the option to continue using these rules to determine a First Nation's citizenship criteria. There is also a mechanism for a "band" to take over control of its membership pursuant to a procedure set out in the *Indian Act* itself (section 10).

To assist Nations and the Crown in questions of membership under the *Indian Act*, AANDC has established a membership program with the responsibility to:

- enable First Nations to assume control of their membership
- ensure that the acquired rights of First Nations members are protected as required by the *Indian Act*, and
- advise the Treaties and Aboriginal Government sector of AANDC, and other sectors as needed, on membership components of self-government proposals.

In this case, the First Nation assumes control by developing membership rules that protect all rights to membership that had been acquired while AANDC was maintaining the "band" membership list. The rules must be approved by a majority of the First Nation's electorate. All membership decisions thereafter are made by the First Nation.

Section 10 Membership Code Checklist	
1.	First Nation drafts membership code meeting the legal requirements of the *Indian Act* including an appeal procedure to review rejected applications.
2.	Referendum of the "members" of the First Nation to determine the intention to control membership and to "approve" the membership code.
3.	Formal notice sent to the Minister, usually by sworn affidavit, including a copy of the membership code and evidence of notice and consent that the community wants to control membership and has accepted the membership code.
4.	If all conditions have been met, Minister sends notice to the First Nation that it has control of its own membership and directs the Registrar to provide a copy of the "Band List" held by AANDC to the First Nation.
5.	The membership code is in force as of the day notice was sent by the First Nation to the Minister.
6.	The First Nation establishes the administration to maintain an updated membership list containing additions and deletions of the members. The list is kept in the administration offices of the First Nation and is available to all members.

As of October 2014, 232 First Nations in Canada determine their own membership under section 10. In BC, 78 First Nations control their own membership under section 10 of the *Indian Act*.

SECTORAL GOVERNANCE INITIATIVES

There are currently no sectoral initiatives to deal with the determination of citizenship. Therefore, the options for First Nations are limited to *Indian Act* processes, comprehensive governance negotiations, or direction by the courts.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

An alternative method that Nations can use to assume control of determining their citizenship criteria is through comprehensive governance negotiations. This can be done through a separate negotiation process or as part of treaty negotiations. All of the existing self-government agreements recognize the Nation's jurisdiction in determining their citizenship, and all future self-government arrangements would presumably recognize this jurisdiction as well. Today, 12 First Nations have codes in accordance with their comprehensive governance arrangements.

As of October 2014, 232 First Nations across Canada and 78 in BC determine "membership" under section 10 of the *Indian Act*. Twelve First Nations in BC determine who their citizens are in accordance with their comprehensive governance arrangements.

In some cases, First Nations desiring to come under comprehensive governance arrangements may have attempted in the past to make codes under the *Indian Act*, only to have them rejected by the Minister. Self-government negotiations may provide an opportunity to revisit these issues. In any case, codes should be fair and non-arbitrary.

Some Nations may include the detailed rules for who belongs to the Nation in their constitution as the core and fundamental law of the Nation, while others might prefer to make separate citizenship laws. Of note, however, is that in most cases where Nations have developed citizenship rules, significant work has taken place to deconstruct the *Indian Act* system of membership and replace it with new, more appropriate rules. This is particularly the case for modern governance arrangements.

In the case of modern treaties, such as Tsawwassen's, it is important to appreciate the different entitlements of "Members" (citizens) and "Individuals" referred to in the Final Agreement. These entitlements reflect the change in the Nation's legal structure between the last day it existed as an *Indian Act* "band" and its first day as a self-governing Nation, when the *Indian Act* "band" ceases to exist. For example, there is a provision in the *Tsawwassen First Nation Final Agreement* stating that if you were a Tsawwassen member under the *Indian Act* and chose not to enrol as a Member of the new entity, you become known as a Tsawwassen "Individual." As such, you are not eligible for treaty benefits or to participate in the governance of the Nation, and while you have some vested rights you do not have many rights with respect to participation in the Nation's affairs.

Looking at the Nisga'a arrangements, the starting point is that citizenship is actually defined as having no relationship to the *Indian Act*. In accordance with the treaty, the Nisga'a Constitution provides that persons choosing to enrol in the treaty are considered citizens unless they renounce this citizenship at some point. The Nisga'a can expand the set of people who are considered citizens under Nisga'a law but cannot contract the set. They also have the power to pass a Citizenship Act, under which any person can be a Nisga'a citizen. "Participants" in the treaty have no right other than the right to become a citizen of the Nisga'a Nation. Citizenship is then the basis of any treaty rights.

When looking at comprehensive governance arrangements, it is therefore important to appreciate that after the initial set of persons enrolled or entitled to bring the governance arrangements into effect has been determined and the new arrangements are in place, the Nation can determine, in accordance with its constitution, the extent to which the group will adjust its own rules concerning citizenship as part of the exercise of its ongoing jurisdiction.

Other comprehensive agreements detail citizenship on the effective date, offer fairly open-ended opportunities for the Nation to create further rules to define citizenship after the effective date, and acknowledge that the Nation's laws prevail in the event of any dispute with provincial or federal law.

A number of Nations have developed citizenship rules outside of comprehensive agreements. For example, the Haida Nation has established very broad citizenship rules that are distinct from the determination of membership in the two *Indian Act* Haida bands (Skidegate and Masset). Under Article Two of the Haida Constitution, all people of Haida ancestry are citizens of the Haida Nation and have the exclusive right to determine the process for determining Haida citizenship. These rules were put into effect through a Peoples' Assembly and were not enacted as part of comprehensive governance negotiations. The Champagne and Aishihik First Nations (Yukon Territory) Citizenship Code (2012) is another example. Their code stipulates that — outside of automatic citizenship by being on the membership rolls from the outset or a beneficiary of their treaty — the Nation's council has sole jurisdiction in assigning citizenship. New citizens must pledge an Oath of Allegiance administered through an elder.

Table — Comprehensive Governance Arrangements

	ENTITLEMENT AND ENROLMENT	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	Existing members of the Sechelt Indian Band.	Federal legislation establishes need for a Sechelt membership code that must have Sechelt electors' approval. The rules are set out in the Sechelt constitution. (s. 10(2))	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)
Westbank	Existing members of the former Westbank Indian Band. Cannot be a member of another band or First Nation at the same time. (Part VII, s. 72, 73 and 75)	Westbank First Nation has jurisdiction in relation to membership of Westbank First Nation. (Part VII, s. 70)	Westbank law prevails. (Part VII, s. 77)
Nisga'a	a) of Nisga'a ancestry; b) a descendant of (a) or (c); c) an adopted child of (a) or (b); or d) an Aboriginal person married to (a), (b), or (c) and has been adopted by a Nisga'a tribe. (Ch. 20, s. 1)	Nisga'a Lisims Government may make laws with respect to Nisga'a citizenship. (Ch. 11, s. 39)	Nisga'a law prevails. (Ch. 11, s. 40)
Tsawwassen	a) was a member or entitled to be a member of Tsawwassen Indian Band prior to effective date; b) of Tsawwassen ancestry; c) adopted by an individual eligible to be enrolled; or d) descendant of above. The child of a non-aboriginal Tsawwassen member (who gained membership through marriage prior to 1985) and a person who is not eligible to be enrolled, is not eligible for enrollment. (Ch. 21, s. 2)	Tsawwassen Government will make laws regarding entitlement to membership. (Ch. 16, s. 48)	Tsawwassen law prevails. (Ch. 16, s. 49)
Maa-nulth	a) of that Maa-nulth First Nation ancestry; b) adopted by an individual eligible to be enrolled; c) a descendant of above; or d) is accepted by that Maa-nulth First Nation as a member. Cannot be a member of another band or First Nation at the same time. (s. 26.1.1 and 26.1.2)	Power to make laws in respect of citizenship in the applicable Maa-nulth First Nation. (s. 13.13.1)	Maa-nulth law prevails. (s. 13.13.3)

Table — Comprehensive Governance Arrangements... *continued*

	ENTITLEMENT AND ENROLMENT	GENERAL JURISDICTION	CONFLICT OF LAWS
Yale	a) is of Yale First Nation ancestry and has a demonstrated attachment to Yale First Nation; b) was a member, or was entitled to be a member, as of the day before the Effective Date; c) adopted as a Child by an individual who is eligible for enrolment under this Agreement; d) has been accepted into the community under Yale First Nation custom; or e) is a descendant of an individual who is eligible for enrolment under a, b, c or d. (s. 25.1.1)	Power to make laws with respect to Yale First Nation membership. (s. 3.12.1)	Yale First Nation law prevails. (s. 3.12.2)
Tla'amin	a) is of Tla'amin ancestry; b) is registered, or is eligible to be registered, the day before the Effective Date; c) was adopted as a Child or by Tla'amin custom by an individual eligible for enrolment under subparagraphs 1.a, 1.b or 1.d; d) is a descendant of an individual eligible for enrolment under subparagraphs 1.a, 1.b or 1.c; or e) after the Effective Date, is accepted according to a community acceptance process set out in Tla'amin Law. (Ch. 22, s. 1)	Power to make laws in relation to Tla'amin Citizenship. (Ch. 15, s. 53)	Tla'amin law prevails. (Ch. 15, s. 55)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**		
First Nations membership codes in BC		
FIRST NATION	***INDIAN ACT***	**CUSTOM**
?Akisq'nuk First Nation (f. Columbia Lake)	s. 11	
Adams Lake		s. 10
Ahousaht		s. 10
?Aq'am (f. St. Mary's)		s. 10
Aitchelitz		s. 10
Alexis Creek	s. 11	
Ashcroft		s. 10
Beecher Bay	s. 11	
Blueberry River First Nations	s. 11	
Bonaparte	s. 11	
Boothroyd		s. 10
Boston Bar First Nation		s. 10
Bridge River	s. 11	
Burns Lake	s. 11	
Canim Lake		s. 10
Cayoose Creek	s. 11	
Chawathil (f. Hope)	s. 11	
Cheam	s. 11	
Cheslatta Carrier Nation		s. 10
Coldwater	s. 11	
Cook's Ferry	s. 11	
Cowichan		s. 10

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	*INDIAN ACT*	CUSTOM
Da'naxda'xw First Nation (f. Tanakteuk)	s. 11	
Ditidaht (f. Nitinaht)		s. 10
Doig River		s. 10
Ehattesaht		s. 10
?Esdilagh First Nation (f. Alexandria)	s. 11	
Esketemc (f. Alkali Lake)	s. 11	
Esquimalt	s. 11	
Fort Nelson First Nation		s. 10
Gitanmaax (f. Hazelton)	s. 11	
Gitanyow (f. Kitwancool)	s. 11	
Gitga'at (f. Hartley Bay)		s. 10
Gitsegukla (f. Kitsegukla)	s. 11	
Gitwangak (f. Kitwanga)	s. 11	
Gitxaala Nation (f. Kitkatla)	s. 11	
Glen Vowell	s. 11	
Gwa'sala-'Nakwaxda'xw	s. 11	
Gwawaenuk Tribe (f. Kwa-wa-aineuk)	s. 11	
Hagwilget Village (f. Tsitsk)	s. 11	
Haisla Nation (f. Kitamaat)		s. 10
Halalt		s. 10
Halfway River First Nation	s. 11	
Heiltsuk (f. Bella Bella)		s. 10
Hesquiaht		s. 10
High Bar		s. 10
Homalco	s. 11	
Hupacasath First Nation (f. Opetchesaht)		s. 10
Iskut		s. 10
Kanaka Bar		s. 10
Katzie		s. 10
Kispiox		s. 10
Kitamaat (Aka Haisla)		s. 10
Kitasoo	s. 11	
Kitselas		s. 10
Kitsumkalum		s. 10
Klahoose First Nation	s. 11	
K'omoks First Nation (f. Comox)	s. 11	
Kwadacha (f. Fort Ware)	s. 11	
Kwakiutl (f. Kwawkewith)		s. 10
Kwantlen First Nation (f. Langley)		s. 10
Kwaw-Kwaw-Apilt		s. 10
Kwiakah	s. 11	
Kwicksutaineuk-ah-kwaw-ah-mish	s. 11	
Kwikwetlem First Nation (f. Coquitlam)	s. 11	
Lake Babine Nation	s. 11	
Lake Cowichan First Nation (f. Cowichan Lake)	s. 11	
Lax-Kw'alaams	s. 11	

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	*INDIAN ACT*	CUSTOM
Leq'a:mel First Nation (f. Lakahahmen)		s. 10
Lheidli T'enneh (f. Fort George)	s. 11	
Lhtako Dene Nation (f. Quesnel, f. Red Bluff)		s. 10
Little Shuswap Lake		s. 10
Lhoosk'uz Dene Nation (f. Kluskus)		s. 10
Lower Kootenay	s. 11	
Lower Nicola	s. 11	
Lower Similkameen	s. 11	
Lyackson	s. 11	
Lytton		s. 10
Malahat First Nation	s. 11	
Mamalilikulla-Qwe'Qwa'Sot'Em	s. 11	
Matsqui		s. 10
McLeod Lake		s. 10
Metlakatla	s. 11	
Moricetown	s. 11	
Mount Currie		s. 10
Mowachaht/Muchalaht		s. 10
Musqueam		s. 10
N'Quatqua (f. Anderson Lake)	s. 11	
Nadleh Whuten (f. Fraser Lake)	s. 11	
Nak'azdli (f. Nescoslie)	s. 11	
Namgis First Nation (f. Nimpkish)	s. 11	
Nanoose First Nation		s. 10
Nazko		s. 10
Nee Tahi-Buhn	s. 11	
Neskonlith	s. 11	
Nicomen		s. 10
Nooaitch	s. 11	
Nuchatlaht	s. 11	
Nuxalk Nation (f. Bella Coola)		s. 10
Okanagan	s. 11	
Old Massett Village Council	s. 11	
Oregon Jack Creek	s. 11	
Osoyoos		s. 10
Oweekeno/Wuikinuxv Nation	s. 11	
Pacheedaht First Nation (f. Pacheenaht)		s. 10
Pauquachin		s. 10
Penelakut Tribe		s. 10
Penticton	s. 11	
Peters		s. 10
Popkum	s. 11	
Prophet River First Nation	s. 11	
Qayqayt (f. New Westminster)	s. 11	
Qualicum First Nation		s. 10
Quatsino	s. 11	

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	*INDIAN ACT*	CUSTOM
Saik'uz First Nation (f. Stony Creek)	s. 11	
Samahquam	s. 11	
Saulteau First Nations		s. 10
Scowlitz	s. 11	
Seabird Island		s. 10
Semiahmoo	s. 11	
Seton Lake	s. 11	
Shackan	s. 11	
Shuswap	s. 11	
Shxw'ow'hamel First Nation	s. 11	
Shxwhá:y Village (f. Skway)		s. 10
Simpcw First Nation (f. North Thompson)	s. 11	
Siska		s. 10
Skatin Nations (f. Skookumchuck)	s. 11	
Skawahlook First Nation		s. 10
Skeetchestn		s. 10
Skidegate	s. 11	
Skin Tyee	s. 11	
Skowkale		s. 10
Skuppah		s. 10
Skwah	s. 11	
Snuneymuxw First Nation (f. Nanaimo)	s. 11	
Songhees First Nation		s. 10
Soowahlie	s. 11	
Spallumcheen (Aka. Splatsin)	s. 11	
Spuzzum		s. 10
Squamish		s. 10
Squiala First Nation		s. 10
Stellat'en First Nation (f. Stellaquo)	s. 11	
Sts'ailes (f. Chehalis)	s. 11	
Stswecem'c Xgat'tem First Nation (f. Canoe Creek)	s. 11	
Stz'uminus First Nation (f. Chemainus)		s. 10
Sumas First Nation	s. 11	
T'it'q'et (f. Lillooet)		s. 10
Tla'amin	s. 11	
T'Sou-ke First Nation (f. Sooke)	s. 11	
Tahltan	s. 11	
Takla Lake First Nation	s. 11	
Tk'emlúps te Secwépemc (f. Kamloops)	s. 11	
Tl'azt'en Nation (f. Stuart-Trembleur Lake)	s. 11	
Tl'etinqox-t'in Government Office (f. Anahim)	s. 11	
Tla-o-qui-aht First Nations		s. 10
Tlatlasikwala	s. 11	
Tlowitsis Tribe	s. 11	
Tobacco Plains		s. 10
Toosey	s. 11	

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	*INDIAN ACT*	CUSTOM
Ts'kw'aylaxw First Nation (f. Pavilion)	s. 11	
Tsartlip	s. 11	
Tsawout First Nation		s. 10
Tsay Keh Dene	s. 11	
Tseshaht (f. Sheshaht)		s. 10
Tseycum		s. 10
Tsleil-Waututh (f. Burrard)		s. 10
Tzeachten		s. 10
Ulkatcho	s. 11	
Union Bar		s. 10
Upper Nicola	s. 11	
Upper Similkameen	s. 11	
We Wai Kai (f. Cape Mudge)		s. 10
We Wai Kum (f. Campbell River)		s. 10
West Moberly First Nations	s. 11	
Wet'suwet'en First Nation (f. Broman Lake)	s. 11	
Whispering Pines/Clinton	s. 11	
Williams Lake		s. 10
Xat'súll First Nation (f. Soda Creek)	s. 11	
Xaxli'p (f. Fountain)	s. 11	
Xa'xtsa (f. Douglas)	s. 11	
Xeni Gwet'in First Nations Government (f. Nemiah Valley)	s. 11	
Yakweakwioose	s. 11	
Yale First Nation	s. 11	
Yekooche	s. 11	
Yunesit'in Government (f. Stone)	s. 11	
TOTALS	**111**	**78**
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
BC First Nations with citizenship acts, membership acts and regulations under comprehensive governance arrangements		
CGA	**LAW NO.**	**DESCRIPTION**
Huu-ay-aht First Nations	HFNA 2011	Citizenship Act
Ka:'yu:'k't'h'/Che:k'tles7et'h First Nations	KCFNS 10/2011	Citizenship Act
Nisga'a Lisims Government	MAR 2008	Nisga'a Citizenship Act
Nisga'a Lisims Government	OCT 2008	Nisga'a Citizenship Regulation
Sechelt Indian Band	1993	Sechelt Constitution
Toquaht Nation	TNS 10/2011	Citizenship Act
Tsawwassen First Nation	APR 2009	Membership Act
Uchucklesaht Tribe	UTS 10/2011	Citizenship Act
Uchucklesaht Tribe	UTS 1/2011	Citizenship And Enrolment Forms Regulation
Ucluelet First Nations	YFNS 10/2011	Citizenship Act
Ucluelet First Nations	YFNS 1/2011	Citizenship And Enrolment Forms Regulation
Westbank First Nation	JUL 2007	Westbank First Nation Constitution

RESOURCES

First Nations

Assembly of First Nations
Trebla Building
Suite 1600, 55 Metcalfe St.
Ottawa, ON K1P 6L5
Phone: 613-241-6789
Toll-free: 1-866-869-6789
Fax: 613-241-5808
www.afn.ca

- Policy Area on Citizenship
  www.afn.ca/index.php/en/policy-areas/citizenship
- National Dialogue on First Nation Citizenship
  www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AP/STAGING/texte-text/gov_na1_1359035648602_fra.pdf

Federal

Aboriginal Affairs and Northern Development Canada
British Columbia Region
Suite 600, 1138 Melville Street
Vancouver, BC V6E 4S3
Phone: 604-775-7114 or 604-775-5100
Fax: 604-775-7149
Email: Infopubs@aandc-aadnc.gc.ca
www.aadnc-aandc.gc.ca/eng/1100100010002/1100100010021

- The Exploratory Process on Indian Registration, Band Membership and Citizenship
  www.aadnc-aandc.gc.ca/eng/1308584070908/1308584221643

SELECT LEGISLATION

- *Gender Equity in Indian Registration Act* (S.C. 2010, c. 18)

PART 1 /// SECTION 3.7

Education

3.7

EDUCATION

3.7

EDUCATION

BACKGROUND

Education is a fundamental human right. It is also addressed in the United Nations Declaration on the Rights of Indigenous Peoples. For First Nations governments, lifelong learning of its citizens is a primary focus and the AFN Chiefs-in-Assembly have by resolution identified education as the national priority. First Nations children need a quality education through which they gain the knowledge, skills and tools required to be successful in the modern economy and fully contributing citizens in their communities. They should also be empowered, supported and encouraged to learn and maintain their culture and traditions, including their languages, within their formal education. Unfortunately, high school six-year completion rates for Aboriginal students in the BC public education system remain considerably lower than for the general population, at 60 percent compared to 86 percent for non-Aboriginal people (BC Ministry of Education, *How Are We Doing?* November 2013). The statistics are even worse for children under a provincial Continuing Custody Order, who have a 34 percent school completion rate. Of those completing grade 12 in the public education system, only 51 percent of Aboriginal students graduate with a BC Certificate of Graduation (the "Dogwood" Diploma), compared to 72 percent of non-Aboriginal students. Thus, far too many Aboriginal students are not meeting the minimum high school graduation requirements. The good news is that the trend is more positive, as efforts to correct this situation years ago are slowly beginning to have an impact. First Nations maintain that for the situation to truly be transformed, First Nations need to be in control of and responsible for "Indian" education — recognizing, of course, the need for federal and provincial partners.

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 26(1)(2)(3): Universal Declaration on Human Rights

"Indian Control of Indian Education"

In 1972, the National Indian Brotherhood (AFN) released a paper entitled "Indian Control of Indian Education: Policy Paper Presented to the Minister of Indian Affairs and Northern Development." The paper highlighted the failure of both federal and provincial governments to appropriately educate First Nations children. It called for educational change and local control of education by First Nations communities and parents, based on positive community engagement. Building on the work of past and present leaders and decades of action at the community, regional and national levels, First Nations are now negotiating the transfer of education authority and jurisdiction over First Nations education from the federal government to First Nations. This important work is proceeding on a number of fronts in BC along the continuum of governance. It ranges from administering funding arrangements for the education programs and services delivered to a First Nation's students and operating schools under the authority of Canada and/or British Columbia to drawing down jurisdiction and designing and operating a First Nation's own school system. There are also initiatives addressing adult learners and early childhood education as well as post-secondary education. Regional First Nations institutions have also been established and empowered to support First Nations, recognizing the need for regional approaches and coordination with respect to negotiations, standard setting and certification; the need for economies of scale; and the capacity limitations of individual communities. In BC, the First Nations Education Steering Committee and the First Nations Schools Association provide this support.

BC First Nations Education Steering Committee

In 1992, the BC First Nations Education Steering Committee (FNESC) was established by First Nations and their technicians working in First Nations education. The First Nations Summit, Union of BC Indian Chiefs and BC Assembly of First Nations have, through resolution, tasked the FNESC with addressing

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education matters and providing support to First Nations in BC as they move forward with implementing a collective vision with respect to First Nations control over education. The FNESC is an independent society led by a diverse board of approximately 100 First Nations community representatives. Since its establishment, the FNESC has worked to communicate the priorities of BC First Nations to the federal and provincial governments, to advocate on their behalf, and to support First Nations communities in working together to advance a number of important education initiatives, including, most notably, the BC First Nations Education initiative, discussed below.

First Nations Schools Association

Like the FNESC, the First Nations Schools Association (FNSA) is committed to promoting First Nations control of education and self-government. Its primary role is to support First Nation–run schools through activities that promote and help to improve the quality of education provided by them, by ensuring the development of high-quality, culturally appropriate education for First Nations students. The FNSA is a registered society and charity that is governed by the more than 100 First Nations schools in BC. Each member of the FNSA Board of Directors, elected at the annual general meeting, represents a specific region of the province. The FNSA leads research projects, provides networking and communications services, and strives to raise awareness about what makes First Nations schools unique. In recent years, it has worked with First Nations schools to develop new tools for gathering data about schools and students, and to develop and implement new instruments for school assessment, among other resources (e.g., the Data Records and User Management System —DRUM).

Mission Statement of the First Nations Schools Association

The First Nations Schools Association will collaborate with First Nation schools to create nurturing environments that develop learners' pride and competence in their First Nations language and heritage and will equip them to realize their full potential, within self-governing First Nations communities.

FNSA

Goals of BC First Nations

First Nations in BC have clear and consistent goals with respect to education, based on the right of First Nations to determine how to best meet the needs of their children and prepare them for success within their First Nations and within Canadian society generally. While there may be differing views on what defines "success," and individual First Nations may have their own perspectives, generally success has been summarized by BC First Nations representatives, through the FNESC and the FNSA, as follows:

- First Nation learners must be provided an education that instills confidence in their self-identity, in their knowledge of themselves, their families, their communities, and their traditional values, languages and cultures.
- First Nation learners must learn the skills and knowledge needed to thrive in contemporary society, including the technological capacity required in the 21st century.
- First Nation learners must receive an education that will allow them to access any opportunities they choose, including a range of higher learning, employment and life choices.

Transformative Change Accord

The educational rights of BC First Nations, consistent with the UN Declaration, were recognized in the 2005 Transformative Change Accord signed by British Columbia, Canada and the Leadership Council (BC Assembly of First Nations, First Nations Summit and Union of BC Indian Chiefs) representing the First Nations of BC. The purpose of the accord was to bring together all parties to achieve the goal of closing the social and economic gap between First Nations and other British Columbians. The accord specifically stated the following commitments to close the education gap:

- Concluding a tripartite agreement on First Nations jurisdiction over K–12 education;
- Supporting First Nation learners;
- Focusing resources on early childhood learning and post-secondary training, including skills, training and apprenticeships; and
- Creating a high quality learning environment for First Nations students through curriculum development, teacher certification and the early detection of, and response to, learning disabilities.

As a result of this accord, a number of initiatives have been undertaken with both British Columbia and Canada. They are discussed below.

Jurisdiction, Governmental Responsibility and the Administration of First Nations Education

Division of Powers

First Nations maintain that jurisdiction over education is an aspect of the inherent right of self-government, although no court has been asked to rule specifically on this power. First Nations with numbered treaties, where a treaty makes reference to the provision of education, have a treaty right to education. This treaty right is interpreted by First Nations to include a right of governance over education and is not simply a right to have education services provided to them under another government's jurisdiction.

(1) Indigenous peoples have the right to establish and control their education systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

(3) States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 14(1)(3): UN Declaration

The *Constitution Act, 1867* generally makes education the exclusive responsibility of the provinces. In BC, the provincial government provides for the education of BC residents under the statutory framework of the *Access to Education Act* (S.B.C. 2001, c. 1), the *School Act* (R.S.B.C. 1996, c. 412), the *Independent School Act* (R.S.B.C. 1996, c. 216), the *Teachers Act*, the *Library Act*, the *First Nations Education Act*, the *Community Care and Assisted Living Act*, the *Special Accounts Appropriation and Control Act*, and the accompanying regulations. There is a Ministry of Education, and local school boards are delegated with the responsibility for running elementary and secondary schools as part of the overall public school system. There are 60 public school districts in BC, including one First Nation–run board (Nisga'a). Performance is monitored through superintendents of achievement, who support districts to improve student achievement and develop leadership at the district level. Under the *Teachers Act*, a system is in place to certify, regulate and discipline teachers through shared responsibility between the Ministry and the education sector.

Notwithstanding general provincial responsibility over education, the federal government, under section 91(24) of the *Constitution Act, 1867*, is responsible for "Indians, and Lands reserved for Indians," which has been interpreted to include elementary and secondary education provided to registered Indians living on-reserve. Canada interprets the treaty right as a right of the Indian to receive education provided by the state and delivered in accordance with its policy and financial discretion.

While education of First Nations students on reserve falls within the scope of federal jurisdiction under section 91(24) of the *Constitution Act, 1867*, post-secondary education is under the jurisdiction of the province. In BC, it is expected that after education jurisdiction negotiations for the K–12 system are complete, negotiations for jurisdiction over early childhood development and post-secondary programming will begin. Currently, however, no First Nations have taken over jurisdiction of post-secondary education.

Determining Governmental Responsibility

At times, there can be some confusion as to which government is responsible for education on-reserve and to which group of students. Federal policy from the early days of the *Indian Act* was developed on the assumption that in most cases there would be few non-Indians living on-reserve, other than the children of people working for the "band" (e.g., the teacher's, policeman's, or Indian Agent's children) or children who were the result of unions between an Indian and a non-Indian, where the child was not registered as an Indian. More recently, confusion has arisen because of the increasing number of non-Indians living on-reserve, and either non-status children or non-Aboriginal children living in commercial land developments.

There are now hundreds and even thousands of these students living in First Nations communities. In these cases, AANDC's policy has been unclear and has shifted to distinguishing between children

who live on lands that are "designated" for leasing (commercial use) under the *Indian Act* and those who do not. Of course, this is not a very satisfactory way to determine legal responsibility and funding obligations. There can be registered Indians living in commercial developments (including citizens of the Nation) and non-Indians living on non-designated lands. It is also not a useful or workable approach for Nations that have moved beyond the *Indian Act* with respect to land management (e.g., communities with land codes under the *First Nations Land Management Act* or under comprehensive governance arrangements), where the *Indian Act* does not apply and tenure distinctions such as "designated lands" are no longer relevant. Obviously, the responsibility for paying and for which set of children must be considered in any discussion First Nations have over the assumption of jurisdiction over education. Moreover, First Nations objectives for First Nations learners may not necessarily be met by assuming jurisdiction over and responsibility (and the potential financial responsibility) for non-citizens.

The Schooling of First Nations Learners Living On-Reserve

First Nations students living on-reserve in BC may be enrolled in either on-reserve schools or off-reserve schools. On-reserve, students can be enrolled in First Nations–operated "band" schools or First Nations-controlled independent schools located in their own communities. "Band"-operated schools are not regulated at all by the BC provincial education system, while First Nations–controlled independent schools are certified through the Independent Schools Branch of the BC Ministry of Education. Both types of schools are funded by AANDC and must operate according to AANDC's funding guidelines. Independent school certification allows First Nations schools to offer the provincial Dogwood diploma (certificate of graduation) to graduating students. While band-operated schools cannot offer the Dogwood diploma, efforts are currently underway to develop a process with the BC Ministry of Education for a First Nations graduation certificate, which would be equivalent to a Dogwood and recognized by the province. The federal government funds all First Nations schools based on the provincial funding formula, with specific adaptations and funding guidelines established by the federal government requiring that all First Nations schools meet the provincial learning outcomes established by the BC Ministry of Education.

Currently, there are over 100 First Nations–controlled schools in 67 First Nations communities in BC. Collectively, they are organized through the BC First Nations Schools Association (FNSA), as discussed above. Through the FNSA, First Nations have established a range of approved educational standards created by and specifically for First Nations' schools. Also, under section 4.10 of the Tripartite Education Framework Agreement (see below), Canada commits to consult with the FNESC regarding the development of BC-specific education program policy and guidelines required to implement the agreement.

It is important to note that First Nations schools in BC historically received significantly less tuition funding than public schools. First Nations schools did not begin to receive a meaningful level of collective service support until the past decade and have only recently received tuition for non-status students who do not ordinarily reside on-reserve (the federal government only funds on-reserve status students). *A Reciprocal Tuition Agreement*, signed in 2009 by the BC Ministry of Education and the FNESC, now allows the provincial government to provide full funding for all off-reserve students who are enrolled in a First Nation school when they choose to attend that school. The province also recognized that the standards set by the FNSA either met or exceeded provincial standards and as long as First Nations schools are FNSA-certified, the province will provide full tuition for off-reserve students. In some instances, these tuition amounts exceeded the amount provided by Canada for on-reserve status Indian students.

Tripartite Education Framework Agreement (TEFA)

In 2012, a Tripartite Education Framework Agreement (TEFA) was negotiated by Canada, British Columbia and FNESC. TEFA recognizes the parties' shared interest in ensuring smooth transitions for students moving between the First Nations and public education systems and confirms the

commitment of all parties to improve educational outcomes for First Nations students throughout British Columbia. Through TEFA, First Nations schools are now funded on the basis of the BC Ministry of Education's Operating Grants Manual. The TEFA also attempts to address the historic absence of meaningful core and what are called "second-level" services for First Nations schools by increasing the funding available for provincially coordinated support activities though the FNESC and the FNSA. This is very important because it is generally recognized that without some degree of self-government regionally in subject areas such as education, the ability to actually implement self-government will be constrained. Individual self-governing communities are often too small and lack the financial and other capacity to, for example, develop and set standards, accredit schools, certify teachers, and design curriculum — activities that in a provincial educational system are typically provided by a school board or a ministry of education.

Local Education Agreements

Many First Nations students, whether living on- or off-reserve (or treaty settlement land) are also enrolled in the public education system that falls under the jurisdiction of the provincial government and is governed by and administered through the BC Ministry of Education. These students may attend public or private schools. Where First Nations children live on-reserve but attend school off-reserve, a First Nation will typically enter into a Local Education Agreement (LEA) with the local school district(s). These arrangements were developed under AANDC's 1988 devolution policy to transfer program responsibility and budgets for "Indian" education to First Nations where requested by a First Nation. Through this type of agreement, a First Nation agrees to pay the school district for services based on a rate set by the province and using moneys received from AANDC, with other terms and conditions as may be negotiated between the First Nation and the school district. These arrangements have evolved from the earliest LEAs negotiated in the early 1990s and create a number of processes and structures to provide educational services to First Nations children. Administrative arrangements with local control allow First Nations in BC to focus on the important needs of their students and increasingly work to ensure that programming meets their academic and cultural goals. LEAs have come a long way since the earliest iterations, when both First Nations and school districts were testing the educational waters together. However, additional LEAs are needed, as many First Nations have not yet been able to negotiate and sign these agreements, or if they have, their agreements do not reflect best practices.

First Nations learners may also attend independent or private schools located off-reserve. In such cases, if a child registered as an Indian under the *Indian Act*, lives on-reserve and attends an independent or private school off-reserve, that child's federal nominal roll money can be directed to that school, thus decreasing or eliminating the tuition fees set by the private school.

Aboriginal Education Enhancement Agreements

In BC, the provincial government provides additional funding to school districts that is dedicated to supporting Aboriginal learners. This money may or may not actually be spent by school districts on Aboriginal learners, and if it is, it may be spent on programs that do not make a lot of sense or have much value. Consequently, the BC Ministry of Education now encourages school districts to engage with Aboriginal groups in their area (local First Nations, tribal bodies, friendship centres, Metis associations, etc.) and negotiate Aboriginal Education Enhancement Agreements (EAs). Although not directly tied to the funding the school district receives or to the funding a First Nation receives and pays to a district for services purchased though an LEA, many First Nations in BC are involved in the creation of EAs. According to ministry policy, EAs are intended to influence district planning and goal setting, and can be an important mechanism for collaborative goal-setting. Ideally, under an EA an Aboriginal Education Committee is established, through which district priorities regarding Aboriginal education are laid out in a plan. However, there can be issues between the Aboriginal representatives and the school

district in determining the respective roles of ministry staff, Aboriginal community representatives, and school trustees in the composition and voting within committees, and ultimately which body — the committee or the school board — makes the final decisions with respect to priorities and financial commitments. In essence, these committees are advisory only. Nevertheless, EAs are generally a good idea. But they are still not all that common: a joint FNESC and Ministry of Education Enhancement Agreement report sponsored in 2013 suggests that 22 percent of school districts do not have a formal EA in place and 18 percent of existing EAs were not developed with an Aboriginal Education Committee. This situation provides an opportunity for greater progress.

BC Education Initiative

In 2006, the FNESC, Canada and British Columbia signed an agreement to recognize First Nations jurisdiction over First Nations education on-reserve in BC. This significant governance initiative is discussed in greater detail below, under "Sectoral Governance Initiatives." As of October 2014, over 68 First Nations have expressed an interest in assuming jurisdiction for education on-reserve, not including those that already have jurisdiction by virtue of self-government arrangements. With jurisdiction, First Nations have the opportunity to design the K–12 education programs that meet their education needs. Creating this jurisdictional space has been complicated, given the relationship between Canada and the provinces over education and Canada's role with respect to First Nations. This initiative is important because it not only provides for local jurisdiction, but at the same time recognizes the need for regional organization to support the exercise of local self-government powers. This is accomplished through the creation of province-wide First Nations education authority that could be described, though somewhat imperfectly, as a hybrid of a school district and a ministry of education.

***Proposed* First Nations Control of First Nations Education Act**

On April 10, 2014, the federal government introduced Bill C-33, *First Nations Control of First Nations Education Act*, in the House of Commons. Bill C-33 would replace those sections of the *Indian Act* dealing with education. Under the provisions of Bill C-33, *Indian Act* bands would administer elementary and secondary school institutions on-reserve, directly, by delegating this authority to a First Nations Education Authority, or by entering into a tuition or administration agreement. The bill also provides a statutory guarantee of funding for First Nations education and the infrastructure to support it. Bill-33 establishes a "Joint Council of Education Professionals," which is intended to advise the Minister on First Nations education matters, with ultimate authority still resting with the Minister. Self-governing Nations would be exempt from the provisions in Bill C-33 and First Nations in BC under TEFA would be exempt until June 30, 2017, when the term of TEFA ends. It is not yet known whether TEFA will be extended beyond 2017 and, if so, whether First Nations in BC would continue to be exempt from this legislation if it is passed. First Nations in BC that are part of the BC Education initiative with respect to jurisdiction over education, that are scheduled to the *First Nations Jurisdiction over Education in British Columbia Act*, and that have exercised its jurisdiction under section 9(1) of that act are also exempt. Currently, while 68 First Nations have indicated that they would like to be scheduled under this act, no First Nations are actually scheduled, so the *First Nations Control of First Nations Education Act* would apply until there are scheduled First Nations.

While Bill C-33 does provide some authority over operational aspects of education on-reserve — for instance, by allowing the school year to be altered to meet individual Nations' needs (providing that the students attend for the mandated number of days) and by providing that students may have instruction on their culture and in their own language, in addition to either English or French — it does not remove First Nations or their schools from *Indian Act* governance or the control of the Minister.

While Canada may argue differently, Bill C-33 was developed unilaterally by the federal government and remained, for the most part, relatively unchanged from a very problematic draft legislative

proposal in October 2013. The legislative proposal followed the announcement in December 2010 of a National Panel on First Nations Elementary and Secondary Education for Students on Reserve to explore and advise on the development of options for First Nations education. The National Panel was launched in June 2011 and undertook "engagement" with First Nations across the country from September to December 2011 and released a report soon after. Child-centred co-developed First Nations education legislation was one of the National Panel's recommendations. When Canada undertook to craft the legislation, it did not enter into any "consultations" with First Nations until December 2012 and did not substantially address any of the key issues raised by FNESC and other First Nations organizations, including the BCAFN, in numerous letters to the Minister. First Nations in BC are already well on their way to "First Nations control of First Nations education." Consequently, one of the biggest concerns expressed by BC First Nations is that any new federal legislation must not negatively impact or slow down this work but rather support and enhance it. While there are a number of issues with Bill C-33, one of the most problematic aspects of it is that it does not contemplate the evolution of First Nation governance beyond the *Indian Act*. The bill embeds in the legislation what today is the existing federal education policy, where *Indian Act* bands have local responsibility for schools but the ultimate control remains with the federal bureaucracy and the Minister. As a result of overwhelming rejection of the legislation by the Chiefs-in-Assembly and a call for the withdrawal of Bill C-33, the federal government stated in the summer of 2014 that the bill would not proceed without the support of the AFN. As of October 2014, the federal government has not progressed Bill-33 through the House of Commons, but it had not been formally withdrawn either.

Assessing Governance and Administrative Options

A Choice of Jurisdiction

Ultimately, as First Nations move away from control by Ottawa and Victoria, most will consider whether to exercise law-making authority in relation to education and the management of their citizens' education. The fundamental question for First Nations policy-makers (and citizens) will be how a broader assertion of jurisdiction will improve education outcomes (e.g., graduation rates, cultural retention). Some First Nations see the opportunity to exercise jurisdiction as a way to focus on innovation and do things differently to give their children an advantage (e.g., First Nation–run schools, contracting out, "voucher" systems). Others may prefer to stay under provincial jurisdiction and operate independent (private) schools, assuming that their interests can be met and there are sufficient financial resources to run the schools — that is, they do not see any compelling need to exercise law-making authority over education, setting standards and so on, but are primarily concerned about local curriculum development and enhancement and having local control of their schools out of the reach of the public school board.

Interestingly, while there is no recognition of First Nations jurisdiction under the *Indian Act*, and despite the policy that is fundamental to the proposed *First Nations Control of First Nations Education Act*, keeping control over education with the Minster and AANDC, Canada has few issues in recognizing First Nations jurisdiction over education in sectoral or comprehensive governance arrangements. Where requested, Canada has not only transferred the Minister's administrative power over education to First Nations (e.g., facilitating local education agreements) but also recognized comprehensive jurisdiction. In BC, First Nations that seek jurisdiction are already well along this path with the sectoral BC education initiative and as set out in comprehensive governance arrangements, both inside and outside of the BC treaty process.

The Need for Legislation

Recognition by Canada of a First Nation's jurisdiction over education includes ensuring the adequate legal status for First Nations' educational institutions and authorities and securing recognition of these authorities by the province. To accomplish this, federal legislation is needed to remove the relevant

sections of the *Indian Act* and recognize First Nations jurisdiction and authority. For practical (though not necessarily legal) reasons, the province should be invited to participate in discussions about either the administrative transfer of education to First Nations or, where a First Nation desires, its assumption of jurisdiction over education.

Considering Transferability

Canada has expressed the concern at various self-government negotiating tables that First Nations education systems should be designed to allow students to move with relative ease between jurisdictions. From Canada's perspective, the design of the First Nations education system should be sufficiently compatible with that of the provinces to allow First Nation students (and others) to move between them, so as to not unduly penalize students wishing to pursue further education and training in provincial schools and universities. In fact, this standard provides the basis for the *Tripartite Education Framework Agreement*, reflecting the high mobility of students between the systems. From the First Nations perspective, First Nations learners must be supported to be successful no matter which system they are in. In fact, First Nations have in many cases set the bar higher than provincial standards do. Of course, meeting standards has much to do with the capacity of whichever government is setting the standards and the financial resources available to it. In considering jurisdiction over education, First Nations have been very aware of this fact. Consequently, institutions have been developed to address these matters as part of the BC education initiative, which is very progressive given what is occurring in other regions in the country where this is not the case.

The Need for Institutional Support

Generally, the BC Ministry of Education is responsible for the supervision of teacher competency and the certification of teachers. This responsibility was previously addressed by the BC College of Teachers before moving to the Teacher Regulation Branch of the BC Ministry of Education. In December 2010, the College passed new regulations that will require all BC teacher certification applicants to receive specialized professional development in teaching students with special needs and in Aboriginal education before they are granted a certificate. The province is also responsible for the evaluation of school programs; the establishment of courses of study and the suggested selection of textbooks (school districts approve textbooks); the provision of financial assistance; the establishment of rules and regulations for the guidance of trustees and education officials of school boards; and the delineation of school principals' and teachers' duties. These services are, of course, necessary in any system of education. They can also be expensive to develop and implement. The absence of appropriate standards and the services that support them can contribute significantly to underperformance by students in a particular education system. It should be noted that over the last few decades, the province has been delegating a number of its responsibilities to school districts. Under the BC First Nations education initiative, funding permitting, these tasks will be performed by a First Nations Education Authority.

Financing Education

With increased jurisdiction will come greater responsibility, but also the ability to direct resources where they are most needed and to ensure that the content of what is taught to First Nation children is appropriate and relevant. While assuming jurisdiction for education is an objective of many communities, caution is advised to ensure that there are adequate resources to pay for education. The design of programs and services and the extent to which education objectives can be met through the assumption of jurisdiction over education will in large part be determined by the amount of resources available to First Nations. The federal and provincial governments will need to have a continuing role, even as First Nations assume jurisdiction over education.

Providing a quality education system is not cheap. AANDC allocated $1.55 billion in 2011/12 for elementary and secondary education for children living on-reserve in Canada and the results are still largely unsatisfactory and the education systems wanting. The $1.55 billion from AANDC, which does not include capital items, is currently distributed through the various funding arrangements with First Nations and provinces. A 2013 study by the Parliamentary Budget Office (PBO) showed that baseline federal funding for First Nations school infrastructure in BC is $26 million. The PBO estimates that sustaining the current footprint of First Nations school infrastructure in BC would require $39 million in 2013/14. The funding requirement is anticipated to increase in real terms at the annual rate of student population growth, reaching $47 million by 2028/29. Overall, expenditures for elementary and secondary education, while inadequate, are among the largest departmental program allocations.

Moving forward, any discussions on jurisdiction over education by First Nations in BC must consider the true costs of providing a quality education system. They must also consider new federal approaches to funding sectoral governance arrangements and existing federal approaches to funding comprehensive governance arrangements. These approaches are discussed below with respect to education and more generally in Section 4 — Financing First Nations Governance. For education, resolving funding arrangements with Canada, and where necessary with British Columbia, is particularly important when there are children living under expanded First Nations jurisdiction who are not citizens but who may be deemed by Canada or British Columbia to be the responsibility of that Nation's government, to be covered within its funding envelope.

When considering the options for education governance and administrative reform, community leaders and citizens may wish to discuss the following questions.

Questions to Consider with Respect to Education	
1.	Does your First Nation currently operate a "band"-run or an independent school? If yes, has your community considered assuming jurisdiction over education from K to 12?
2.	Does your school provide education services to non-members, both status Indians and those who are not?
3.	Should jurisdiction extend to non-members as well as members?
4.	Is sufficient funding available? Is funding sufficient for language and culture programming?
5.	Is your Nation in a location where you can attract good teachers and administration?
6.	If you are in a remote location, do you have sufficient infrastructure, Internet access, teacher accommodation, and so on?
7.	What are the key elements in education required to ensure that students are able to transition without academic penalty between a First Nation's school and a public school in the same province?
8.	What governance framework is required to ensure quality education through transparency, accountability and economies of scale?
9.	Which elements are in place and working well?
10.	What needs to be in place to measure and monitor transitioning without academic penalty?
11.	What are the roles and responsibilities of the partners in the province that would need to be in place in order to support success?
12.	Are schools getting the second-level supports they need for comparable outcomes? If not, where should they be getting additional support?
13.	What are the similarities and differences between First Nations' schools and similarly situated provincial schools (the comparisons would cover areas such as programming, accountability, services, supports and resourcing)?
14.	Is there or will there be an effective tripartite K–12 education partnership between First Nations, the Province and AANDC?

There is considerable information on the FNESC website (www.fnesc.ca) to help First Nations answer some of these questions, including terms of reference for Community Education Authorities (setting out a governance framework), local education agreement support documents (including a comprehensive toolkit for negotiations), and school certification process information.

INDIAN ACT GOVERNANCE

There is no jurisdiction for First Nations over education under the *Indian Act*. However, there are administrative arrangements entered into with Canada.

The Minister is responsible for Indian education. Since 1927, under sections 114–122 of the *Indian Act*, the Minister may provide for and make regulations concerning schools for Indians with respect to teaching, education, inspection and discipline. However, this is qualified by section 4(3), which says the act applies only to Indian children living on-reserve. Section 114 provides that the Minister may operate schools for Indian children or the Governor in Council may authorize the Minister to enter into agreements with various bodies (provincial or territorial governments, school boards, religious organizations). The *Indian Act* also provides for school attendance by Indian children aged 6 to 18. It is mandatory to attend from ages 7 to 16 and is at the Minister's discretion for age 6 or from 17 to 18. Under provincial law, all BC residents, both Indian and non-Indian, are required to go to public school until the age of 16. BC has also implemented full-day Kindergarten, and children as young as age 4 are able to attend school on a daily basis. The act also provides for the Minister to make regulations with respect to standards for buildings, equipment, teaching, inspection and discipline in schools. No regulations are in force under these powers.

Funding to provide education to Indian children comes from AANDC, which in the case of First Nations–operated schools ("band" schools and independent schools) is delivered directly to "band" councils and First Nations' education organizations and calculated using the Nominal Roll, which is the list of all children eligible for federal funding. Indian children living off-reserve are subject to the provincial laws of general application. Canada pays BC for the cost of schooling for registered Indians attending school off-reserve but who live on-reserve. This is also calculated using the Nominal Roll, but in this case the money is either sent through the First Nation's administering authorities or is paid to a school district through the First Nation in accordance with a Local Education Agreement. The province is principally responsible for persons who are not registered as Indians living on-reserve, although there may be some exceptions as a matter of federal policy. AANDC requires that any First Nations administering authorities with more than 10 full-time equivalent students attending either an independent or private school have a LEA in place before it will flow funding to the administering authority. If not, AANDC pays the school directly. There are currently 115 BC First Nations communities whose K–12 education funding is administered under LEAs and more than half of those are also partners in Enhanced Education Agreements with their local school boards.

With respect to education standards, to date AANDC has not established specific standards and policies regarding First Nations schools and students. Unless specified differently through a particular agreement, AANDC generally accepts provincial education standards and relies on their application to provide First Nations students living on-reserves with comparable programs, whether they are enrolled in First Nations, provincial or private schools. Standards are, of course, very important and necessary for the good governance of any education system. (For a description of the scope and type of service provided by Canada, including applicable standards, see AANDC's "Elementary/Secondary Education Program — National Program Guidelines 2014–2015."

Notwithstanding the *Indian Act*, many First Nations do operate schools ("band" schools or independent schools), as discussed above. In these cases, the First Nation does have some control over the education received by children, though this control is subject to any funding agreements entered into and, where applicable, provincial laws.

There is no bylaw-making power over the education of children in the *Indian Act*, although the powers under section 81 dealing with public works and buildings would cover the physical structure of the schools.

SECTORAL GOVERNANCE INITIATIVES

In BC, the First Nations education initiative has resulted in a number of agreements and opportunities for First Nations to take over jurisdiction for K–12 education on-reserve. Some of these opportunities have not yet been realized by First Nations because of funding issues with Canada.

BC Education Initiative

Through the BC education initiative, the FNESC, Canada and the provincial government have developed a process by which the control of education can be moved out from under the *Indian Act* to the First Nation. On July 5, 2006, FNESC, Canada and British Columbia signed a package of agreements to recognize the jurisdiction of BC First Nations. The agreements negotiated include an overarching framework agreement (*Education Jurisdiction Framework Agreement*), which lays out the responsibilities of each party (including scope of First Nation jurisdiction, consultation, curriculum, information sharing and evaluation, funding, etc.). The *Education Jurisdiction Framework Agreement* ("Education Agreement") was confirmed with the passage of federal legislation (*First Nations Jurisdiction over Education in British Columbia Act* [S.C. 2006, c. 10]) and provincial legislation (*First Nations Education Act* [S.B.C., 2007, c. 40]). The other agreements include a template Canada-First Nations Education Jurisdiction Agreement (CFNEJA) and template funding agreement, and the *BC-FNESC Education Agreement* (5 July 2006). These agreements do not come into force until both the Canada-First Nations Education Jurisdiction Agreement and the Canada-First Nations Education Jurisdiction Funding Agreements are complete. When complete, the specific agreements will be initialled by the First Nation and Canada, following which the First Nation has up to 36 months to prepare for implementation of jurisdiction. Then the citizens of the First Nation must ratify the agreement for it to come into effect. All these agreements, including the Framework Agreement, are available on the FNESC website.

To date, the BC jurisdiction negotiations have involved 68 First Nations, which have submitted letters of intent to FNESC, Canada and British Columbia to negotiate their own First Nations Education Jurisdiction Agreements and to participate in the initiative. Fourteen First Nations have been actively involved in negotiating jurisdictional arrangements. Once the individual First Nations Education Jurisdiction Agreement has been executed, the First Nation will have the recognized legal capacity to exercise the rights, powers and privileges under the various arrangements in relation to education and to make laws in accordance with the First Nation law-making protocol. This protocol sets out procedures for the passage and amendment of a First Nation's education laws and must include procedures for passing and amending First Nation Education laws, a process for challenging the validity of those laws, a procedure for amending the law-making protocol, and conflict of interest rules. These arrangements are restricted to jurisdiction for on-reserve education and are meant to address the fact that under the *Indian Act* there are no clear procedures for how First Nations laws are actually made (see Section 2 of this report).

More specifically, First Nations that enter into a jurisdictional arrangement with Canada will have the power to:

- make and administer laws applicable on First Nation lands, through its band council and the First Nation law-making protocol;
- act through its band council or a Community Education Authority (CEA), which the band council may establish in its First Nations education law, in carrying out its education-related duties, functions and obligations;
- establish at its option a CEA to operate, administer and manage the education system for the participating First Nation, and set out the powers, duties, composition and membership of the CEA;
- establish a CEA jointly with other First Nations that have appointed directors to the First Nation Education Authority (EA); and

- designate a First Nation Language Authority on whose recommendation British Columbia will recognize programs of study in the participating First Nation's language as fulfilling the requirement for a second language credit as part of the graduation requirements.

The option for establishing a Community Education Authority (CEA) as set out in the federal legislation is intended to enable First Nations to separate the administration and management of education from the core governing body of the First Nation if it so chooses. It should be noted that the power of the First Nation to make laws in relation to standards for curriculum, exams, graduation requirements, and the certification of teachers and First Nations–operated schools can be delegated by those First Nations participating in the initiative to the First Nations Education Authority (EA). This delegation will be addressed in an Education Co-Management Agreement signed by the First Nation and the EA, which is in recognition that setting standards, developing curriculum, and so on at the individual First Nation level will be challenging because of limited resources and capacity.

The EA is a central body that will provide support to participating First Nations who wish to exercise jurisdiction over education outside of a comprehensive governance arrangement. The EA will have no inherent jurisdiction and will only exercise jurisdiction in areas that have been delegated to it by participating Nations; which for the most part, First Nations will be compelled to delegate in order to make the system work. The collective nature of the EA is intended to ensure that there is adequate support for smaller First Nations and to provide a more strategic approach to some components of jurisdiction for all of the First Nations involved in the initiative. All participating First Nations will have two seats on the EA and are therefore involved in determining standards and making other decisions. The powers considered for delegation to the EA include:

- teacher certification
- school certification
- standards with respect to curriculum and graduation.

The FNEA will also provide templates for First Nation education laws, terms of reference for a CEA and other required documents.

Unfortunately, despite the best intentions, to date no First Nations have entered a jurisdictional agreement or passed a community law with respect to this initiative. This is because the funding arrangements have not been finalized between the FNESC and Canada, and the Canada-First Nations Education Jurisdiction Funding Agreement has therefore not been executed.

One of the primary reasons for financial negotiations having reached an impasse with respect to the implementation of the BC education initiative is the federal government's insistence on applying its own-source revenue (OSR) policy, through which Canada is looking to offset its contributions for funding to First Nations by taking into account the revenues raised by First Nations. (For a fuller discussion, see Section 4.3 — Own-Source Revenue (OSR) Impact on Transfer Payments.) Canada follows this policy in negotiating comprehensive governance arrangements and increasingly is looking to apply the approach to sectoral governance initiatives. Notwithstanding the broader problems with the federal approach to OSR, in practice it would be much more complicated to apply OSR to a sectoral governance initiative, given the differences in scope and issues that exist, than it would to apply it to the negotiation and implementation of comprehensive governance arrangements.

For example, with the BC education initiative, it is not clear if the federal intention with the OSR clawback is in relation to all the revenues of the Nation or just those associated with schooling. In comprehensive arrangements, the clawback applies to all revenues, regardless of the Nation's jurisdictions. Notwithstanding the appropriateness of clawing back own-source revenues or the way this may be calculated, the federal approach poses other possible governance challenges for First Nations with

respect to the education initiative. This is because it may not be the First Nation's governing body that is directly involved with education matters (now or in the future) or involved in the negotiations respecting the implementation of the new education arrangements in BC, but rather a First Nation's school or another entity (including a CEA, once established).

In 2012/13, the FNESC engaged an economist to estimate the impact of the OSR policy on First Nations education funding. Estimates for seven Nations demonstrate that the application of the OSR policy would result in First Nations losing from 2 percent to over 90 percent of their education funding from Canada (an average loss of 31.2 percent), with high volatility from year to year. Changing financial reporting practices to support OSR calculations will also create an additional financial burden. Canada has more recently indicated that its fiscal "harmonization initiative" (see Section 4.2 — First Nation Revenues) will also have an impact on education jurisdiction. Additionally, a number of broad education funding concerns remain outstanding, including the funding for language and culture, technology/connectivity, and transportation, as well as limited mechanisms for adjusting costs over time. Specific to jurisdiction, negotiating First Nations have raised concerns about the real cost of governance and second-level services costs.

Issues of fiscal relations are much broader than can be considered from the perspective of one particular jurisdiction and it is hard to see how these arrangements could be negotiated outside a comprehensive approach. Perhaps not surprisingly, Canada has now indicated that it is reassessing its approach with respect to OSR and the BC education initiative. Further, with respect to its OSR policy generally, it has indicted that program transfers for health, education and social development will not be reduced on the basis of an Aboriginal government's OSR. If this is the case, it is expected that a number of First Nations will be in a position to assume jurisdiction over education. It should be noted that many of these Nations already contribute to the cost of education, as federal funds are insufficient to their needs (even though Canada has wanted to claw them back though OSR offsets), and will continue to do so after assuming jurisdiction. Indeed, they may add to them.

Interestingly, BC provincial school districts have the ability to generate revenue to augment their budgets and British Columbia does not claw back any of their funding and would likely never consider doing so. In fact, school districts in BC generate a total of approximately $450 million in additional revenues each year. The province allows school districts to reinvest in their education services.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All comprehensive governance arrangements address education. Both the *Westbank First Nation Self-Government Agreement* and *Nisga'a Final Agreement* recognize jurisdiction over K–12 education. To date, neither Nation has drawn down this jurisdiction. The Nisga'a Lisims government has authority over K–12 for Nisga'a children on Nisga'a lands (para 100). Nisga'a has had a provincially established school board (School District 92) for some time and is continuing with these arrangements. The school board consists of four Nisga'a members and one non-Nisga'a member. Westbank has jurisdiction on Westbank Lands (reserves) with respect to its citizens only. Westbank has not exercised jurisdiction over education, but provides educational services under agreements. Westbank operates a provincially licensed independent school (K–7), which accepts both "Indian" and non-Indian students, whether they are Westbank members or not.

The Tsawwassen and Maa-nulth Agreements recognize First Nation jurisdiction over K–12 provided by First Nation institutions on First Nation lands to any person. Tsawwassen has enacted an *Education, Health and Social Development Act*. The Yale and Tla'amin agreements contain similar language, and those Nations will be able to take similar steps once their final agreements are effective.

Where a First Nation is considering entering into comprehensive governance arrangements and may have already assumed jurisdiction over education under the BC First Nations education initiative, as

with all sectoral governance initiatives it will be important to ensure coordination and negotiate transitional arrangements reflecting the manner in which First Nation law-making authority or core institutions of government are established under the comprehensive governance arrangements. In some cases, a First Nation may wish to continue its sectoral arrangements under the BC education initiative for various policy reasons, and legal mechanisms to support this approach would need to be considered and legal techniques designed to accomplish it.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	Legislative powers of council to make laws on education of Band members on Sechelt Lands as authorized by the Sechelt Constitution. (s. 14(1)(g)) There are no provisions in the current Sechelt Constitution dated October 1993 regarding the power of the Sechelt Indian Band to make laws in relation to the education of its band members. Therefore, there would have to be an amendment approved by referendum of Sechelt members and approved by the governor in council for the implementation of this jurisdiction. (Order Declaring Amendments to the Constitution of the Sechelt Indian Band in Force, SOR 93-126) Has the power to enter into contracts and can use this authority to provide education services on its Lands. (*Sechelt Indian Band Self-Government Act*, s. 6(a) and (e))	N/A
Westbank	Westbank has jurisdiction over Kindergarten to grade 12 education on Westbank Lands for Westbank members. (Part XVI, s. 186–190) Has the power to enter into contracts and can use this authority to provide education services on its Lands. (Part III, s. 19) Has legal capacity to establish boards and commissions such as a school board. (Part VI, s. 47)	Westbank law prevails. (Part XVI, s. 190)
Nisga'a	Nisga'a Lisims Government has jurisdiction on Nisga'a Lands over pre-school to grade 12 education and post-secondary education. (Ch. 11, s. 100 and 103) Has the power to enter into contracts and can use this authority to provide education services on its Lands. (Ch. 11, s. 5(a) and (e)) Has legal capacity to establish boards and commissions such as a school board. (Ch. 11, s. 34(a) and definition of "Nisga'a Public Institution" at Ch. 1. See also Ch. 11, s. 9(h))	Nisga'a law prevails. (Ch. 11, s. 101 and 105)
Tsawwassen	Tsawwassen has jurisdiction over education, post-secondary education and training. (Ch. 16, s. 76–79, 82) Has the power to enter into contracts and can use this authority to provide education services on its Lands. (Ch. 16, s. 7(a) and (e)) Has legal capacity to establish boards and commissions such as a school board. (Ch. 16, s. 43(a) and definition of Tsawwassen Public Institution at Ch. 1. See also Ch. 16, s. 8(n))	Tsawwassen law prevails in area of K–12 education. (Ch. 16, s. 80) Federal or provincial law prevails in area of post-secondary education. (Ch. 16, s. 83)
Maa-nulth	Maa-nulth First Nations have jurisdiction over kindergarten to grade 12 education and post-secondary education. (s. 13.20.1–13.20.3 and 13.21.1) Has the power to enter into contracts and can use this authority to provide education services on its Lands. (s. 13.2.1(a), 13.2.1(e)) Has legal capacity to establish boards and commissions such as a school board. (s. 13.11.1(a) and definition of Maa-nulth First Nation Public Institution at Ch. 29. See also Ch. 13.3.1(l))	Maa-nulth law prevails in area of K–12 education (s. 13.20.4) Federal or provincial law prevails in area of post-secondary education. (s. 13.21.2)
Yale	Yale First Nation has jurisdiction over language and culture education. (s. 3.24.1–3.24.3) Yale may make laws with respect to kindergarten to grade 12 education provided by a Yale First Nation Institution on Yale First Nation Land and with respect to home education of Yale First Nation Members. Yale has the legal capacity to establish curriculum and exam standards and can provide for the certification of teachers. (s. 3.25.1–3.25.3)	Yale First Nation law prevails in area of language and culture education (s. 3.24.5) Yale First Nation law prevails in area of K–12 education (s. 3.25.4)
Tla'amin	Tla'amin Nation has jurisdiction over language and culture education. (Ch. 15, s. 101) The Tla'amin Nation may make laws with respect to kindergarten to grade 12 education on Tla'amin Lands provided by a Tla'amin institution or for Tla'amin Citizens, and in respect to home education of Tla'amin Citizens on Tla'amin Lands. (Ch. 15, s. 103 and 107) The Tla'amin Nation may make laws in relation to post-secondary education provided by a Tla'amin Institution on Tla'amin Lands, including establishing post-secondary institutions. (Ch. 15, s. 111)	Tla'amin law prevails in the area of language and culture education. (Ch. 15, s. 102) Tla'amin law prevails in the area of K–12 education and home education. (Ch. 15, s. 109) Federal or provincial law prevails in the area of post-secondary education. (Ch. 15, s. 112)

Table — BC First Nations' Laws/Bylaws in Force

COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Tsawwassen First Nation	APR 3, 2009	TFN Education, Health And Social Development Act
Tsawwassen First Nation	018-2009	TFN Instructional Services Support Regulation
Tsawwassen First Nation	084-2009	TFN Post-Secondary Education And Training Assistance
Tsawwassen First Nation	038-2009	TFN Education, Health And Social Development Appeal Regulation
Tsawwassen First Nation	DEC 2010	Tsawwassen First Nation Post-Secondary Education Policy And Application

Table — First Nation Schools

FIRST NATION SCHOOLS	
1. ?A'q'amnik Elementary School	53. Moricetown Elementary School
2. Aatse Davie School	54. Nak'albun Elementary School
3. Acwsalcta Band School	55. Morris Williams Primary School
4. Agnes George Nursery	56. Musqueam Cooperative Preschool
5. Alvin A. McKay Elementary School	57. Na Aksa Gila Kyew Learning Centre
6. Bella Bella Community Band School	58. Nak'albun Elementary School
7. Blueberry River First Nations School	59. Nathan Barton Elementary School
8. Bonita Barton Nursery School	60. Neqweyqwelsten School
9. Busy Bear Club Band Pre-School	61. Nisga'a Elementary/Secondary
10. Chalo School	62. N'Kwala Elementary/Secondary Band
11. Chi Chuy Band Pre-School	63. N'Quatqua Head Start Preschool
12. Chief Atahm School	64. Ntamtqen Snm'a?M'aya?Tn
13. Chief Matthews Community School	65. Nus Wadeezulh Community School
14. Coast Tsimshian Academy of Lax Kw'alaams	66. Outma Squil'xw Cultural School
15. Coldwater Band School	67. Pacheedaht Pre-School
16. Ditidaht Community School	68. Penticton Indian Band Education Centre
17. Eliza Archie Memorial Band School	69. Prophet River Dene Tsaa School
18. Eugene Joseph Elementary Secondary School	70. Quw'utsun Smuneem Elementary School
19. First Nations High School (Hazelton)	71. Qwam Qwum Stuwixwulh Community School
20. Fort Babine Band School	72. Rosie Seymour Elementary
21. Gitanmaax Band Nursery School	73. Saanich Adult Education Centre
22. Gitanyow Independent School	74. Seabird Island Community School
23. Gitgingolx Wilp Wiloxskw	75. Secwepemc Cultural Education Society
24. Gitsegukla Elementary Band School	76. Sen Pok Chin School
25. Gitwangak Adult School	77. Sensisyusten House Of Learning
26. Gitwangak Elementary School	78. Shihiya School
27. Gitwinksihlkw Band Nursery	79. S-hXiXnu-tun Lelum
28. Gitwinksihlkw Elementary	80. Sk'elep School Of Excellence
29. Gwa'sala-'Nakwaxda'xw School	81. Skidegate Band Nursery School
30. Haahuupayak School	82. Sk'il'Mountain Community School
31. Haisla Community School	83. Snc'c'amala?tn School
32. Hartley Bay Elementary/Junior/Secondary And Nursery	84. Songhees Band School
33. Head Of The Lake School	85. Stein Valley Nlaka'pamux

Table — First Nation Schools... ***continued***

34. Hot Springs Cove Band School	86. Sts'ailes Community School
35. Ittatsoo Learning Centre	87. Sxoxomic Community Band School
36. Ittatsoo Nursery/Kindergarten	88. Ted Williams Memorial Learning Centre
37. Jean Marie Joseph Adult School	89. T'it'kit Preschool
38. Jean Marie Joseph School	90. Tl'azt'en Adult Learning Centret Tl'etinqox School
39. K'ak'ot'lats'i School	91. Totem Preschool
40. Klappan Independent Day School	92. Tsay Keh Dene School
41. Ksi Xy'ans Daycare Head Start	93. Tsi Del Del School
42. Kwadacha Dune Ty Centre	94. Tsleil-Waututh Nation School
43. Kwanwatsi Band School	95. Tsi Deldel School
44. Kyah Wiget Adult Centre	96. Wabsuwialaks'm Gitselasu
45. Lack Klan Nursery/Elementary/Junior Secondary	97. Wagalus School
46. Lau Wel New Tribal School	98. Waglisla Adult Learning Centre
47. Le'lum'uy'lh Child Development Centre	99. We Wai Kai Daycare/Nursery/Head Start
48. Lhoosk'uz Dene School	100. Woyenne Secondary School
49. Lilawagila School	101. Xit'olacw Community School
50. Little Chiefs Primary School	102. Xwemelch'stn Etsimxwawtxw Capilano Littlest Ones
51. Little Fawn Nursery	103. Yaqan Nukiy Band School
52. Maaqtusiis Elementary/Secondary Band School	104. Yu Thuy'thut
	105. Yunesit'in ?Esgul School

Table — School Districts with Enhancement Agreements

SCHOOL DISTRICTS WITH ENHANCEMENT AGREEMENTS				
www.bced.gov.bc.ca/abed/agreements/agreements.htm				
CURRENT ABORIGINAL EDUCATION ENHANCEMENT AGREEMENTS ARE LISTED IN THE TABLE BELOW (SCHOOL DISTRICTS WITH AN * (ASTERISK) HAVE SIGNED THEIR SECOND OR THIRD EA).				
• Status of EAs in the Province of BC as of April 2014 • Expired agreements can be found at archived agreements www.bced.gov.bc.ca/abed/agreements/second_signings/agreementsarchive.htm				
SD #	**SCHOOL DISTRICT**	**FRAMEWORK**	**MEMORANDUM OF AGREEMENT**	**5 YEAR AGREEMENT EXPIRES (YYYY-MM-DD)**
05	Southeast Kootenay *	Framework		2016-06-30
08	Kootenay Lake	Framework	MOA	2013-06-30
10	Arrow Lakes	Framework		2015-06-30
19	Revelstoke	Framework	MOA	2014-06-30
20	Kootenay-Columbia	Framework	MOA	2013-06-30
23	Central Okanagan	Framework	MOA	2019-06-30
27	Cariboo-Chilcotin	Framework	MOA	2011-06-30
33	Chilliwack	Framework	MOA	2015-06-30
34	Abbotsford	Framework	MOA	2012-06-30
35	Langley *	Framework		2015-06-30
36	Surrey *	Framework	MOA	2018-06-30
37	Delta *	Framework	MOA	2017-06-30
38	Richmond	Framework	MOA	2016-06-30
39	Vancouver	Framework	MOA	2014-06-30
40	New Westminster *	Framework	MOA	2018-06-30
41	Burnaby	Framework	MOA	2013-06-30

Table — School Districts with Enhancement Agreements... ***continued***

SD #	SCHOOL DISTRICT	FRAMEWORK	MEMORANDUM OF AGREEMENT	5 YEAR AGREEMENT EXPIRES (YYYY-MM-DD)
42	Maple Ridge-Pitt Meadows **	Framework	MOA	2015-06-30
43	Coquitlam	Framework	MOA	2012-06-30
44	North Vancouver	Framework		2016-06-30
47	Powell River *	Framework	MOA	2010-06-30
48	Sea To Sky	Framework	MOA	2019-06-30
49	Central Coast	Framework	MOA	2013-06-30
50	Haida Gwaii	Framework	MOA	2017-06-30
51	Boundary *	Framework		2017-06-30
52	Prince Rupert *	Framework/MOA		2015-06-30
53	Okanagan Similkameen *	Framework	MOA	2016-06-30
54	Bulkley Valley	Framework	MOA	2018-06-30
58	Nicola-Similkameen	Framework	MOA	2018-06-30
59	Peace River South *	Framework	MOA	2016-06-30
60	Peace River North	Framework	MOA	2014-06-30
61	Victoria *	Framework	MOA	2018-06-30
62	Sooke	Framework	MOA	2014-06-30
63	Saanich *	Framework	MOA	2018-06-30
64	Gulf Islands *	Framework	MOA	2018-06-30
67	Okanagan Skaha	Framework	MOA	2011-06-30
68	Nanaimo-Ladysmith **	Framework	MOA	2016-06-30
69	Qualicum *	Framework	MOA	2015-06-30
70	Alberni	Framework	MOA	2010-06-30
71	Comox Valley *	Framework	MOA	2013-06-30
73	Kamloops-Thompson **	Framework	MOA	2015-06-30
74	Gold Trail *	Framework	MOA	2018-06-30
75	Mission	Framework	MOA	2013-06-30
78	Fraser-Cascade *	Framework		2017-06-30
81	Fort Nelson	Framework	MOA	2011-06-30
83	North Okanagan-Shuswap	Framework	MOA	2017-06-30
84	Vancouver Island West	Framework	MOA	2013-06-30
85	Vancouver Island North *	Framework		2017-06-30
87	Stikine	Framework	MOA	2015-06-30
91	Nechako Lakes	N/A	N/A	N/A
93	Francophone Education Authority	Framework English/French	MOA	2014-06-30

RESOURCES

First Nations

Assembly of First Nations
Suite 1600, 55 Metcalfe Street
Ottawa, ON K1P 6L5
Phone: 613-241-6789
Toll-free: 1-866-869-6789
Fax: 613-241-5808
www.afn.ca

- "Indian Control of Indian Education: Policy Paper presented to the Minister of Indian Affairs and Northern Development" (1972)

The First Nations Early Childhood Development Council (FNECDC)
c/o First Nations Education Steering Committee
Suite 113, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-925-6087
Toll-free: 1-877-422-3672
Fax: 604-925-6097
Email: fnecdc@fnesc.ca

First Nations Education Steering Committee (BC)
Suite 113, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-925-6087
Toll-free: 1-877-422-3672
Fax: 604-925-6097
Email: info@fnesc.ca
www.fnesc.ca

The First Nations Education Steering Committee (FNESC) is an independent society that is committed to improving education for all First Nations learners in British Columbia. FNESC is led by representatives of First Nations across the province. FNESC also provides administrative services for the First Nations Schools Association, IAHLA and other partner organizations.

- Local Education Agreements (between First Nations and School Districts): www.fnesc.ca/wordpress/wp-content/uploads/2012/07/Book-61080-FNESC-LEA-Toolkit-2014-3.pdf
- *Education Jurisdiction Framework Agreement* (5 July 2006): http://www.fnesc.ca/wordpress/wp-content/uploads/2011/11/Ed_Agreement.pdf
- *Reciprocal Tuition Agreement* (between British Columbia Minister of Education and First Nations Education Steering Committee) (6 November 2009): www.fnesc.ca/jurisdiction/jurisdiction_Reciprocal_Tuition.php

First Nations Schools Association
Suite 113, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-925-6087
Fax: 604-925-6097
Email: fnsa@fnesc.ca
www.fnsa.ca

- *Reciprocal Tuition Handbook for Non-Independent First Nations Schools* (15 August 2014): www.fnsa.ca/wordpress/wp-content/uploads/2011/03/Reciprocal-Tuition-Information-Pamphlet-2.pdf

Indigenous Adult Higher Learning Association (IAHLA)
Suite 113, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-925-6087
Toll-free: 1-877-422-3672
Fax: 604-925-6097
www.fnesc.ca/iahla

School District 92 (Nisga'a)
District Board Office
5201 Tait Ave (Box 240)
New Aiyansh, BC V0J 1A0
Phone: 250-633-2228
Fax: 250-633-2425
www.nisgaa.bc.ca

Provincial

BC Teacher Regulation Branch
Ministry of Education
400-2025 West Broadway
Vancouver, BC V6J 1Z6
Telephone: 604-660-6060 (Metro Vancouver)
Toll-free: 1-800-555-3684 (within Canada and the United States)
Fax: 604-775-4859
www.bcteacherregulation.ca

Ministry of Aboriginal Relations and Reconciliation
PO Box 9100 Stn Prov Govt
Victoria, BC V8W 9B1
Phone: 604 660-2421 (Vancouver)
Phone: 250-387-6121 (Victoria)
Toll-free: 1-800-663-7867
Toll-free: 1-800-880-1022 (Information Line)
Email: ABRInfo@gov.bc.ca
www.gov.bc.ca/arr

- *Transformative Change Accord between Government of Canada, Government of British Columbia and the First Nations Leadership Council (Representing the First Nations of British Columbia)* (signed 25 November, 2005): www.gov.bc.ca/arr/social/down/transformative_change_accord.pdf

Ministry of Education
PO Box 9146 Stn Prov Govt
Victoria, BC V8W 9H1
Phone: 1-888-879-1166
www.gov.bc.ca/bced

- *Aboriginal Report 2008/09–2012/13: How Are We Doing?* (December 2010) www.bced.gov.bc.ca/abed/perf2013.pdf
- Aboriginal Education — K–12 Funding: www2.gov.bc.ca/gov/topic.page?id=A68C7DDDA92544E5BC671C58EAA1534E
- Aboriginal Education Enhancement Agreements: www.bced.gov.bc.ca/abed/agreements/welcome.htm
- Aboriginal Education Resources: www.bced.gov.bc.ca/abed/documents.htm

Federal

Aboriginal Affairs and Northern Development Canada (AANDC)
10 Wellington, North Tower
Gatineau, Quebec
Postal Address:
Ottawa, ON K1A 0H4
Toll-free: 1-800-567-9604
Fax: 1-866-817-3977

- AANDC's *Elementary/Secondary Education Program — National Program Guidelines 2014–2015*: www.aadnc-aandc.gc.ca/eng/1386032138376/1386032199233

SELECT LEGISLATION

Provincial

- *Access to Education Act* (S.B.C. 2001, c. 1)
- *First Nations Education Act* (S.B.C., 2007, c. 40)
- *Independent School Act* (R.S.B.C. 1996, c. 216)
- *School Act* (R.S.B.C. 1996, c. 412)

Federal

- *First Nations Jurisdiction over Education in British Columbia Act* (S.C. 2006, c. 10)

PART 1 /// SECTION 3.8

Elections

3.8

ELECTIONS

3.8

ELECTIONS

BACKGROUND

How the representatives of your governing body are chosen will vary from First Nation to First Nation. Whatever system is in place must be recognized and supported by those who are governed.

Legally, the ability to select the governing body of a Nation is a fundamental aspect of the inherent right of self-government. With the exception of determining citizenship, there is nothing more central to the "self" in self-government than the selection of leadership (for further discussion, see Section 2.3 — The Governing Body). Historically, our Nations had many different ways to select leadership. In some cases, leaders were hereditary and groomed from birth to take on the responsibilities of leadership. In other cases, leaders emerged from group dynamics and were chosen by internal processes that may or may not have included all the members of the group in making the decision. For example, matriarchs may have chosen male chiefs, and the clan leaders may have selected their head chief. First Nations in BC, to the best of our knowledge, did not historically have "elections" as that term is commonly understood today in selecting the governing body of contemporary political bodies under the western traditions of "one person, one vote."

Notwithstanding how leadership may have been chosen historically, the question many First Nations (in whole or in part) ask themselves today is: Will others recognize the governing body so selected in accordance with the inherent right? This is why First Nations, through their existing leadership frameworks, often look to have their rules for selecting the contemporary governing body of their First Nation both legitimized by their citizens (by way of referendum) and recognized by outside governments and, in particular, the federal government. The governing body of "bands," subject to a ministerial order under section 74 of the *Indian Act*, consists of a chief and council who are elected by the adult members (citizens) of the First Nation. Some First Nations have election codes or constitutions that set out a clear and transparent process for electing the governing body. In other cases, custom councils are selected in accordance with the traditional laws and customs of that particular Nation.

Some Nations look to combine aspects of their traditional governance structures (e.g., the clan system) with western approaches in selecting their governing bodies through elections. For instance, the Teslin Tlingit (Yukon) have both an Executive Council responsible for policy and law enforcement and a General Council that enacts the laws and charts the political course. The Executive Council includes a chief executive officer, a deputy chief, a youth councillor, one representative from each of five clans, and an executive elder. The General Council is a 25-person body of five members from each clan, appointed for four-year terms by their individual clans. Another example of parallel governance structures working together is the Haida Nation whose legislative body is the House of Assembly (HoA). The HoA meets for four days each year to set the Nation's mandate through motions and resolutions. It also passes laws consistent with the Haida Constitution. The Council of the Haida Nation, which reports to the HoA, is made up of the president and vice-president as well as 14 other members elected through various means (e.g., community and regional). The Haida Nation also has a Hereditary Chiefs Council made up of potlatched hereditary chiefs from 33 clans.

The Tahltan also approach elections through community-driven processes. The Tahltan Nation still uses the 1910 Declaration of the Tahltan Tribe as the guiding principle for the Tahltan Central Council (TCC). The TCC, a registered society, represents approximately 5,000 members (both on- and off-reserve) and comprises one representative from each of the 10 Tahltan families. Family representatives are nominated by the family and then ratified/elected by council at the annual general meeting. An executive (including a chair, vice-chair and secretary-treasurer) are elected every two years. The Tahltan Declaration also claims sovereignty over Tahltan lands and, accordingly, the Tahltan have never relinquished their Aboriginal title.

Regardless of where a Nation ultimately chooses to go in establishing its governing body, all Nations that have not already done so inevitably need to consider and reconcile the reality of the on-reserve selection of leadership in the "band" and the election process under the *Indian Act*.

INDIAN ACT GOVERNANCE

First Nations under the *Indian Act* do have options as to how they select their leadership. They can do so either by custom or through the default rules set out in the *Indian Act*.

The way elections work for First Nations governed under the *Indian Act* is somewhat strange. All "bands" select their leaders in accordance with custom unless the Minister of Indian Affairs orders that a "band" be listed in the *Indian Band Council Election Order* (SOR/97-138). If such an order is made, your First Nation's elections will be held in accordance with the *Indian Act* rules. Most "bands" in BC were initially named in the order under section 74(1) of the *Indian Act*. The majority of First Nations in BC have been removed from the order, and they now hold their elections under their own custom rules, outside the *Indian Act*. Only about 70 First Nations continue to hold elections under section 74(1), three First Nations hold elections under section 74(2) (where band members vote for the council and then the council selects the chief), and one First Nation holds its election under section 74(3), which allows it to have electoral districts. If you are not sure whether your community is still subject to section 74(1) and thus falls under the *Indian Act* rules for elections, you can check the *Indian Band Council Election Order*. For ease of reference, we have included a table in this chapter setting out which "bands" are under custom and which are governed under the election rules set out in the *Indian Act*. It is also important not to mistake "custom elections" as being a historical way of choosing leaders. Custom elections are merely elections that take place under a First Nation's self-developed code rather than under *Indian Act* guidelines.

As already noted, many First Nations have developed custom election codes or constitutions that set out a clear and transparent process for electing the governing body. In other cases, custom councils are selected in accordance with the traditional laws and customs of that particular Nation. As First Nations move from band governance under the *Indian Act*, some will want to incorporate traditional laws or custom rules about leadership selection into their new election laws and policies. It is important to note that while most BC First Nations hold elections either under the *Indian Act* or through a custom election code, a handful have maintained traditional practices (e.g., hereditary chiefs, or a Si:yam system) that are neither.

Under the *Indian Act*, the Minister may remove your "band" from the *Indian Act* and *Indian Band Council Election Order* for purposes of reversion to custom elections. The Deputy Minister of Aboriginal Affairs and Northern Development Canada (AANDC), who is the chief administrative officer of AANDC in Ottawa, has the delegated authority to rescind the Minister's order on behalf of the Minister. To revert to custom elections, your First Nation has to satisfy AANDC of this intention. AANDC has established a number of conditions, as listed below.

Custom Elections Checklist

1. First Nation drafts election code, which must, meet basic legal requirements:
    a) be written and understandable;
    b) include a process to settle election appeals (not involving AANDC);
    c) have amending provisions requiring community approval (not involving AANDC);
    d) respect principles of "natural justice"; and
    e) be consistent with the Canadian Charter of Rights and Freedoms (off-reserve members permitted to vote with reasonable opportunity to participate).
2. Election code is approved through either a referendum of the "members" who are 18 or older
    a) voting is done by secret ballot or in a manner that is agreed upon with AANDC in advance.
3. Documentation is forwarded to the BC Regional Director General of AANDC and includes:
    a) a copy of the election code;
    b) a resolution of the council adopting the election code;
    c) the list of eligible electors (as defined in section 2 of the *Indian Act*); and
    d) an affidavit from the person presiding over the conversion to custom process, setting out:
        I. steps taken to inform the electors of:
            i. the consequences of converting to custom
            ii. the content of the election code
            iii. their right to vote and
            iv. the voting procedures;
        II. the results of the vote.
4. Regional Director General considers documents forwarded by the First Nation and makes recommendations to the Minister.
5. Minister, if satisfied, makes an order removing the First Nation from the application of section 74 of the *Indian Act* and related provisions.
6. Minister's order transmitted to the Clerk of the Privy Council within seven days of being made for registration under the federal *Statutory Instruments Act* (R.S.C. 1985, c. S-22).
7. Order comes into force when registered, and the First Nation can now hold elections under its election code.

In BC, 112 First Nations that originally held elections under the *Indian Act* have followed this procedure to replace *Indian Act* rules with their own custom election codes. Copies of these codes can be found on the BCAFN website for reference and research purposes. As of October 2014, of the over 600 First Nations in Canada, 238 hold elections under the *Indian Act* and the *Indian Band Election Regulations*, and 343 select their leadership according to their own community or custom election codes.

SECTORAL GOVERNANCE INITIATIVES

In 2014, Canada, with the support of the Atlantic Policy Congress of First Nations Chiefs, enacted the *First Nations Elections Act* (S.C. 2014, c.5) (FNEA). The act is opt-in legislation for First Nations that conduct their elections under the *Indian Act*, either through custom election codes or under the *Indian Band Election Regulations*. The FNEA extends the prescribed election term under the *Indian Act* from two to four years; has provisions for a recall mechanism; provides for elections to be contested in a court; sets specific criteria for those wishing to run for chief; allows for the setting of candidacy fees (not to exceed $250 and refundable if the candidate received at least 5 percent of the total vote); sets out penalties for defined offences, such as obstructing the electoral process; and sets out offences and penalties related to the election of a chief or councillor. Under the FNEA, the Minister of AANDC has no role in receiving, investigating or deciding on election appeals. In order to opt in, a First Nation must provide details of their elections regulations, including how they prepare voters lists, post notices and nominate candidates, to AANDC.

From a federal government perspective, the election system under the FNEA addresses some of the long-time issues identified in the 2010 report of the Senate Standing Committee on Aboriginal Peoples, *First Nations Elections: The Choice Is Inherently Theirs*. Among the changes are:

- extending the terms of elected members from two to four years to address concerns that current terms are not long enough to make real progress;
- creating stricter rules for mail in ballots;
- offering a formula for the number of councillors a community should have (one for every 100 residents, with a minimum of two and a maximum of 12 elected councillors), but allowing for that number to be reduced to two or more through a decision of council;
- restricting candidacy to band members; and
- prohibiting a person for running for both the chief's position and a councillor position in the same election.

Leading up to the passage of the FNEA, the Atlantic Policy Congress strongly advocated for changes to the current system of elections under the *Indian Act*. The congress pointed to weaknesses in the system that destabilize First Nations governments and prevent them from moving forward on important projects. The Atlantic Policy Congress were also concerned that the two-year term for chiefs and councils gives officials very little time to learn their responsibilities before the next election. This, they said, creates political instability and does not make First Nations very attractive for long-term investment and economic development. Other problems the congress cited with the *Indian Act* election system are that it:

- sets no limit on how many positions persons living off-reserve can hold;
- has a loose nomination process that allows the nomination of candidates who are not serious or dedicated, often resulting in excess of 100 candidates vying for between three and 12 positions in a given election;
- offers no way to prevent one person from running and being elected as both chief and councillor (if the same person is elected to both positions and wishes to hold only one, the vacancy has to be filled through another lengthy and costly by-election);
- has a mail-in ballot system that is open to abuse;
- has no defined offences and penalties, making corrupt practices impossible to prosecute (even those practices that, were they to take place in a federal, provincial or municipal election, would be illegal and subject to criminal prosecution);
- requires the involvement of the Minister in reviewing, investigating and deciding on election appeals, which is a lengthy process; and
- has no system of recall.

While the FNEA was in fact developed jointly between the Atlantic Policy Congress of First Nations Chiefs and the federal government, a provision the government included that was not supported by those First Nations involved was section 3 under the act. Section 3 gives the Minister the ability to force a First Nation to hold its elections under the FNEA if there is a prolonged election dispute under the *Indian Act* with respect to that First Nation (whether the First Nations is under custom code or not). Under section 3, the Minister may also decide to bring a First Nation under the FNEA if the Minister feels that a leadership dispute has compromised the governance of that First Nation or if there was corrupt practice in connection with the election. This provision provides the biggest concern for First Nations that are looking to move away from the *Indian Act* and toward self-government, because it allows the Minister to force a First Nation that already conducts its elections under a custom code to come under the FNEA. The Assembly of First Nations, along with a number of other First Nations organizations, strongly advocated for the removal of this clause, but the federal government refused.

As discussed in length in *A Guide to Community Engagement* (Part 3 of the Toolkit), in order for First Nations to create any significant social change, they have to support it. Another concern with this legislation is that the FNEA makes it easier for First Nations governments to make changes (such as lengthening terms from two to four years) without involving their citizens and developing a custom election code.

If a First Nation does decide to be added to the schedule and have their elections under the new FNEA, that First Nation can then remove themselves from the schedule by developing and adopting what the act calls a "community election code," which sets out the rules regarding the election of its chief and councillors. This process is different from that of being removed from the *Indian Act* and *Indian Band Council Election Order*, as discussed above. Under section 42 of the FNEA, the Minister may remove the First Nation from the schedule if the First Nation's council has provided to the Minister a community election code and resolution requesting that the name of that First Nation be removed from the schedule. The community election code must satisfy certain conditions, namely that it: establish a procedure for being amended; be approved by a majority vote of eligible electors of the First Nation; and be published on a website maintained by or for the First Nation or in the *First Nations Gazette*. The FNEA also requires that there be no outstanding charges under the FNEA against any member of that First Nation.

The development of regulations for the FNEA, as set out in section 41, is currently underway and is required to bring the act into force. Most of the rules and procedures with respect to the conduct of elections, and the process of removal from office of a chief or councillor by means of a recall petition, are not explicitly described in the legislation, and will thus need to be addressed by regulation. The Atlantic Policy Congress of First Nations Chiefs has once again taken the lead on engaging with First Nations and drafting the regulations.

The FNEA can be seen as an interim step to any comprehensive governance arrangements a Nation may enter into in the future, as is the case with other sectoral governance initiatives; or as an interim step until a court ultimately decides that selecting a governing body is an aspect of the inherent right of self-government.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All comprehensive self-government arrangements provide for the Nation to establish the rules for conducting elections either in their constitution or in an election code or election law.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	The council has, to the extent that it is authorized by its constitution, the power to make laws in relation to the conduct of band elections and referenda. (s. 14(1)(s))	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)
Westbank	The Constitution shall provide for democratic elections of council by members, rules for composition of council, tenure of council members and provision for the removal of council members. (Part VI, s. 43(b))	Westbank law prevails. (Part VI, s. 45(a))
Nisga'a	Nisga'a Lisims Government may make laws with respect to the administration, management and operation of Nisga'a Government, including elections, by-elections and referenda. (Ch. 11, s. 34(f))	Nisga'a law prevails. (Ch. 11, s. 36)
Tsawwassen	Tsawwassen Government may make laws with respect to the election, administration, management and operation of Tsawwassen Government including, elections, by-elections and referenda. (Ch. 16, s. 43(e))	Tsawwassen law prevails. (Ch. 16, s. 47)
Maa-nulth	Each Maa-nulth First Nation Government may make laws with respect to the election, administration, management and operation of that Maa-nulth First Nation Government, including elections, by-elections and referenda. (s. 13.11.1(e))	Maa-nulth law prevails. (s. 13.11.5)
Yale	Yale First Nation Government may make laws with respect to the election administration, management and operation of Yale First Nation Government including elections, by-elections, and referenda. (s. 3.11.1)	Yale First Nation law prevails. (s. 3.11.3)
Tla'amin	The Tla'amin Nation may make laws in relation to the election, administration, management and operation of Tla'amin Government including elections, by-elections and referenda. (Ch. 15 s. 47(e))	Tla'amin law prevails. (Ch. 15, s. 52)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**		
This following is a list of BC First Nations who select their leadership either by 'custom' or by the default rules set out in the *Indian Act*:		
FIRST NATION	***INDIAN ACT***	**CUSTOM**
?Akisq'nuk First Nation (f. Columbia Lake)		CUSTOM
Adams Lake		CUSTOM
Ahousaht		CUSTOM
Aitchelitz		CUSTOM
Alexis Creek	S.74(1)	
Ashcroft	S.74(1)	
Beecher Bay	S.74(1)	
Blueberry River First Nations	S.74(1)	
Bonaparte	S.74(1)	
Boothroyd	S.74(1)	
Boston Bar First Nation	S.74(1)	
Bridge River	S.74(1)	
Burns Lake	S.74(1)	
Campbell River		CUSTOM
Canim Lake		CUSTOM
Cape Mudge		CUSTOM
Cayoose Creek		CUSTOM
Chawathil	S.74(1)	
Cheam	S.74(1)	
Cheslatta Carrier Nation		CUSTOM
Coldwater		CUSTOM
Cook's Ferry		CUSTOM
Cowichan	S.74(1)	
Da'naxda'xw First Nation		CUSTOM
Ditidaht		CUSTOM
Doig River	S.74(1)	
Douglas		CUSTOM
Dzawada'enuxw First Nation		CUSTOM
?Esdilagh First Nation (f. Alexandria)		CUSTOM
Ehattesaht		CUSTOM
Esketemc (f. Alkali Lake)		CUSTOM
Esquimalt		CUSTOM
Fort Nelson First Nation	S.74(2)**	
Gitanmaax	S.74(1)	
Gitanyow	S.74(1)	
Gitga'at		CUSTOM
Gitsegukla	S.74(1)	
Gitwangak	S.74(1)	
Gitxaala Nation (f. Kitkatla)		CUSTOM
Glen Vowell	S.74(1)	
Gwa'sala-'Nakwaxda'xw		CUSTOM
Gwawaenuk Tribe (f. Kwa-Wa-Aineuk)		CUSTOM
Hagwilget Village	S.74(1)	
Haisla (f. Kitamaat)	S.74(1)	

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	*INDIAN ACT*	CUSTOM
Halalt	S.74(1)	
Halfway River First Nation	S.74(1)	
Hartley Bay		CUSTOM
Heiltsuk		CUSTOM
Hesquiaht		CUSTOM
High Bar		CUSTOM
Homalco		CUSTOM
Hupacasath First Nation (f. Opetchesaht)	S.74(1)	
Iskut		CUSTOM
Kanaka Bar		CUSTOM
Katzie		CUSTOM
Kispiox	S.74(1)	
Kitasoo	S.74(2)**	
Kitselas	S.74(1)	
Kitsumkalum	S.74(1)	
Klahoose First Nation	S.74(1)	
K'omoks (f. Comox)	S.74(1)	
Kwadacha (f. Fort Ware)		CUSTOM
Kwakiutl		CUSTOM
Kwantlen First Nation (f. Langley)		CUSTOM
Kwaw-Kwaw-Apilt		CUSTOM
Kwiakah		CUSTOM
Kwicksutaineuk-ah-kwaw-ah-mish	S.74(1)	
Kwikwetlem First Nation (f. Coquitlam)		CUSTOM
Lake Babine Nation		CUSTOM
Lake Cowichan First Nation (f. Cowichan Lake)		CUSTOM
Lax-Kw'alaams		CUSTOM
Leq'a:mel First Nation (f. Lakahahmen)		CUSTOM
Lheidli T'enneh (f. Fort George)	S.74(1)	
Lhtako Dene Nation (f. Red Bluff, f. Quesnel)	S.74(1)	
Little Shuswap Lake		CUSTOM
Lhoosk'uz Dene Nation (f. Kluskus)		CUSTOM
Lower Kootenay		CUSTOM
Lower Nicola		CUSTOM
Lower Similkameen		CUSTOM
Lyackson		CUSTOM
Lytton	S.74(1)	
Malahat First Nation	S.74(1)	
Mamalilikulla-Qwe'Qwa'Sot'Em		CUSTOM
Matsqui		CUSTOM
McLeod Lake		CUSTOM
Metlakatla		CUSTOM
Moricetown	S.74(1)	
Mount Currie	S.74(1)	
Mowachaht/Muchalaht		CUSTOM
Musqueam	S.74(1)	

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	*INDIAN ACT*	CUSTOM
N'Quatqua (f. Anderson Lake)		CUSTOM
Nadleh Whut'en	S.74(1)	
Nak'azdli		CUSTOM
Namgis First Nation (f. Nimpkish)		CUSTOM
Nanoose First Nation	S.74(1)	
Nazko	S.74(1)	
Nee Tahi-Buhn		CUSTOM
Neskonlith		CUSTOM
New Westminster		CUSTOM
Nicomen	S.74(1)	
Nooaitch	S.74(1)	
Nuchatlaht		CUSTOM
Nuxalk Nation (f. Bella Coola)	S.74(1)	
Okanagan	S.74(1)	
Old Massett Village Council		CUSTOM
Oregon Jack Creek		CUSTOM
Osoyoos	S.74(1)	
Oweekeno/Wuikinuxv Nation	S.74(1)	
Pacheedaht First Nation (f. Pacheenaht)	S.74(1)	
Pauquachin	S.74(1)	
Penelakut	S.74(1)	
Penticton		CUSTOM
Peters	S.74(1)	
Popkum		CUSTOM
Prophet River First Nation		CUSTOM
Qualicum First Nation	S.74(1)	
Quatsino	S.74(1)	
Saik'uz First Nation (f. Stony Creek)	S.74(1)	
Samahquam		CUSTOM
Saulteau First Nations		CUSTOM
Scowlitz	S.74(1)	
Seabird Island	S.74(1)	
Semiahmoo	S.74(1)	
Seton Lake		CUSTOM
Shackan		CUSTOM
Shuswap	S.74(2)**	
Shxw'ow'hamel First Nation		CUSTOM
Shxwhá:y Village (f. Skway)		CUSTOM
Simpcw First Nation (f. North Thompson)		CUSTOM
Siska		CUSTOM
Skatin Nations (f. Skookumchuck)		CUSTOM
Skawahlook First Nation		CUSTOM
Skeetchestn		CUSTOM
Skidegate	S.74(1)	
Skin Tyee		CUSTOM
Skowkale		CUSTOM

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	*INDIAN ACT*	CUSTOM
Skuppah		CUSTOM
Skwah		CUSTOM
Snuneymuxw First Nation (f. Nanaimo)		CUSTOM
Songhees First Nation	S.74(1)	
Soowahlie	S.74(1)	
Spallumcheen (Aka. Splatsin)	S.74(1)	
Spuzzum		CUSTOM
Squamish		CUSTOM
Squiala First Nation		CUSTOM
St. Mary's		CUSTOM
Stellat'en First Nation (f. Stellaquo)		CUSTOM
Sts'ailes (f. Chehalis)	S.74(1)	
Stswecem'c Xgat'tem First Nation (f. Canoe Creek)	S.74(3)**	
Stz'uminus (f. Chemainus)		CUSTOM
Sumas First Nation		CUSTOM
T'it'q'et (f. Lillooet)		CUSTOM
Tla'amin	S.74(1)	
T'Sou-ke First Nation (f. Sooke)	S.74(1)	
Tahltan	S.74(1)	
Takla Lake First Nation		CUSTOM
Tk'emlúps Te Secwépemc (f. Kamloops)		CUSTOM
Tl'azt'en Nation		CUSTOM
Tl'etinqox-t'in Government Office (f. Anahim)	S.74(1)	
Tla-o-qui-aht First Nations	S.74(1)	
Tlatlasikwala		CUSTOM
Tlowitsis Tribe		CUSTOM
Tobacco Plains		CUSTOM
Toosey	S.74(1)	
Ts'kw'aylaxw First Nation (f. Pavilion)		CUSTOM
Tsartlip	S.74(1)	
Tsawataineuk		CUSTOM
Tsawout First Nation	S.74(1)	
Tsay Keh Dene		CUSTOM
Tseshaht (f. Sheshaht)		CUSTOM
Tseycum	S.74(1)	
Tsleil-Waututh (f. Burrard)	S.74(1)	
Tzeachten		CUSTOM
Ulkatcho		CUSTOM
Union Bar		CUSTOM
Upper Nicola		CUSTOM
Upper Similkameen	S.74(1)	
West Moberly First Nations		CUSTOM
Wet'suwet'en First Nation (f. Broman Lake)		CUSTOM
Whispering Pines/Clinton	S.74(1)	
Williams Lake		CUSTOM
Xat'súll (f. Soda Creek)		CUSTOM

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	*INDIAN ACT*	CUSTOM
Xaxli'p (f. Fountain)		CUSTOM
Xeni Gwet'in First Nations Government (f. Nemiah Valley)		CUSTOM
Yakweakwioose		CUSTOM
Yale First Nation		CUSTOM
Yekooche		CUSTOM
Yunesit'in Government (f. Stone)		CUSTOM
TOTALS	**76**	**112**
Custom Codes Pending**		

COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Huu-ay-aht First Nations	HFNA 2011	Election Act
Huu-Ay-Aht First Nations	HFNA 2011	Referendum And Recall Act
Ka:'yu:'k't'h'/Che:k:tles7et'h' First Nations	KCFNS 8/2011	Elections Act
Ka:'yu:'k't'h'/Che:k:tles7et'h' First Nations	KCFNS 18/2011	Recall Act
Ka:'yu:'k't'h'/Che:k:tles7et'h' First Nations	KCFNS 9/2011	Referendum Act
Nisga'a Lisims Government	JUN 2008	Nisga'a Elections Act
Nisga'a Lisims Government	JUN 2008	Nisga'a Elections Dispute Resolution Regulation
Nisga'a Lisims Government	NOV. 2013	Nisga'a Elections Regulation
Sechelt Indian Band	2007-08-10	Council Recall Law
Toquaht Nation	TNS 8/2011	Elections Act
Toquaht Nation	TNS 9/2011	Referendum Act
Tsawwassen First Nation	APR 2009	Election Act
Tsawwassen First Nation	086-2009	Campaign Advertising Regulation
Tsawwassen First Nation	086-2009	Election Notice Regulation
Tsawwassen First Nation	086-2009	Election Officer Regulation
Tsawwassen First Nation	086-2009	Election Recount And Appeal Deposit Regulation
Tsawwassen First Nation	086-2009	Nomination Regulation
Tsawwassen First Nation	086-2009	Voting And Mail-In Ballot Regulation
Uchucklesaht Tribe	UTS 8/2011	Elections Act
Uchucklesaht Tribe	UTS 9/2011	Referendum Act
Ucluelet First Nations	YFNS 8/2011	Elections Act
Ucluelet First Nations	YFNS 9/2011	Referendum Act
Westbank First Nation	JUL 2007	Westbank First Nation Constitution

RESOURCES

First Nations

National Centre for First Nations Governance
Phone: 604-922-2052
Toll-free: 1-866-922-2052
Fax: 604-922-2057
Email: services@fngovernance.org
www.fngovernance.org

- Custom Leadership Selection Codes for First Nations

Atlantic Policy Congress
Cole Harbour Head Office
153 Willowdale Drive Cole Harbour
Dartmouth, NS B2V 0A5
Phone: 1-902-435-8021
Toll-free: 1-877-667-4007
Fax: 1-902-435-8027
www.apcfnc.ca/en/index.asp

Federal

Department of Justice Canada
The Aboriginal Justice Strategy
284 Wellington Street, SAT-3
Ottawa, ON K1A 0H8
Email: ajs.sja@justice.gc.ca
www.justice.gc.ca/eng/index.html

- Indian Bands Council Elections Order.
  http://laws-lois.justice.gc.ca/eng/regulations/sor-97-138/page-1.html

Aboriginal Affairs and Northern Development Canada
BC Regional Office
Governance and Capacity Development
Suite 600 – 1138 Melville Street
Vancouver, BC V6E 4S3
Phone: 604-775-5100
Toll-free: 1-800-567-9604
Fax: 604-775-7149
TTY: 1-866-553-0554
Email: infopubs@aandc-aadnc.gc.ca

- Best Practices — Reviewing Custom Election Codes.
  www.aadnc-aandc.gc.ca/eng/1100100013949/1100100013950
- Sample Leadership Selection Code.
  www.aadnc-aandc.gc.ca/eng/1100100013945/1100100013947
- Senate Standing Committee on Aboriginal Peoples *First Nations Elections: The Choice is Inherently Theirs* report:
  www.parl.gc.ca/Content/SEN/Committee/403/abor/rep/rep03may10-e.pdf

SELECT LEGISLATION

- *First Nations Elections Act* (S.C. 2014, c. 5)
- *Indian Band Council Election Order* (SOR/97-138)

PART 1 /// SECTION 3.9

Emergency Preparedness

3.9

EMERGENCY PREPAREDNESS

3.9

EMERGENCY PREPAREDNESS

BACKGROUND

Dealing with emergencies and natural disasters is an important function of any government. When there is an emergency or crisis, citizens and other people who reside or conduct business on First Nations lands expect and require swift and appropriate government intervention and response. How well First Nations governments can respond in times of crisis is a function of the resources available (capacity), their ability to regulate in this area, and their ability to coordinate activities with other governments and institutions that have the responsibility or the capacity to act. Emergencies and natural disasters do not respect jurisdictional boundaries, and governments (First Nation, federal, provincial, municipal and other local authorities) must work together to protect people. Much has been learned from the massive forest fires, floods, and so on that have affected our communities in recent years about how to prepare for and respond to emergencies and how to coordinate our activities.

In Canada, no single level or order of government has primary responsibility for emergencies and natural disasters. Rather, lead agencies within federal, provincial, and local governments may be responsible, depending on the scale and type of emergency. While this can seem difficult to navigate, generally, provincial government agencies or, depending on the severity and area affected, even more localized bodies, have taken the lead.

The federal government's *Emergency Management Act* (S.C. 2007, c. 15) places responsibility for emergencies and national safety with the Minister of Public Safety and Emergency Preparedness. Key responsibilities of the Minister include coordinating the government of Canada's response to an emergency, coordinating with and supporting provincial emergency response, and reviewing emergency management plans prepared by government departments. Under the *Emergency Management Act*, each Minister is required to create emergency management plans for their area of responsibility. The act requires a federal plan to incorporate any provincial agreements or arrangements, including those with local authorities. For example, Public Safety Canada, a federal department, coordinates with provincial governments and bodies, but Public Safety Canada states that "emergencies are managed first at the local level… Local authorities who need assistance request it from provincial or territorial governments. If an emergency escalates beyond their capabilities, the province or territory may seek assistance from the federal government." While there is no link in the *Emergency Management Act* to First Nations, Aboriginal Affairs and Northern Development Canada (AANDC) is included in the act as an affected government institution.

In BC, the provincial government has enacted several pieces of legislation (*Emergency and Health Services Act* (R.S.B.C. 1996 c. 182); *Emergency Communications Corporations Act* (S.B.C. 1997, c. 47); *Emergency Program Act* (R.S.B.C. 1996, c. 111)) dealing with emergencies. The *Emergency and Health Services Act* was updated as recently as 2013 to expand co-operation with paramedics and first responders who are often the first point of contact in emergency situations.

Currently, none of these provincial or federal statutes make any direct reference to First Nations governments, nor do they require coordination of plans with First Nations or a working relationship with First Nations governing bodies — with the exception of First Nations with modern treaties, which are considered local authorities for the purposes of provincial emergency preparedness. Given the broad range of possible emergencies and natural disasters, this chapter does not examine all federal or provincial management plans or legislation respecting each sector. Where applicable,

legislative frameworks relating to emergency preparedness and response are examined within other jurisdictions. For example, a key concern for many First Nations in BC is environmental emergency preparedness and response. This is examined in detail in Section 3.10 — Environment.

The exercise of jurisdiction with respect to emergency preparedness is linked to numerous other powers of government, including administration of justice; environment; fish, fisheries and fish habitat; forests; health; land management; land and marine use planning; oil and gas; public order, safety and security; public works; traffic and transportation; and water.

First Nations governing under the *Indian Act* are not recognized as having explicit jurisdiction over emergency preparedness. However, two First Nations (Upper Nicola and Lower Nicola) have made emergency preparedness bylaws under the authority of section 81(1)(a) of the *Indian Act* to make bylaws in relation to health (see below). In addition, although not necessarily as an exercise of direct jurisdiction over emergency preparedness, a number of First Nations have enacted bylaws addressing public safety, including fire prevention bylaws. This is addressed further in Section 3.25 — Public Order, Safety and Security.

A number of First Nations have service agreements with municipalities that require a fire protection bylaw. According to CivicInfo BC, 11 BC First Nations currently have specific fire protection agreements, and others have wider agreements that may include fire protection or prevention. Many First Nations in BC have developed emergency plans, which are usually brought into effect by resolution of council, and many First Nations communities are working with adjacent local governments and the province on emergency preparedness. For example, coastal communities have well-developed emergency plans addressing earthquakes and tsunamis. Communities working on fire prevention and response and preparation for earthquakes and tsunamis can find useful information on the provincial government's Emergency Management website, including brochures, manuals and videos

As a result of efforts by some First Nations, and in particular those in the Nicola Valley, established the Society of Native Indian Firefighters (SNIF) in 1986; this became the First Nations Emergency Services Society (FNESS) in 1994. The FNESS assists communities in building both emergency preparedness capacity to increase response effectiveness, thus reducing potential loss of life, as well as in developing more decision-making abilities within communities. Ongoing support includes planning, training, community education and assistance to ensure that communities are prepared for emergency events. According to FNESS, every community should have an emergency plan, which should identify everyone's role during an emergency; clearly identify evacuation routes and resources to assist with emergency needs (food, shelter, medical, heavy equipment, etc.); and identify and prioritize emergency equipment and other capital/infrastructure needs. An emergency plan will ensure that communities are able to respond better to and recover from an emergency. Having an emergency plan is seen as one indicator of progress toward a healthy, resourceful community.

Emergency plans generally include:

- an evaluation/identification of community risks
- a system for notifying officials/agencies that must respond
- a description of the responsibilities of key positions and who will fill these positions (including 24-hour contact information)
- a description of the communications system to be used
- a list of resources for finding information, and
- contacts and equipment needed in a hurry.

INDIAN ACT GOVERNANCE

The *Indian Act* provides no specific power for the Minister or a "band" council in relation to emergency preparedness. A First Nation could conceivably make a bylaw under section 81 using the provisions regarding the health of on-reserve residents, and the observance of law and order and ancillary powers, although such bylaws could be disallowed by the Minister. To date, two First Nations have used section 81(1)(a) to enact provisions in relation to emergency programming and emergency measures:

> 81.(1) The council of a band may make bylaws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
>
> (c) the observance of law and order;
>
> (d) the prevention of disorderly conduct and nuisances;
>
> (q) with respect to any matter arising out of or ancillary to the exercise of powers under this section;

Section 65 of the *Indian Act* provides that the Minister can use money from the "band" to deal with emergencies, although as a rule AANDC will not do this unless requested by a First Nation:

> 65. The Minister may pay from capital moneys
>
> (b) expenses incurred to prevent or suppress grass or forest fires or to protect the property of Indians in cases of emergency.

SECTORAL GOVERNANCE INITIATIVES

Considerable work has been undertaken by FNESS and First Nations in developing emergency plans and working with other governments in the area of emergency preparedness. However, this work has not been undertaken in accordance with a sectoral governance initiative addressing the specific recognition of First Nations law-making authority in this subject area.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All comprehensive governance arrangements provide for jurisdiction over emergency preparedness. In some cases, the power is explicit, while in other cases it is spread across the different powers of the Nation. To exercise jurisdiction over emergency preparedness, in order to affect plans and compel action, a Nation would typically rely on a number of heads of power. For instance, while there is no specific section in the *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27), powers over matters such as public order and safety, preservation of natural resources, preservation of animals and administration of property belonging to the Band, as set out in section 14 of the act would support the development and enforcement of an emergency preparedness law. In the Westbank arrangements, responsibility for handling emergencies and First Nations law-making powers for emergency preparedness are set out in the chapters on public works and public order, peace and safety. These chapters provide for continuation of current procedures until an agreement between governments is reached. Westbank also has jurisdiction in relation to environmental emergencies.

The provisions in the treaty arrangements with respect to emergencies are set out in more detail, reflecting the agreed application of provincial and federal laws and coordination with First Nations administrative and law-making powers (to the extent that these powers are provided for in the treaty where the First Nation is deemed a local authority). The Yale and Tla'amin Final Agreements allow the First Nations to create laws that address emergency preparedness and response. Where there is conflict, federal and/or provincial legislation prevails.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	POWER TO MAKE LAWS	CONFLICT OF LAWS
Sechelt	No provisions deal directly with emergency preparedness although the Nation has jurisdiction over a number of matters into which emergency preparedness would fall. (s. 14)	No specific provisions.	N/A
Westbank	Current procedures and responsibilities in relation to emergency preparedness and emergency response continue to apply until a subsequent agreement is completed with Westbank First Nation, Canada and the province. (Part XXII, s. 218)	Westbank has law-making power in relation to "programs in preparation for emergencies". (Part XXI, s. 212 (n)) Westbank has law-making authority in relation to environmental protection, including dealing with environmental emergencies. (Part XIV, s. 145)	Westbank law prevails with respect to emergency preparedness. (Part XXI, s. 216) Federal law prevails with respect to environmental protection. (Part XIV, s. 145)
Nisga'a	Nisga'a Lisims Government has the rights, powers, duties, and obligations of a local authority under federal and provincial legislation with respect to emergency preparedness and emergency measures on Nisga'a Lands. (Ch. 11, s. 122)	Nisga'a Lisims Government may make laws with respect to its rights, powers, duties, and obligations under paragraph 122. (Ch. 11, s. 123)	Federal or provincial law prevails. (Ch. 11, s. 123)
Tsawwassen	Tsawwassen First Nation has the rights, powers and responsibilities of a local authority under federal and provincial law with respect to emergency preparedness and emergency measures on Tsawwassen Lands. (Ch. 16, s. 113)	Tsawwassen Government may make laws with respect to its rights, powers, duties, and obligations in the area of emergency preparedness and emergency measures. (Ch. 16, s. 114) Tsawwassen has law-making authority in relation to in response to an environmental emergency. (Ch. 15(1)(d))	Federal or provincial law prevails. (Ch. 16, s. 115)
Maa-nulth	Each Maa-nulth First Nation Government has the rights, powers and responsibilities of a local authority under federal and provincial law with respect to emergency preparedness and emergency measures on Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation. (s. 13.26.2)	Each Maa-nulth First Nation Government may make laws with respect to its rights, powers, duties, and obligations in the area of emergency preparedness and emergency measures. (s. 13.26.1) Maa-nulth First Nations have law-making authority in relation to in response to an environmental emergency. (s. 22.4.1)	Federal or provincial law prevails. (s. 13.26.3)
Yale	Yale First Nation has the rights, powers and responsibilities of a local authority under federal and provincial law with respect to emergency preparedness and emergency measures on Yale First Nation Land. (s. 3.26.1)	Yale First Nation Government may make laws with respect to Yale First Nation's rights, powers, duties, and obligations in the area of emergency preparedness and emergency measures. (s. 3.26.2) Yale First Nation has law-making authority in relation to response to an environmental emergency. (s. 18.1.1)	Federal or provincial law prevails. (s. 3.26.3)
Tla'amin	Tla'amin Nation has the rights, powers and responsibilities of a local authority under federal and provincial law with respect to emergency preparedness and emergency measures on Tla'amin Lands. (Ch. 15, s. 130)	The Tla'amin Nation may make laws in relation to its rights, powers, duties and obligations in the area of emergency preparedness and emergency measures. (Ch. 15, s. 131) Tla'amin Nation has law-making authority in relation to response to an environmental emergency. (Ch. 15, s. 9)	Federal or provincial law prevails. (Ch. 15, s. 132)

Table — Comprehensive Governance Arrangements... ***continued***

	DECLARING A STATE OF LOCAL EMERGENCY	EFFECT ON CANADA AND BC'S POWER TO DECLARE A NATIONAL OR PROVINCIAL STATE OF EMERGENCY	ENVIRONMENTAL EMERGENCY OR NATURAL DISASTER
Sechelt	No specific provisions.	No provisions and no effect.	No specific provisions.
Westbank	No specific provisions. May declare an emergency in accordance with law-making powers.	No provisions and no effect.	If the Party (Canada and Westbank) who has primary responsibility to respond to an environmental emergency does not respond or is unable to respond in a timely manner, the other party may respond to the emergency. The responding party must notify the party with primary responsibility as soon as possible, and state what measures were taken to prevent, correct or respond to the emergency. (Part XIV, s. 154)
Nisga'a	Nisga'a Lisims Government may declare a state of local emergency, but any declaration and any exercise of those powers is subject to the authority of Canada and British Columbia set out in those federal and provincial laws. (Ch. 11, s. 124)	Nothing affects the authority of Canada to declare a national emergency or BC to declare a provincial emergency in accordance with federal and provincial laws of general application. (Ch. 11, s. 125)	Any party may respond to an environmental emergency or natural disaster if the party with primary responsibility for responding has not responded, or is unable to respond, in a timely manner. (Ch. 10, s. 12)
Tsawwassen	Tsawwassen First Nation may declare a state of local emergency, but any declaration and any exercise of those powers is subject to the authority of Canada and British Columbia set out in those federal and provincial laws. (Ch. 16, s. 116)	Nothing affects the authority of Canada to declare a national emergency; or British Columbia to declare a provincial emergency, in accordance with federal or provincial law. (Ch. 16, s. 117)	Any Party may respond to an emergency or natural disaster on Crown land or Tsawwassen Lands or the bodies of water immediately adjacent to Tsawwassen Lands, if the party with primary responsibility for responding has not responded, or is unable to respond, in a timely way. (Ch. 7, s. 36)
Maa-nulth	Each Maa-nulth First Nation Government may declare a state of local emergency, but any declaration and any exercise of power is subject to the authority of Canada and British Columbia under federal law or provincial law. (s. 13.26.4)	Nothing affects the authority of Canada to declare a national emergency; or BC to declare a provincial emergency, in accordance with federal or provincial law. (s. 13.26.5)	Any Party may respond to an environmental emergency on Crown land or Maa-nulth First Nation Lands or the bodies of water immediately adjacent to Maa-nulth First Nation Lands, if the party with primary responsibility for responding has not responded, or is unable to respond in a timely manner. (s. 22.5.2)
Yale	Yale First Nation may declare a state of local emergency, but any declaration and any exercise of those powers is subject to the authority of Canada and British Columbia set out in those federal and provincial laws. (s. 3.26.4)	Nothing affects the authority of Canada to declare a national emergency; or BC to declare a provincial emergency, in accordance with federal or provincial law. (s. 3.26.5)	Any Party may respond to an emergency or natural disaster on Crown land or Yale First Nation Land or the bodies of water immediately adjacent to Yale First Nation Land, if the person with primary responsibility for responding has not responded, or is unable to respond, in a timely way. (s. 14.9.1)
Tla'amin	Tla'amin Nation may declare a state of local emergency, but any declaration and any exercise of those powers is subject to the authority of Canada and British Columbia set out in those federal and provincial laws. (Ch. 15, s. 133)	Nothing affects the authority of Canada to declare a national emergency; or BC to declare a provincial emergency, in accordance with federal or provincial law. (Ch. 15, s. 134)	No specific provisions.

Table — BC First Nations' Law/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(a) Health			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Katzie		HEALTH	Draft Bylaw Respecting Fire Safety
Lower Nicola	13	HEALTH	Bylaw Respecting An Emergency Program
Upper Nicola	98-001	HEALTH	Bylaw Respecting Emergency Measures Program
Bylaws — Section 81(1)(c) Observance of Law and Order			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Haisla Nation		TRAFFIC, ANIMAL, NOISE, NUISANCE, FIREARMS, FIRE	Bylaw Respecting Traffic, Animal Control, Nuisance, Noise, Firearms, Fire Protection, Emergency Program, Smoke Alarms (General Provisions That Include All These Subjects)
Heiltsuk	10	LAW AND ORDER	To Provide For The Establishment Of A Volunteer Fire Department
Leq'a:mel First Nation	1997.01	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Nuisance (Illegal Burning)
Nadleh Whuten	1998-2	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Fire Department And Safety Committee
Tsleil-Waututh Nation	1989-07	LAW AND ORDER	Bylaw Respecting Fire
Westbank	2005-12	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Storage, Sale And Discharge Of Incendiary Devices
Bylaws — Section 81(1)(d) Prevention of disorderly conduct and nuisances			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Haisla Nation	Unnumbered	TRAFFIC, ANIMAL, NOISE, NUISANCE, FIREARMS, FIRE	Bylaw Respecting Traffic, Animal Control, Nuisance, Noise, Firearms, Fire Protection, Emergency Program, Smoke Alarms
Kamloops	1987-1	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Fire Prevention
Lax Kw'alaams	1989-2	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Fire Safety
Leq'a:mel	1997.01	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Nuisance (Illegal Burning)
Nisga'a Village Of Gitwinksihlkw	Unnumbered	DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Fire Safety
Quatsino	5	DISORDERLY CONDUCT & NUISANCE	Bylaw Setting Out The Fire Protection Regulations Of The Quatsino Band
Soda Creek	2010.02	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Open Air Fires
Songhees First Nation	01-1998	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Prevention Of Fire And The Protection Of Persons And Property
Tk'emlups te Secwepemc	1977-1	DISORDERLY CONDUCT AND NUISANCE	To Provide For The Prevention Of Fires, The Spread Of Fires, And For The Preservation Of Life And Property
Tk'emlups te Secwepemc	1987-1	DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Fire Prevention
Tsleil-Waututh Nation	DRAFT	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Draft — Bylaw Respecting The Use Of Buildings By Establishing A System Of Fire Protection Of The Reserve
Bylaws — Section 81(1)(h) Construction			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Tsleil-Waututh Nation	2008	CONSTRUCTION	Bylaw Respecting The Use Of Buildings By Establishing A System Of Fire Protection

Table — BC First Nations' Law/Bylaws in Force... *continued*

SECTORAL GOVERNANCE INITIATIVES		
FNLMA - FRAMEWORK AGREEMENT - OPERATIONAL	**LAW NO.**	**DESCRIPTION**
Tzeachten First Nation	10-03	Tzeachten First Nation Fireworks Law 2010
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Nisga'a Lisims Government	Oct 2004	Nisga'a Emergency Program Act
Sechelt Indian Band (SIGD)	1989-09	Fire Protection
Sechelt Indian Band (SIGD)	1998-03	Emergency Measures
Sechelt Indian Band (SIGD)	2007-01	State Of Emergency Declaration Provision
Sechelt Indian Band (SIGD)	2008-03	Burning & Smoke Release
Tsawwassen First Nation	049-2009	TFN Fire Regulation
Westbank First Nation	2005-11	WFN Fire Protection Law
Westbank First Nation	2005-12	WFN Fireworks Law
Westbank First Nation	2009-01	WFN Community Protection Law
Westbank First Nation	2008-05	WFN False Alarm Law

RESOURCES

First Nations

First Nations Emergency Services Society BC
102 – 70 Orwell Street
North Vancouver, BC V7J 3R5
Phone: 604-669-7305
Toll-free: 1-888-822-3388
Fax: 604-669-9832
Email: info@fness.bc.ca
www.fness.bc.ca

- Community Emergency Preparedness Plan: www.fness.bc.ca/pages/EPP.html
- Fire Department Support Program (FDSP): www.fness.bc.ca/CFLSS.htm
- Emergency information links: www.fness.bc.ca/whatwedo/emergencyInfoLink.htm

Provincial

Provincial Emergency Program (PEP)

Headquarters
Block A – Suite 200
2261 Keating Cross Road
Saanichton, BC V8M 2A5
Phone: 250-952-4913
Fax: 250-952-4888
www.pep.bc.ca

Mailing Address:
PO Box 9201 Stn Prov Govt
Victoria, BC V8W 9J1

- Emergency Preparedness Information Links: www.pep.bc.ca/index.html
- Emergency Management Training Manual: www.embc.gov.bc.ca/em/training/reference_manual.pdf

CivicInfo BC
7th Floor – 620 View Street
Victoria, BC V8W 1J6
Phone: 250-383-4898
Fax: 250-383-3879
Email: info@civicinfo.bc.ca
www.civicinfo.bc.ca/index.asp

Federal

Aboriginal Affairs and Northern Development Canada
British Columbia Region
Suite 600, 1138 Melville Street
Vancouver, BC V6E 4S3
Phone: 604-775-7114 or 604-775-5100
Fax: 604-775-7149

- *Evaluation of the Emergency Management Assistance Program (EMAP)*: www.aadnc-aandc.gc.ca/eng/1100100011392/1100100011397
- *Emergency Management in BC First Nation Communities*: www.aadnc-aandc.gc.ca/eng/1311983608041/1314718739695

SELECT LEGISLATION

Provincial

- *Emergency and Health Services Act* (R.S.B.C. 1996, c. 182)
- *Emergency Communications Corporations Act* (S.B.C. 1997, c. 47)
- *Emergency Program Act* (R.S.B.C. 1996, c. 111)

Federal

- *Emergency Management Act* (S.C. 2007, c. 15)

PART 1 /// SECTION 3.10

Environment

3.10

ENVIRONMENT

3.10

ENVIRONMENT

BACKGROUND

The exercise of jurisdiction over the environment and jurisdictional arrangements between governments in Canada with respect to the environment are evolving. Questions regarding sustainable development and finding the right balance between exploiting natural resources and protecting the environment are among the most important and talked-about areas of public policy and are of great concern to many Canadians. Addressing climate change, which requires countries to adopt appropriate environmental policy, is one of the biggest global challenges. The fact that people are even having this conversation about environmental stewardship is acknowledgement that every reasonable thinking person in Canada knows what the choice really is and many are struggling with that choice: on the one hand balancing the material wants and economic needs of the present with the future needs and quality of life of future generations. For Indigenous peoples, the responsible choice has always been relatively easy, given a worldview that typically sees one generation as borrowing the land and resources from the next and not "owning it" for present-day exploitation.

First Nations people and Canadians generally are seeing an increased role for First Nations in the area of environmental management and stewardship, in part as a result of the existence of Aboriginal title, which gives rise to the right to have a say in how lands are used (taking into account the environmental impact), and also how the powers of self-government (either ancillary to title, negotiated or independently) are implemented. In short, perhaps more than in other areas of public policy and reconciliation with First Nations, there will be movement in this area, particularly where major land use decisions being made (e.g., the approval of mines, pipelines, dams, etc.), in the era of recognition, where Aboriginal title and rights, including treaty rights, are crystalizing on the ground.

Jurisdiction with respect to the environment is linked to the following other subject matters: lands and land management; land and marine use planning; water; minerals and precious metals; forestry; oil and gas; agriculture; fish, fisheries and fish habitat; wildlife; licensing, regulation and operation of business; emergency preparedness; public works; and administration of justice.

Division of Powers

The division of powers under the *Constitution Act, 1867* does not identify which level of government has jurisdiction over environment. As a consequence, it is not clear which level of government in Canada is primarily responsible for environmental stewardship. When the Constitution was drafted, little, if any, consideration was given to environmental stewardship. It was not top of mind for the framers, when an objective of confederation was to open up the country to development, not to regulate environmental stewardship. Today, therefore, both Canada and the provinces assert and exercise jurisdiction over the environment, based on the federal powers outlined in section 91 of the *Constitution Act, 1867*, and provincial powers in section 92. Into this mix, First Nations are increasingly asserting or re-establishing their jurisdiction and control over the environment, with respect to governance over reserve lands, treaty settlement lands and Aboriginal title lands or within their broader ancestral territories.

Managing the Environment

Broadly speaking, in Canada, when governments exercise jurisdiction over the environment they do so in two broad categories: environmental assessment and environmental protection. Environmental

assessment refers to the process by which a proponent submits a project proposal and that proposal is assessed on the basis of its potential environmental impacts. The environmental assessment takes place before major land or resource decisions are made and a development is approved and occurs. Environmental protection (and management) refers to the regulation of activities and occurs once development or use of the lands and resources has already been approved and is taking place. Throughout the process, between approval through an "assessment" and the development of environmental "protection" regulations, governments at all levels use a variety of mechanisms to set standards for the construction of projects. In theory, the projects that are larger in scope and/or pose a higher environmental risk are the projects that receive a proportionately higher degree of scrutiny and regulation.

Geographical Scope of Governance

In considering questions of jurisdiction over the environment, it is important to distinguish between reserve lands, treaty settlement lands and Aboriginal title lands and within the broader ancestral lands of a Nation. While First Nations are looking to exercise or are exercising increased powers on-reserve or on treaty settlement lands, they are also looking to have greater influence over decisions made with respect to the environment within their broader territories, where Canada and British Columbia are currently exercising jurisdiction without due regard to First Nations jurisdiction or authority. The question of geographical scope of governance is particularly important given the relative size of the current on-reserve and/or treaty settlement land base compared to the broader territories that are within ancestral lands and where there are questions around Aboriginal title. It is far more likely that major projects with significant potential environmental impacts will, or are, occurring within the broader ancestral lands of Nations than on reserves or treaty settlement lands.

How First Nations rights, both proprietary rights in the land itself and governance rights over the land, should be accommodated or are considered in the environmental assessment and reviews and regulations that follow development is a matter of much ongoing debate. Typically, First Nations or their institutions may be asked by Canada or British Columbia to participate or apply to participate in their environmental assessment and review processes. This participation is not necessarily as governments or sharing in decision-making or contemplation; rather, First Nations participate as "stakeholders" — affected and interested parties. As greater areas of land within a Nation's broader ancestral lands are delineated, either through negotiations, recognition by governments, or further court declarations of Aboriginal title, this reality can and will likely change.

Ultimately, with respect to environmental assessment, the issue is first which government (federal, provincial or First Nations) may conduct an assessment and then, notwithstanding which government conducts the assessment, which government has the authority to approve or disallow a project and set conditions for its approval. Whether the federal government, provincial government or First Nation government has the final word, questions of shared decision-making and joint decision-making must be considered. In this regard, outside of comprehensive governance arrangements, but within Nations' broader ancestral lands, there are examples of reconciliation agreements that Aboriginal groups have entered into with British Columbia that to some degree address environmental assessment and project approval. While reconciliation agreements vary by Nation, common environmental management–related features include frameworks for shared decision-making (which may include the development of joint decision-making councils), land use planning maps, and shared commitments to forestry planning, alternative energy strategies, and/or revenue sharing.

Given the development of the law and the precedents that have been established with respect to reconciliation agreements and recognition of First Nations interests in off-reserve land projects that potentially impact Aboriginal title and rights, there are now increased opportunities for Nations to reach agreements with British Columbia on the role they will play in relation to proposed projects on their lands. This is particularly the case where, under the current regulatory framework, the project requires

a provincial environmental assessment and is clearly located in a Nation's territory. Finally, and perhaps most significantly because of the consultation and accommodation requirements under the Haida Nation case (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511) and later court rulings, First Nations will have notice of projects in their broader territories and can challenge decisions of provincial approving agencies where they have not been adequately consulted and accommodated. The Haida currently have one of the only reconciliation agreements outside of treaty settlement that provides for the involvement of a First Nation in true shared decision-making (as opposed to a consultation and accommodation framework through which the province remains the final decision-maker on strategic decisions of substance). While the Haida protocol does not specifically reference environmental assessment or protection, it does by inference presuppose the Haida Nation being involved in all strategic and major decisions affecting Haida Gwaii, including environmental stewardship decisions. The Haida Nation, as an exercise of its inherent law-making powers and in furtherance of its recognized shared decision-making powers, enacted a Haida stewardship law in 2010 in its House of Assembly. In doing so, it has exercised recognized authority over its ancestral lands.

Environmental Assessment

Environmental assessment addresses the evaluation of a specific project to determine the extent and acceptability of its environmental impact as well as any mitigating measures that may be required. The *Canadian Environmental Assessment Act* (S.C. 2012, c. 19, s. 52) (CEAA) sets parameters that trigger a federal environmental assessment and the responsible authority and type of assessment required. CEAA also sets timelines, as well as guidelines for public participation. Types of assessment can include screening, environmental assessment by responsible authority, or review panel. Generally, a project can require federal environmental assessment if it is regulated under other federal regulators such as the National Energy Board or the Canadian Nuclear Safety Commission and/or if the project falls under a federal jurisdiction. Federal jurisdiction with respect to the environment can include fish and fish habitat, other aquatic species, migratory birds, federal lands, and cross-provincial or international boundaries; where there are impacts on Aboriginal peoples; or where there is a direct, or necessarily incidental link to any federal jurisdictional decisions about a project. Ministerial discretion provisions allow for delegation of a project to an equivalent provincial process, referral of a project to a panel review process, and, where a project is deemed to cause significant adverse environmental effects, the ability to refer to Governor in Council to decide whether the project is in the national interest.

The Province of British Columbia has established broad-based laws with respect to environmental assessment (*Environmental Assessment Act* [S.B.C. 2002, c. 43]) that essentially identifies a class of major projects in BC that will trigger an environmental review or assessment. In some cases, the federal government may also have assumed jurisdiction over these projects, if they are on federal lands within provincial boundaries, they are using federal funds, or they require federal permits.

Both the federal and provincial statutes look at whether a project will have a significant negative impact on the environment and determine whether and how it might proceed. There are no definitive guidelines in either federal or provincial law as to what constitutes an impact significant enough to stop a project or change its scope. As a result, there is still considerable discretion for decision-makers (cabinet) to allow or disallow projects. In all cases, there is an important role for First Nations in decision-making.

In the federal legislation, while the acts and regulations are complicated, essentially there is a requirement that for projects on-reserve, an environmental review or assessment will be undertaken if the project is seen as disturbing the land. All projects on-reserve may require submission of a project description through which AANDC would assess the environmental impact of the project. The federal process would consider the existing environmental state of the land, plus the impact of proposed developments.

Environmental Protection

Where development is necessary and approved, whether it is large-scale industrial development or issuing building permits, environmental protection involves management and regulation of impacts on the land. Both Canada and British Columbia have enacted legislation dealing with environmental protection: the federal *Canadian Environmental Protection Act, 1999* (S.B.C. 1999, c. 33) (CEPA) and the provincial *Environmental Management Act* (S.B.C. 2003, c. 53) (EMA).

With respect to on-reserve lands, CEPA authorizes the Governor in Council to make regulations respecting environmental management systems, pollution, and regulations for any substance that may be released into the environment.

While standards vary between the provinces, provincial environmental laws generally regulate municipal-level areas, local works, property and civil rights, and natural resources. Notwithstanding legislation governing specific resources like forestry, groundwater and safe drinking water, minerals and precious metals, and oil/gas extraction, the primary statute in BC for environmental protection is EMA. EMA addresses regulations for waste management as well as environmental management to protect human health and the quality of water, lands and air. EMA also includes penalties and compliance measures.

Where provincial laws do not apply to on-reserve lands, Canada has attempted to ensure that provincial standards and policies are met when it issues land permits for on-reserve lands. Essentially, the proponent of any development on reserve lands must commit in its terms of reference to follow provincial regulations. Under the *Indian Act*, there is no recognition of First Nation jurisdiction over environmental protection or assessment. For more information on how AANDC addresses environmental assessment on reserves, see chapter 12 of the Aboriginal Affairs and Northern Development Canada Lands Management Manual.

Notably, solid waste, sewage, fuel storage tanks, and contaminated sites continue to be an area of concern for many First Nations communities. The 1978 *Indian Reserve Waste Disposal Regulations* (CRC, c. 960) stipulates how AANDC issues permits for disposal or storage of waste, as well as very limited penalties in the form of a $100 fine or imprisonment not exceeding three months. In Chapter 6 of the *2009 Fall Report of the Auditor General of Canada*, "Land Management and Environmental Protection on Reserves," AANDC explained that permits are rarely issued and there is no surveillance for compliance because of the very out-dated nature of the regulations. Sewage and wastewater discharges are also connected to the issue of safe drinking water on reserves and can be linked to the *Safe Drinking Water for First Nations Act* (S.C. 2013, c. 21), described in detail in Section 3.31 — Water.

The *First Nations Commercial Industrial Development Act* (S.C., 2005, c. 53) (FNCIDA) is an example of an effort led by First Nations to ensure that reserve lands are regulated. The FNCIDA allows First Nations to opt into legislation that provides a regulatory base for commercial industrial development of on-reserve lands that is harmonized with that of the province (see Section 3.20 — Lands and Land Management).

Environmental Emergency Preparedness and Response

Environmental protection can also be viewed in terms of environmental emergency preparedness and response, which has application both on-reserve and for a Nation's broader territory. While for many First Nations, strong environmental protections are fundamental to any development, the reality is that where there is development, there is risk (see Section 3.9 — Emergency Preparedness.)

An environmental emergency regime can be looked at in terms of prevention, preparedness, response and recovery. Both federally and provincially, regulations attempt to promote the

responsibility of the proponent or industries in developing emergency preparedness plans and, where an accident occurs, the "polluter pays" principle. But environmental emergencies do not follow boundaries, either territorial or jurisdictional, established by governments and require coordination of a number of different departments and heads.

Under CEPA, Environment Canada through its Environmental Emergencies Program provides technical expertise and is responsible for any spill that affects federal jurisdictions such as fish and wildlife and hazardous substances. Under Canada's *Emergency Management Act* (S.C. 2007, c. 15), all federal ministers are required to have emergency preparedness plans to deal with emergencies related to that Minister's area of accountability. Proponents working on federal lands are also required to have emergency preparedness and response plans based on CEPA.

As with federal legislation, provincial responsibility for emergency preparedness, response and recovery falls under different departments depending on type of emergency. The BC Ministry of Environment is responsible for environmental and public safety threats including oil and hazardous material spills (marine and inland), gas and gas leaks (pipeline), water-related debris flows, erosion and accretion, and submarine landslides, but may also provide support to other ministries for flood hazards, landslides, dam safety and seismic threats. EMA also includes regulations for spill cost recovery and spill reporting regulation.

There are no provisions within the *Indian Act* for environmental emergency preparedness, and where provincial and federal legislation exists, there is no regulated process for coordinated emergency response with First Nations when environmental emergencies occur.

Impact Benefit Agreements

In addition to working on a government-to-government basis with Canada, BC and/or other First Nations, First Nations have growing opportunities to require environmental management conditions in Impact Benefit Agreements (IBA) or other similar agreements with industry. For example, BC Hydro has a number of IBAs with First Nations, including Kwadacha, Tsay Keh Dene, St'at'imc, Kitselas, Nisga'aa, We Wai Kai, and Wei Wai Kum. There is also an IBA between New Gold and the Tk'emlups Indian Band, which has environmental content. Without prejudice to the governance rights of First Nations, the approach here is to achieve some of the same objectives, mitigating significant negative environmental impacts as they affect the environment and Aboriginal rights, and place these issues and the requirement for processes into contracts with third parties that can be enforced in court if they are not adhered to. At the same time, some First Nations have negotiated equity participation in projects through which they can influence decision-making as an owner of shares in the legal entity undertaking a project. Some First Nations that have less faith in the established, though evolving, provincial and federal environmental assessment processes and are now putting more reliance on these types of contracts with third parties that permit access to their broader territories with greater certainty that Aboriginal title and rights have been addressed appropriately.

Local Government Management

In addition to the review and assessment of major projects, under provincial law local governments (municipalities and cities) also exercise delegated authority over environmental management as part of their building permitting process and increasingly in other areas as well. For example, local governments can exercise their authority when regulating the environment using targeted procurement policies, green infrastructure initiatives, zoning of protected areas and establishment of riparian areas and parks. Traditionally, and when there was less concern for the environment, local governments only considered whether there was any environmental issue for land on which construction or development was proposed — for the most part, whether any environmental

degradation might cause a problem for the future use of the land if redeveloped and create a potential liability for the local government in approving the development. This has typically been done in the screening process when building applications are submitted to planning offices.

In Canada, municipalities are established under provincial legislation; therefore, they can exercise delegated authority within the scope of provincial jurisdictions and under certain limitations. Essentially, municipalities can make bylaws as long as they are local, are within provincial jurisdiction, and do not conflict with provincial or federal regulations. Municipalities can enact bylaws in areas that are not reflected in existing regulations or setting a higher standard than currently exists if it is deemed for the general welfare of the local people.

Given these parameters, many municipalities have accepted the challenge of defining creative ways to promote environmental stewardship. For example, in July 2011, the City of Vancouver approved the Greenest City 2020 Action Plan. The action plan outlines 10 goals and strategies to reduce greenhouse gas emissions, increase green jobs and reduce waste. The key tactic is to utilize municipal jurisdiction over building zoning and infrastructure as well as targeted procurement — as in a Vancouver building bylaw that establishes stronger regulations on energy and water efficiency as well as energy and water efficiency upgrades to existing buildings. Vancouver is one example of many municipalities seeking to be global leaders in green city planning. While environmental regulations require capacity and funds to implement, as First Nations continue to access economic development opportunities it stands to reason that their communities can also exercise bylaw/law-making powers to promote best environmental practices, in those circumstances where they are exercising governmental authorities akin to those of local government.

Evolving First Nations' Environmental Regimes, Indigenous Perspectives and the Rights of Nature

In sectoral governance initiatives and comprehensive governance arrangements, there is recognition of First Nations jurisdiction in the areas of environmental assessment and protection on First Nations lands. In the area of environmental assessment, there is increasing recognition of First Nations jurisdiction for projects on reserve lands. There is also recognition of First Nation involvement when a project not on a Nation's reserve lands or treaty settlement land can be seen as having a potential impact on its citizens. With respect to protection measures, penalties are generally at least equivalent to penalties under federal and provincial environmental protection laws.

In developing environmental assessment laws and administrative systems to support laws affecting projects on First Nations land, there are some overriding considerations. First, recognition by Canada of a First Nation's jurisdiction for environmental assessments generally requires the First Nation to "meet or beat" Canada's standards. Second, Canada insists that current processes under CEAA will continue to apply. Therefore, the relationship between Canada's environmental processes under CEAA and those of a First Nation's needs to be addressed and a mechanism developed so that they can operate in conjunction with one another. This could involve harmonization agreements between a First Nation and Canada and/or British Columbia regarding the respective environmental assessment processes and other matters. To date, there is no such comprehensive agreement that can serve as an example to turn to.

It is important to appreciate that many First Nations, through their teachings and cultural beliefs and as reflected in their Indigenous legal traditions, do not actually see natural resources, like water, as commodities that can be owned in the Western legal sense. Rather, First Nations see themselves as caretakers, where resources are being borrowed from future generations. Indeed, in some Indigenous cultures there is a belief that inanimate objects have their own identity and spirit (e.g., mountains and bodies of water), just as a human person does. Internationally, such Indigenous perspectives on the

natural world are now beginning to influence environmental stewardship and are even in some cases reflected in legal codes in which the natural world is, like a person, given legal standing and rights that can be defended. These traditions are a part of the evolving legal concept of the "rights of nature."

One of the most prominent examples of the rights of nature being reflected in state law is Ecuador's 2008 constitutional amendments, which provide for the rights of the natural world. These amendments, brought about by Ecuador's Indigenous president Rafael Correa, were guided by and reflect the Indigenous concept of "*Buen Vivir*" or "good living," which focuses on social, environmental and spiritual wealth as opposed to material wealth. In accordance with the constitution, "nature" has fundamental and inalienable rights, reflecting the Indigenous belief that nature is the mother and must be respected and consequently protected with legal standing.

As First Nations here in Canada rebuild, no doubt so too will they develop laws that reflect differing perspectives on ownership, the environment, and the management and protection of natural resources. These perspectives can assist in finding the right balance between the need to exploit natural resources to support economic growth and development and the need to ensure the preservation of the environment.

INDIAN ACT GOVERNANCE

There is no jurisdiction or authority for environmental management under the *Indian Act*. For communities under the *Indian Act*, any development of a reserve is subject to the *Canadian Environmental Assessment Act*. With respect to environmental protection, the *Canadian Environmental Protection Act* applies, as well as the regulations made under the *Indian Act* (see the *Indian Reserve Waste Disposal Regulations* [C.R.C., c. 960]). It should also be noted that the federal government has passed the *Safe Drinking Water for First Nations Act* (S.C. 2013, c. 21). This issue is dealt with more fully in Section 3.31 — Water.

In addition to the *Indian Act*, other federal legislation has an impact on specific on reserve habitats, namely the *Species at Risk Act* (S.C. 2002, c. 29) and the *Fisheries Act* (R.S.C. 1985, c. F-14).

SECTORAL GOVERNANCE INITIATIVES

Sectoral Initiatives on-Reserve

With respect to on-reserve jurisdiction, there are no sectoral initiatives specifically dealing with the environment. However, all land-related sectoral governance initiatives address the environment.

The Framework Agreement on First Nation Land Management

Part V of the *Framework Agreement on First Nation Land Management* (signed in 1996) (Framework Agreement) specifically addresses the environment. A First Nation with a land code in effect has the power to make environmental laws relating to its lands. Both Canada and the First Nations in the Framework Agreement agree that each First Nation should have both an environmental assessment and an environmental protection regime, and that Canada and participating First Nations will harmonize their respective environmental regimes and processes, with the involvement of the provinces where they agree to participate. This is to "promote effective and consistent environmental regimes and processes and to avoid uncertainty." Environmental protection standards and punishments that a First Nation may set or impose must have at least the same effect as those in the laws of the province in which the First Nation is situated.

With respect to environmental assessment, a First Nation is expected to make "best efforts" to develop an environmental assessment process within one year after its land code comes into force.

However, this timeframe can be extended if the Minister of AANDC and the First Nation agree. The First Nation's environmental assessment process must be consistent with CEAA requirements. The First Nation's environmental assessment process will be triggered where the First Nation is approving, regulating, funding or undertaking a project on First Nation land, and the assessment will occur as early as possible in the planning stages of a proposed project and "before an irrevocable decision is made." Further, Canada and the First Nation will use their best efforts to implement the principle that the First Nation's environmental assessment process will be used where an environmental assessment of a project on First Nation land is also required under CEAA. Finally, the Framework Agreement obliges a First Nation to establish environmental assessment and environmental protection regimes, however this is subject to there being "adequate financial resources and expertise being available to the First Nation." This provision of the Framework Agreement is significant because there have in fact been challenges for First Nations in developing their environmental management regimes, given the complexity of the issues and the linkages to Canada and the provinces. The question of adequate resources is an issue not just with respect to the environment but also for many other important areas of jurisdiction that a First Nation may desire or be required to assume. (For more discussion, see Section 4 — Financing First Nations Governance.)

Most First Nations with land codes have been and are addressing environmental management and jurisdiction over the environment. However, they are moving forward carefully in this area and, to date four operational First Nations have enacted environmental management plan laws and several others are in development. Given the inclusion of environmental management provisions in the Framework Agreement, the Lands Advisory Board and First Nations with land codes have considerable experience in this area. (For more information, see the Lands Advisory Board's Resource Centre website.)

***The* First Nations Oil and Gas and Moneys Management Act**

The *First Nations Oil and Gas and Moneys Management Act*, (S.C. 2005, c. 48) (FNOGMMA) is federal legislation that provides First Nations with the option to manage on-reserve oil and gas resources that are currently managed on their behalf by Canada. Under section 35(1) of the act, a scheduled First Nation has the power, in accordance with its oil and gas code, to make laws respecting oil and gas exploration and exploitation in its managed area, to the extent that those laws are not in relation to matters coming within the exclusive jurisdiction of a provincial legislature or conflict with the *Fisheries Act* (R.S.C. 1985, c. F-14), *Migratory Birds Convention Act* (S.C. 1994, c. 22) or *Species at Risk Act* (S.C. 2002, c. 29). Under Section 63(1), the Governor in Council reserves the right to make regulations regarding the content of an environmental assessment under the First Nation's oil and gas law. The extent to which a Nation may have the jurisdiction to approve or disapprove projects on its managed areas is therefore unclear. Under section 35(c), these arrangements do provide for First Nations jurisdiction over environmental protection from the effects of oil and gas exploration and conservation. (This initiative is discussed in detail in Section 3.24 — Oil and Gas.)

***The* First Nations Commercial and Industrial Development Act**

Like FNOGMMA, the *First Nations Commercial and Industrial Development Act* (S.C. 2005, c. 53) (FNCIDA) also addresses environmental assessment under section 3(2)(n), by way of incorporation by regulation of provincial rules and processes. (This initiative and these provisions are more fully discussed in Section 3.20 — Lands and Land Management.)

Sectoral Initiatives on Ancestral Lands

For off-reserve–based environmental decision-making, work is being undertaken through provincial reconciliation protocols addressing land and marine management that necessarily involve consideration of environmental issues.

As discussed above, there are now examples of reconciliation protocols or agreements between First Nations and British Columbia that address environmental decision-making within ancestral lands (see also Section 3.19 — Land and Marine Use Planning and Section 3.20 — Lands and Land Management). These are continually evolving and are influenced by developments in the law and the level of political will of governments to work together.

In addition, Strategic Engagement Agreements (see also Section 3.20 — Lands and Land Management), can deal with environmental management issues. However, it is notable that as a provincial ministry, division, branch, agency or office that is not subject to the terms of the agreement, the provincial Environmental Assessment Office is a "Non-Participatory Provincial Agency." The same applies to the provincial Oil and Gas Commission.

The important point with respect to these agreements is that while recognition of property rights or the recognition or transfer of jurisdiction may not be explicit, agreements made in the context of reconciling Aboriginal title and Crown title can result in mechanisms that ensure First Nations involvement in land-use decisions and can affect the way in which environmental assessments are conducted and how decisions are ultimately reached on a particular development project.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All self-government arrangements provide for recognition of First Nations jurisdiction in relation to the environment with respect to protection on First Nation lands. The *Westbank First Nation Self-Government Agreement*, the *Nisga'a Final Agreement*, and the *Yale First Nation Final Agreement* provide for jurisdiction in relation to environmental assessment on their respective lands. The Yale First Nation's ability to make laws with respect to environmental assessment is limited to "Yale First Nation projects." The *Tla'amin Final Agreement* provides for jurisdiction in relation to environmental assessment for projects that are not subject to environmental assessment under provincial law. The Tsawwassen and Maa-nulth Agreements do not provide for First Nation jurisdiction over assessment, but provide for guaranteed First Nation participation in provincial and federal processes and specify the conditions for that participation. Yale may make laws related to the prevention, mitigation and degradation of the environment.

As Canada, British Columbia and some First Nations have concurrent jurisdiction with respect to environmental assessments or protection under self-government agreements, the agreements contain provisions requiring harmonization of the parties' respective environmental assessment laws. Alternatively, the agreements describe whose laws will prevail in the event of a conflict. The purpose of these provisions is to avoid duplicating the environmental assessment requirements faced by project proponents. This is similar to, if not the same as, the approach taken in the Framework Agreement.

Given the evolving nature of government jurisdiction over environmental management, provisions that require First Nations law to meet or beat provincial or federal law can prove challenging. Does "meet or beat" apply to processes and systems that may be out of date or inefficient? And what happens if federal or provincial laws become more stringent? Similarly, what is the process when a First Nation's standard is higher than Canada's or the Province's, as could easily be the case? Working toward harmonization, while laudable, requires considerable co-operation, which is probably why such agreements are few and far between.

In considering how jurisdiction over the environment is evolving, we need look no further than the Sechelt arrangements. There is no reference to the environment in Sechelt, any more than there is in the *Constitution Act, 1867*, since this was not a matter considered by the parties at that time. Presumably, aspects of environmental management jurisdiction are contained within the Sechelt authority to manage lands, but this is an issue that would need to be considered. For Westbank and Sechelt, where jurisdiction is based on their reserve lands, questions of shared decision-making and influence over off-reserve land use are not specifically addressed.

Table — Comprehensive Governance Arrangements

	PROTECTION OF THE ENVIRONMENT	CONFLICT OF LAWS	ENVIRONMENTAL ASSESSMENT	CONFLICT OF LAWS
Sechelt	No provision.	N/A	No provision.	N/A
Westbank	Westbank has jurisdiction in relation to the protection and conservation of the environment on Westbank Lands. (Part XIV, s. 148)	Federal laws prevail. (Part XIV, s. 150)	The Westbank First Nation has jurisdiction to make laws in relation to environmental assessments on Westbank Lands. (Part XIV, s. 159)	Federal law prevails. (Part XIV, s. 166)
Nisga'a	Nisga'a Lisims Government may make laws with respect to environmental protection on Nisga'a Lands. (Ch. 10, s. 11)	Federal or provincial laws prevail. (Ch. 10, s. 11)	The Nisga'a Lisims Government may make laws with respect to the environmental assessment of projects on Nisga'a Lands. (Ch. 10, s. 3)	In event of a conflict, parties will negotiate and attempt to reach an agreement to coordinate Nisga'a, federal, and provincial environmental assessment requirements. (Ch. 10, s. 1)
Tsawwassen	The Tsawwassen Government may make laws to manage, protect, preserve and conserve the environment on Tsawwassen Lands. (Ch. 15, s. 1)	Federal or provincial laws prevail. (Ch. 15, s. 2)	While the Tsawwassen First Nation does not have authority to make environmental assessment laws, it has the authority to make laws in relation to the approval of proposed developments on Tsawwassen Lands. (Ch. 6, s. 1(h))	Federal or provincial laws prevail. (Ch. 6, s. 8)
Maa-nulth	Each Maa-nulth First Nation Government may make laws to manage, protect, preserve and conserve the environment on Maa-nulth Lands. (s. 22.4.1)	Federal or provincial laws prevail. (s. 22.4.2)	Federal and provincial environmental assessment laws apply on Maa-nulth First Nation Lands. (s. 22.1.1) No federal or provincial project will proceed on Maa-nulth First Nation Lands without the permission of that Maa-nulth First Nation. (s. 22.1.2)	Federal or provincial environmental assessment laws prevail. (s. 22.4.2)
Yale	Yale First Nation Government may make laws applicable on Yale First Nation Land to manage, protect, preserve and conserve the environment (s. 18.1.1)	Federal or provincial laws prevail. (s. 18.1.2)	The Yale First Nation Government may make laws, applicable on Yale First Nation Land, with respect to the environmental assessment of Yale First Nation projects. (s. 17.2.1)	Federal or provincial laws prevail. (s. 17.2.4)
Tla'amin	Tla'amin Nation may make laws to protect, preserve and conserve the environment on Tla'amin Lands. (Ch. 13, s. 9(b))	Federal or provincial laws prevail. (Ch. 13, s. 12)	The Tla'amin Nation may make laws, applicable on Tla'amin Lands, in relation to environmental assessment for Tla'amin projects that are not subject to environmental assessment under provincial law. (Ch. 13, s. 9(a)) No federal or provincial project on Tla'amin Lands will proceed without the consent of the Tla'amin Nation. (Ch. 13, s. 2)	Federal or provincial laws prevail. (Ch. 13, s. 12)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(j) Destruction and control of noxious weeds			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Campbell River	2	NOXIOUS WEEDS	To Provide For The Destruction And Control Of Noxious Weeds.
Cape Mudge	2	NOXIOUS WEEDS	To Provide For The Destruction And Control Of Noxious Weeds.
Comox	2	NOXIOUS WEEDS	To Provide For The Destruction And Control Of Noxious Weeds.
Gitanyow	6	NOXIOUS WEEDS	To Provide For The Destruction And Control Of Noxious Weeds.
Gitxaala Nation	2	NOXIOUS WEEDS	Destruction And Control Of Noxious Weeds
Haisla Nation	3A	NOXIOUS WEEDS	Destruction And Control Of Noxious Weeds.
Hartley Bay	3	NOXIOUS WEEDS	Destruction And Control Of Noxious Weeds On The Hartley Bay Reserve.
Kispiox	6	NOXIOUS WEEDS	To Provide For The Destruction And Control Of Noxious Weeds In The Kispiox Reserve.
Lax Kw'alaams	2A	NOXIOUS WEEDS	Destruction And Control Of Noxious Weeds
Namgis First Nation	2	NOXIOUS WEEDS	To Provide For The Destruction And Control Of Noxious Weeds.
Nuxalk Nation	3	NOXIOUS WEEDS	To Provide For The Destruction And Control Of Noxious Weeds.
Squamish	2	NOXIOUS WEEDS	To Provide For The Destruction And Control Of Noxious Weeds.
Tlowitsis Tribe	2	NOXIOUS WEEDS	To Provide For The Destruction And Control Of Noxious Weeds.
SECTORAL GOVERNANCE INITIATIVES			
INTERIM ENVIRONMENTAL ASSESSMENT PROCESS CONTAINED WITHIN INDIVIDUAL AGREEMENTS OF THE OPERATIONAL LAND CODES:			
• Kitselas First Nation		• Sumas First Nation	
• Leq'a:mel First Nation		• Tla'amin First Nation	
• Lheidli-T'enneh Band		• Tsawout First Nation	
• Matsqui First Nation		• Tsekani (McLeod Lake Indian Band)	
• Seabird Island Band		• Tsleil-Waututh First Nation	
• Scia'new (Beecher Bay First Nation)		• Ts'kw'aylaxw (Pavilion Indian Band)	
• Shxwhá:y Village (Skway First Nation)		• T'Sou-ke Nation	
• Skawahlook First Nation		• Tzeachten First Nation	
• Squiala First Nation		• We Wai Kai Nation (Cape Mudge)	
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Ka:'yu:'k't'h'/Che:k:tles7et'h' First Nations	15/2011	Environmental Protection Act	
Toquaht Nation	15/2011	Environmental Protection Act	
Tsawwassen First Nation	025-2009	Tsawwassen First Nation Tree Protection Regulation, 2009	
Uchucklesaht Tribe	15/2011	Environmental Protection Act	
Ucluelet First Nations	15/2011	Environmental Protection Act	
Westbank First Nation	No. 2005-03	WFN Noxious Insect Control Law	
Westbank First Nation	No. 2005-02	WFN Noxious Weeds And Grass Law	

RESOURCES

First Nations

First Nations Land Advisory Board
First Nations Land Management Resource Centre
Suite 106, 350 Terry Fox Drive
Kanata, ON K2K 2W5
Phone: 613-591-6649
Fax: 613-591-8373
Email: webadmin@labrc.com
www.fafnlm.com

- *Framework Agreement on First Nation Land Management* (1996) http://labrc.com/wp-content/uploads/2014/03/Framework-Agreement-Amendment-5-edited.pdf

BC First Nations Energy and Mining Council
1764 – 1959 Marine Drive
North Vancouver, BC V7P 3G1
Phone: 604-924-3844
www.fnemc.ca

Provincial

Ministry of Environment
Environmental Sustainability Division
PO Box 9362, STN Prov Govt
Victoria, BC V8W 9M2
www.env.gov.bc.ca/esd/

Environmental Assessment Office
2nd Floor, 836 Yates Street
PO Box 9426 Stn Prov Govt
Victoria, BC V8W 9V1
www.eao.gov.bc.ca/index.html

Federal

Aboriginal Affairs and Northern Development Canada
Terrasses de la Chaudière
10 Wellington
Ottawa, ON K1A 0H4
Toll-free: 1-800-567-9604
Fax: 1-866-817-3977
Toll-free: 1-866-553-0554
Email: InfoPubs@ainc-inac.gc.ca
www.ainc-inac.gc.ca

- *Land Management Manual*: www.aadnc-aandc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/enr_lds_pubs_lmm_1315105451402_eng.pdf

Canadian Environmental Assessment Agency
22nd Floor, Place Bell 160 Elgin Street
Ottawa ON K1A 0H3
Phone: 613-957-0700
Toll-free: 1-866-582-1884
Fax: 613-957-0862
www.ceaa-acee.gc.ca

Environment Canada
National Inquiry Response Team
Suite 260 – 77 Westmorland Street
Fredericton, NB E3B 6Z3
Fax: 506-451-6010
www.ec.gc.ca

National Energy Board
444 Seventh Avenue SW
Calgary, AB T2P 0X8
Phone: 403-292-4800
Toll-free: 1-800-899-1265
Fax: 403-292-5503
Toll-free fax: 1-877-288-8803
www.neb-one.gc.ca

Walter & Duncan Gordon Foundation
Suite 400 – 11 Church Street
Toronto, ON M5E 1W1
Phone: 416-601-4776
Fax: 416-601-1689

- *IBA Community Toolkit*: http://gordonfoundation.ca/sites/default/files/publications/IBAToolkit_web.pdf

SELECT LEGISLATION

Provincial

- *Environmental Assessment Act* (S.B.C. 2002, c. 43)
- *Haida Gwaii Reconciliation Act* (S.B.C. 2010, c. 17)

Federal

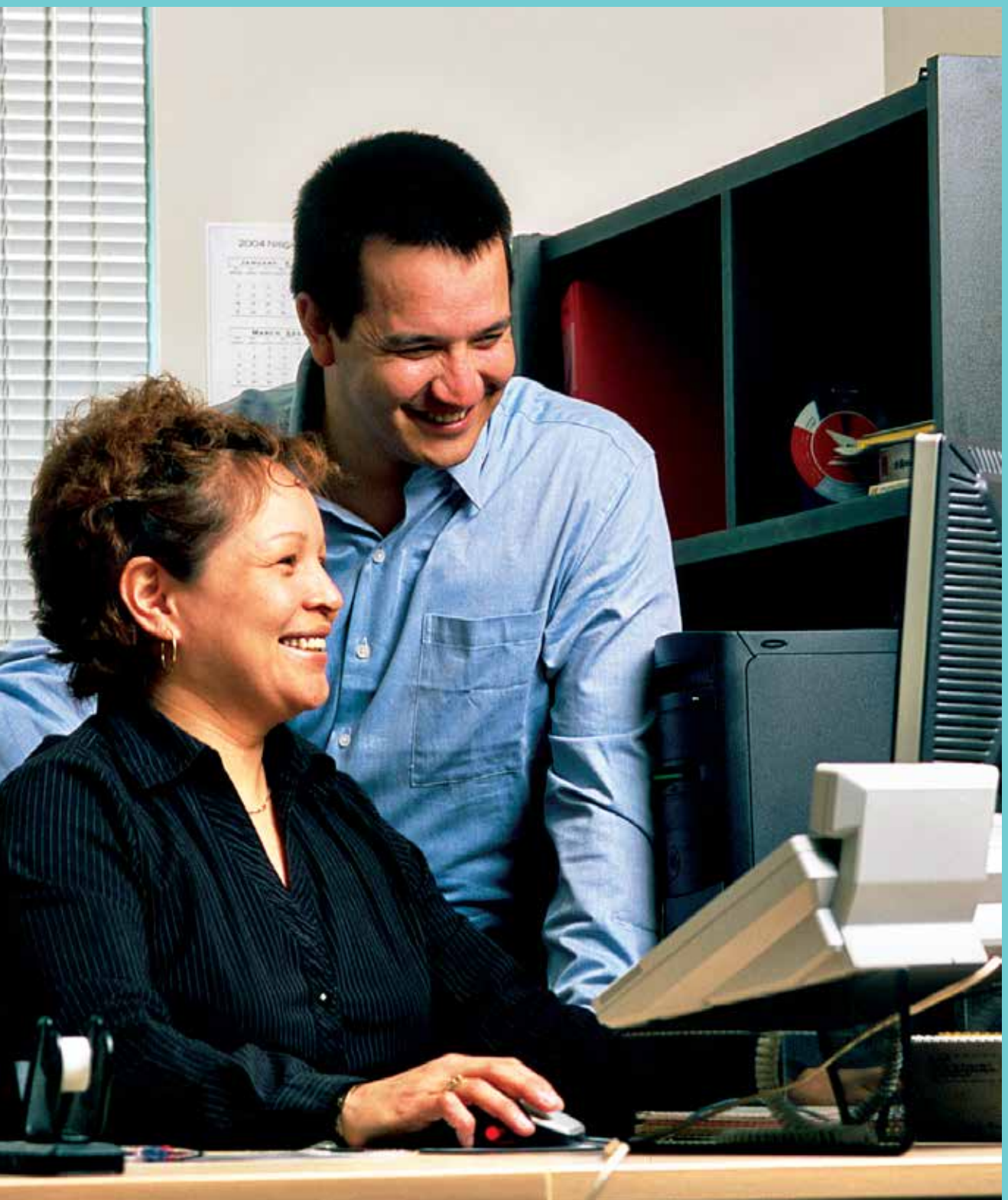
- *Canadian Environmental Assessment Act* (S.C. 2012, c. 19, s.52)
- *Canadian Environmental Protection Act* (1999, S.B.C. 1999, c. 33)
- *Environmental Management Act* (S.B.C. 2003, c.53)
- *First Nations Commercial Industrial Development Act* (S.C., 2005, c. 53)
- *First Nations Oil and Gas and Moneys Management Act* (S.C. 2005, c. 48)
- *Fisheries Act* (R.S.C. 1985, c. F-14)
- *Indian Reserve Waste Disposal Regulations* (CRC, c. 960)
- *Safe Drinking Water for First Nations Act* (S.C. 2013, c. 21)
- *Species at Risk Act* (S.C. 2002, c. 29)

COURT DECISIONS

- *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511

PART 1 /// SECTION 3.11

Financial Administration



3.11

FINANCIAL ADMINISTRATION

3.11

FINANCIAL ADMINISTRATION

BACKGROUND

Jurisdiction over financial administration, while perhaps not often thought of as a particular head of power, provides governments with the legal tools necessary to regulate and provide for financial management systems. Establishing an appropriate legal framework that supports the sound financial management is fundamental to ensuring good governance and protecting the financial and economic health of a First Nation. Notably, it keeps those in control of the "treasury" accountable to those they serve and encourages better financial decision-making (e.g., in budgeting, investing and expending moneys). This subject matter is linked to all other subject matters.

When considering exercising jurisdiction over financial administration, it is important to appreciate that it is about more than simply audits, reporting and following administrative practices governed by professional accounting standards. As a matter of jurisdiction, financial administration covers all aspects of financial matters, ranging from how finances are raised and the limits on those powers, to how moneys are budgeted, expended and ultimately accounted for, including spending limits and the need for consultation and so on. This chapter focuses primarily on the expenditure side and the accountability framework for expenditures, not on the revenue side. With the exception of the discussion of the First Nations Finance Authority (FNFA) below, specific revenue-raising powers of First Nations are covered in other sections of the report that address the ability to raise moneys in accordance with, or to support, the exercise of that particular jurisdiction. General revenue-raising power is also addressed in Section 3.29 — Taxation and is considered in depth in Section 4.2 — First Nations Revenues. In all cases, it is important to bear in mind that there is significant responsibility and often liability (collective and personal) for public officials (elected and non-elected) when it comes to the control and care of community assets.

While many First Nations have policies addressing aspects of financial management/administration, many have not actually made financial administration bylaws, laws or codes, although this is changing quite quickly. Without strong systems of financial administration in place as a cornerstone of self-government, the prospects of a First Nation are diminished. First Nations governments recognize that they need to govern their finances in a manner comparable to, or better than, other governments in Canada and to ensure compliance under their own bylaws, laws and codes.

First Nations Financial Administration

While there are general legal requirements for governing bodies to carry out their fiduciary duties and to act in their citizens' best interests, remarkably there is also nothing in the *Indian Act* addressing financial management/administration with respect to the role of the chief and council or other officials of the "band." To fill this gap, First Nations have been making bylaws under section 83 of the *Indian Act* and have initiated a number of sectoral governance initiatives, including the *First Nations Fiscal Management Act* (FNFMA), through which the jurisdiction of a First Nation to enact a Financial Administration Law (FAL) is recognized. A FAL is a comprehensive set of interrelated rules that can form the foundation of a First Nation's internal financial control environment. It includes processes and actions that govern the decision-making, management, monitoring and reporting of the financial administration of a First Nation. Moving along the governance continuum, all comprehensive governance arrangements also address financial administration. Self-government agreements typically set out that a First Nation will establish internal financial administration arrangements comparable to those

of other governments of comparable size in Canada. This is typically done through a law backed up by policies and procedures, or is sometimes included, in part, through provisions found in the First Nation's constitution.

Today there are many good examples of First Nation law-making in this area and of financial management/administration systems that are already well established and that are working well in practice. First Nations certainly do not need to reinvent the wheel in this area if they are looking to enact laws or establish comprehensive management systems for the first time, or to improve the laws and systems that are already in place. Generally speaking, moving along the continuum of First Nations governance, First Nations with increased jurisdiction and greater independence from Canada will exercise greater law-making authority over financial administration, and there will be less oversight of and interference in their internal affairs by outside governments. This is in keeping with a decreasing link between federal funding and oversight and the exercise of First Nation jurisdiction and a relationship where primary accountability is to the citizens. It is positive and evidence of movement beyond the simple program-and-service delivery model under the *Indian Act*. Further, the management systems may be more complex for a self-governing or larger First Nations, reflecting the type or scale of activities that the First Nation is undertaking.

AFOA Canada

AFOA Canada (formerly Aboriginal Financial Officers Association of Canada) was founded as a not-for-profit association in 1999 and is one of the pre-eminent First Nations institutions in Canada. It is a national professional association with regional chapters supported by its members, who pay yearly dues in order to belong. The concept of AFOA Canada originated in BC, and the BC chapter is one of the most active and strong. Initially AFOA Canada was primarily an association of financial administration officers working for Aboriginal governments or institutions and was created as a forum for these people to meet and share ideas, experiences, and so on. Today, AFOA Canada's terms of reference have expanded and the association now addresses a wider range of First Nation public administration/management issues, beyond simply finance. Further, its membership now includes band managers and other administrative staff of First Nations, as well as elected officials.

AFOA Canada and its chapters have developed and published a variety of resources, toolkits, best practices and reference documents. Most of AFOA Canada's resources are available on its website for free download to AFOA Canada members or for a fee to non-members. This is an excellent source of material for First Nations that are looking to strengthen their governance as they move to self-government. AFOA Canada also publishes the *Journal of Aboriginal Management* (JAM) twice yearly and is generally available to provide advice on all administrative matters to First Nations. One of the most important services of AFOA Canada is that it offers a Certified Aboriginal Financial Manager (CAFM) designation, which has become the preferred credential for Aboriginal financial management positions in Canada. The CAFM designation identifies a person as someone who is a well-qualified financial management professional and up to date on the latest Aboriginal financial management practices, and who adheres to professional standards of conduct. More recently, AFOA Canada has introduced a second designation for a Certified Professional Administrator.

Financial Administration by Contract

Financial administration within the context of a First Nation government must also be considered in light of the ongoing and evolving fiscal relationship with Canada. In the absence of a suitable legal framework to work with under the *Indian Act* or otherwise, and where Canada is transferring moneys to a First Nation through a funding agreement, the federal government will insist on clauses in the funding agreement that address the financial administration of the First Nation with respect to these moneys. In this way, a significant percentage of most First Nations' finances are actually being

"governed" by Canada through Financial Transfer Agreements (FTA) and not under law (First Nation or federal), and the terms of the FTAs contractually bind a First Nation to certain budgeting and reporting requirements. These requirements can be supported by whatever financial administration policies the First Nation may have in place, but only address aspects of the financial administration of a First Nation's funding received from Canada. Most significantly and most problematic is that the financial administration rules in FTAs, being strictly contractual in nature, are not established under the exercise of First Nations jurisdiction.

How a First Nation government manages and administers its own-source revenues, which are an ever-increasing share of First Nations revenues, is often of more concern to the citizens than the federal transfers. Citizens expect that all moneys raised and expended by their governments will be governed and administered with the same degree of care and diligence, regardless of the source of the revenues. Hence, citizens increasingly demand that appropriate systems of financial administration and clear conflict-of-interest provisions be established in their First Nation's law and that there is clear accountability on the use of community funds.

Not only are citizens requiring more robust systems of financial management/administration based on First Nations law, so too are third parties — for example, those who may be paying fees or taxes to a First Nation or receiving services, or others who may be engaged in business with a First Nation. Banks and financial institutions will often need assurance that the First Nation has robust and sound financial administration practices and that they are being followed (i.e., the First Nation is complying with its own rules). The ability to ensure appropriate controls requires recognition and implementation of a First Nation's jurisdiction over the management of all its finances, and not simple contracting through FTAs.

For more information on FTAs and the negotiation thereof, see Section 4.2 — First Nation Revenues. For more information on the evolving fiscal relationship with Canada, see Section 4.4 — Developing a New Fiscal Relationship.

Accountability and Transparency

The question of First Nations accountability and transparency has in recent years been the subject of political debate between First Nations and the government of Canada. Beginning in 2012, the federal government sought to develop legislation that, in addition to the terms of FTAs, would increase transparency and accountability of First Nations governments to their citizens and to the Canadian public. First Nations leaders questioned the underlying motives of the federal government.

The unilaterally developed *First Nations Financial Transparency Act* (S.C. 2013, c. 7) received Royal Assent on March 27, 2013, and became law as of January 1, 2014. This legislation should not be viewed as a substitute for a First Nation developing its own comprehensive financial administration laws and financial management systems. The act deals with only one aspect of financial administration, namely reporting. It does not ensure accountability or transparency in the budget development process or in the manner in which officials conduct the financial affairs of a First Nation over the course of the fiscal year, including the making of expenditure decisions such as investments or the providing of guarantees, appointment of auditors, the role of the finance committee, and so on. That said, the act will apply to all First Nations that are not self-governing, so all Nations must be aware of its provisions and act accordingly. Self-governing First Nations are exempt.

Under the act, First Nations must publicly post on their website their audited consolidated financial statements and a schedule of salaries and other remuneration and expenses paid to their chief and councillors. This would necessarily include financial information about corporate entities controlled by the Nation, which is of great concern to some First Nations. If a First Nation does not have a website,

it can comply with the act by asking another organization, such as a First Nations organization, to post the information on its website or by asking AANDC to post the information on its website. Failure to post the information, or to cause the information to be posted, can result in sanctions such as court orders, withholding of funding, and even cancelling of funding agreements.

There is no question that the vast majority of, if not all, First Nations leaders are fully committed to and supportive of transparency and accountability to their citizens. However, political and financial accountability has to be, first and foremost, to First Nations citizens and in accordance with First Nations laws. Further, financial transparency and accountability are aspects of a much broader accountability framework that is a central part of the ongoing and difficult Nation-rebuilding efforts. Unfortunately, Canada's over-simplistic and targeted legislation has done little to support the broader efforts of leadership. To focus on this one aspect of financial management, for what First Nations argue are politically motived reasons, does not serve to assist First Nations in developing the types of financial management systems that they actually need.

Assessing the Options

All self-government arrangements, whether sectoral or comprehensive, address financial administration. It is not surprising, therefore, that there have been a number of initiatives that have considered appropriate financial administration/management systems for First Nations governments.

As discussed above, financial administration in the First Nations context ranges from the different initiatives under the *Indian Act* through various sectoral initiatives, to comprehensive governance arrangements. The complexity of the financial administration systems and community needs will, in part, reflect the size and scope of a First Nation's government and the programs and services it delivers. Increasingly, the rules governing financial management will be set out in First Nations laws or bylaws.

First Nations are building on their existing administrations and establishing financial administration systems appropriate to their particular needs (reflecting size, location, complexity, etc.) through supporting institutions and mechanisms that meet applicable standards where required. For accounting standards, this means meeting Generally Accepted Accounting Principles (GAAP) for the public sector, as determined by the Public Sector Accounting Board (PSAB). In addition, First Nations are developing their own standards, which, while not duplicating or replacing accepted industry standards, do provide guidelines for how they might exercise broader law-making authority and govern their financial affairs beyond simple accounting rules.

The most significant work in this area is being undertaken by the First Nations Financial Management Board ("FMB") created under the *First Nations Fiscal Management Act* (S.C. 2005, c. 9) (FNFMA). The FMB has developed standards for First Nations financial administration laws (discussed below under sectoral governance initiatives). The FMB is specially tasked under federal legislation with assisting First Nations in developing financial management laws and supporting administrative systems. Along with standards set by the FMB, there may be additional conditions required by those from whom First Nations receive funding. What goes into a financial administration law or policy, and the systems of administrative support required, will be determined in each community based on its circumstances, but recognizing that basic principles are applicable in all situations. There are now a number of resources to help a community build appropriate financial administration.

There are several options for First Nations wanting to develop financial management laws and supporting administrative systems. These range from using *Indian Act* bylaw-making powers to developing financial management laws and administrative systems as part of sectoral initiatives or comprehensive governance arrangements. In fact, every sectoral self-governance initiative has, to some degree, developed rules or provided authority for financial administration/management in relation to the particular jurisdiction being

addressed in the sectoral initiative. In considering the requirements for financial management law-making and the process to establish systems, it is important to note that different sectoral initiatives may have different requirements and/or considerations. At times this may seem confusing, particularly where a First Nation is participating in a number of sectoral governance initiatives and where there are different rules respecting financial administration. To the extent it can, the First Nation should coordinate the rules that apply and develop one set of overarching rules and procedures for financial administration (through its laws and policies). Consistency will result in less uncertainty around which rules apply and greater administrative efficiency, resulting in increased compliance by the First Nation to its own rules and less cost (including auditor costs). In addition to the options, new reporting requirements have been set out in the *First Nations Financial Transparency Act*.

Finally, one matter that a First Nation should consider, even if it prefers not to, is the need for quick recourse mechanisms in cases of mismanagement and financial difficulty (i.e., intervention). Some First Nations will inevitably have financial difficulties, and citizens and third parties (e.g., banks and financial institutions) will want to know what measures are in place to limit this possibility. The first requirement, of course, is to ensure that the First Nation has an appropriate financial administration law supported by sound financial management systems. However, simply having laws and systems in place will not necessarily protect a First Nation from all eventualities and certainly not if people do not follow the law or use the systems. Accordingly, and in addition to legal remedies that may be available under their law, citizens will want to know what happens if the financial situation of the First Nations is seriously deteriorating (i.e., heading into insolvency or bankruptcy), particularly where the First Nation has assumed more responsibility under self-government, whether sectoral or comprehensive.

The need for quick recourse mechanisms is an important question and it is not addressed in any way in the *Indian Act* and generally determined by contractual provisions in the FTA. For a First Nation that is essentially insolvent, Canada will intervene through its Default Prevention and Management Policy (formerly Intervention Policy) and place an *Indian Act* band into one of five levels of default management:

1) Recipient-managed 90-day plan

2) Withholding of funds

3) Requirement to prepare a management action plan (MAP) — recipient-managed when the First Nation is willing and has the capacity to remedy the default; when the recipient lacks the capacity to develop or implement the MAP, a recipient-appointed advisor (RAA) will be required

4) Third-party funding agreement manager

5) Termination of agreement, for the purposes of managing the FTA moneys and delivering programs and services in community

For a description of the Default Prevention and Management Policy, see Section 4.2 — First Nation Revenues.

However, such provisions only address revenues from Canada and not a First Nation's own-source revenues. There is also uncertainty as to how financial difficulties are addressed in self-governing arrangements (whether sectoral or comprehensive), unless this is specifically addressed in a First Nation's constitution or laws. This question is addressed in part in the FNFMA, where the FMB may intervene in certain limited and controlled circumstances — namely, where a First Nation is in breach of its own laws or the FNFMA with respect to local revenues collected under the act or where a First Nation borrowing through the First Nations Finance Authority (FNFA) encounters serious financial difficulties.

INDIAN ACT GOVERNANCE

While the *Indian Act* does not identify a specific financial management law-making power in section 81(1), that section contains an "ancillary powers" provision, and some First Nations have made financial administration bylaws relying on this authority. In addition, First Nations can make financial administration bylaws under section 83(b) of the *Indian Act*, and 16 have done so. The First Nations Tax Commission (FNTC) can assist First Nations in developing these bylaws and provides a financial administration bylaw template on its website. Both mechanisms require Ministerial consent. The difference is that bylaws made under section 81 may be disallowed by the Minister, whereas bylaws made under section 83 require the explicit approval of the Minister following a FNTC recommendation.

AFOA Canada is an excellent resource, offering a number of tools and services in relation to financial administration primarily for "bands" governing under the *Indian Act*. It also provides examples of policies and procedures that First Nations may consult when developing their own policies. AFOA Canada is also a good resource to consult regarding the ever-changing First Nations financial reporting requirements to Canada in FTAs.

SECTORAL GOVERNANCE INITIATIVES

First Nations Financial Management Board

The *First Nations Fiscal Management Act* (FNFMA) came into effect on April 1, 2006 and establishes the FMB, the First Nations Tax Commission (FNTC), and the First Nations Finance Authority (FNFA). The FNFMA provides a mechanism for First Nations to make their own Financial Administration Laws (FAL) and develop financial management systems and, if they so choose, to be certified by the FMB to borrow though the First Nations Finance Authority. Law-making authority under the FNFMA over financial administration is quite broad, and laws made do not require the approval of the Minister.

The FMB was established by the FNFMA to develop and publish standards for First Nations' financial management systems and financial performance; where requested, to approve financial administration laws; and to certify that a First Nation has met and is in compliance with its standards. The FMB is also empowered, in strict accordance with the FNFMA, to intervene in a First Nation's financial affairs should the need arise. This system of financial oversight and regulation is intended to provide rigour to the system of financial administration underpinning a First Nation government and in particular where First Nations are collectively pooling their borrowing requirements through the FNFA.

The FMB is a "shared governance" corporation and is governed by a minimum of nine and a maximum of 15 directors, including a chair. Three of the directors are appointed by AFOA Canada. The chair and the remaining directors are appointed by the federal governor in council (Cabinet).

The FMB has developed the following standards, based on best practices for the development of a financial administration law and supporting financial management systems:

- Financial Administration Law Standards
- Financial Management System Standards
- Financial Performance Standards
- Local Revenue Account Financial Reporting Standards.

The FMB developed its standards by using existing models and internationally recognized standards dealing with aspects of organizational governance, internal control, enterprise risk management and financial reporting and performance. The FMB standards are intended to satisfy not only the citizens of a Nation but also other stakeholders, and to address potential market concerns over financial management and reporting.

Each of the four standards has corresponding "core" documents concerning their implementation. For example, FMB supports participating First Nations in the development of financial administration laws, and in addition to the FAL standards has developed other documents to assist in this process, including:

- Sample FAL
- FAL Explanatory Notes
- FAL Self-Assessment
- FAL Review Procedures

All of the core documents are available for download at www.fnfmb.com/core-documents. The FMB regularly reviews its standards and the core documents associated with the standards, so it is important for First Nations to check often to make sure they are using the most recent versions.

The following table shows the core documents made available by the FMB for First Nations to use in developing, implementing and improving their financial management.

FINANCIAL ADMINISTRATION LAW		DESCRIPTION
A1	FINANCIAL ADMINISTRATION LAW — **REVIEW PROCEDURES**	Procedures to apply when requesting a compliance approval of the First Nation's Financial Administration Law.
A2	FINANCIAL ADMINISTRATION LAW — **STANDARDS**	Standards that support sound financial administration practices for a First Nation government in Canada.
A3	**SAMPLE** FINANCIAL ADMINISTRATION LAW	Example of a law which meets the requirements of the A2 Financial Administration Law — Standards.
A4	FINANCIAL ADMINISTRATION LAW — **EXPLANATORY NOTES**	Provides assistance on the development of a Financial Administration Law by discussing the structure and substantive content of the A3 Sample Financial Administration Law.
A5	FINANCIAL ADMINISTRATION LAW — **SELF-ASSESSMENT**	Tool that can be utilized to compare existing or proposed Financial Administration Law(s) of the First Nation to the A2 Financial Administration Law — Standards.
FINANCIAL MANAGEMENT SYSTEM		**DESCRIPTION**
B1	FINANCIAL MANAGEMENT SYSTEM — **CERTIFICATION PROCEDURES**	Procedures to apply when requesting a review of the First Nation's financial management system.
B2	FINANCIAL MANAGEMENT SYSTEM — **STANDARDS**	Standards that support sound financial practices for the operation, management, reporting and control of the financial management system of a First Nation.
B3	FINANCIAL MANAGEMENT SYSTEM — **SELF-ASSESSMENT**	Tool that can be utilized to compare the existing financial management system of the First Nation to the B2 Financial Management System — Standards.
B4	FINANCIAL MANAGEMENT SYSTEM — **FRAMEWORK TO EVALUATE COMPLIANCE**	Companion document to the B3 Financial Management System — Self-Assessment used to evaluate compliance with the B2 Financial Management System — Standards.
FINANCIAL PERFORMANCE		**DESCRIPTION**
C1	FINANCIAL PERFORMANCE — **CERTIFICATION PROCEDURES**	Procedures to apply when requesting a review of the First Nation's financial performance.
C2	FINANCIAL PERFORMANCE — **STANDARDS**	Standards that assess the historical financial performance of a First Nation over a five year period using up to seven financial ratios.
LOCAL REVENUE ACCOUNT		**DESCRIPTION**
D1	LOCAL REVENUE ACCOUNT — **FINANCIAL REPORTING STANDARDS**	Standards that establish the financial reporting requirements for the separate annual financial statements of a First Nation's local revenue account.
D2	LOCAL REVENUE ACCOUNT — **ILLUSTRATIVE FINANCIAL STATEMENTS**	Illustrative annual financial statements designed to comply with the D1 Local Revenue Account — Financial Reporting Standards.

In addition to its standards and core documents, the FMB also publishes the procedures it follows to make decisions, as well as sample administrative policies that a First Nation may wish to adopt if it plans to have its financial management system certified, as discussed below.

FMB SAMPLE POLICIES AND PROCEDURES		
SPP 01 — Delegated & Assigned Responsibilities	SPP 11 — Employee Evaluation & Planning Policy	SPP 21 — Investment Policy
SPP 02 — Policies Procedures and Directions	SPP 12 — Code of Conduct Policy	SPP 22 — Insurance Policy
SPP 03 — Reporting of Compensation, Benefits & Contracts	SPP 13 — Annual Planning and Budgeting Policy	SPP 23 — Emergencies Policy
SPP 04 — Committee Establishment Policy	SPP 14 — Cash Management and Banking Policy	SPP 24 — Financial and Operational Reporting Policy
SPP 05 — Finance and Audit Committee	SPP 15 — Financial Institution Account Policy	SPP 25 — Information Technology Policy
SPP 06 — Appointment of First Nations Officer Policy	SPP 16 — Expenditure Policy	SPP 26 — External Audit Policy
SPP 07 — Organizational Chart Policy	SPP 17 — Debt Policy	SPP 27 — Records Information Management Policy
SPP 08 — HR Records Management Policy	SPP 18 — Procurement Policy	SPP 28 — Tangible Capital Assets Policy
SPP 09 — Hiring Policy	SPP 19 — Risk Management Policy	SPP 29 — Financial Management System Improvement Policy
SPP 10 — Disciplinary and Dismissal Policy	SPP 20 — Loans, Guarantees and Indemnities Policy	SPP 30 — Whistleblower Policy

Developing a Financial Administration Law

If a First Nation wishes to enact a FAL under the authority of the FNFMA, the first step is to become scheduled to the FNFMA. This can be done through a council resolution sent to the Minister. While Canada should exercise no discretion in deciding whether a community is to be scheduled, there can be delays in getting this matter on the Cabinet agenda and in having the scheduling order in council made by the governor in council.

The second step in developing and approving a FAL involves FAL orientation, where the First Nation receives more information from the staff at the FMB, works to understand its objectives for developing a FAL, and reviews the FMB's standards.

The third step is seeking financial assistance from the FMB to support the development of a FAL. The exact costs of developing a FAL depend on a number of factors, including the nature of the First Nation's activities and whether the First Nation chooses to use the FAL sample developed by the FMB. The FMB has an annual capacity development funding program and will provide funding of up to $15,000, on a first come, first served basis, to assist a First Nation in developing its FAL and financial management systems. Developing laws can be expensive, and these funds help communities that might not otherwise be able to afford this work. Notwithstanding the work and cost of establishing modern financial administration laws and systems, many First Nations see their development as an essential investment in their future. Before providing any funding to a First Nation, the FMB requires a First Nation to sign a "Letter of Co-operation" confirming that the First Nation wishes to develop a FAL pursuant to section 9 of the FNFMA and setting out the process that will be followed in developing the FAL and the undertakings of the parties, including any commitment to funding. In any case, the FMB requires a Letter of Co-operation prior to distributing any funding and/or undertaking its internal review of a FAL.

The fourth step is to actually develop the FAL. To assist First Nations, the FMB has prepared a sample FAL that satisfies the requirements of the FAL Standards. The sample law has been developed in an effort to help a First Nation focus its discussions on the issues to be addressed in its FAL and, ideally, to reduce the human and financial resources expended in developing the FAL. The sample FAL can be modified to suit a First Nation's particular needs, and it is up to each First Nation to consider the policy implications of the various aspects of the FAL and to ensure that it will work for the First Nation. Many First Nations will choose to hold community meetings to seek feedback on the proposed laws. This can be quite an empowering exercise, as most citizens will be pleased that their government is developing a FAL. (For ideas about community engagement, see *A Guide to Community Engagement* [Part 3 of the Toolkit].) The sample FAL complies with the requirements of the FNFMA and the FMB standards. If a First Nation is considering developing a law in the area of financial management, regardless of whether it is under the authority of the FNFMA, the FMB standards and sample FAL are a good place to get ideas. The FMB recommends that a First Nation seek legal advice to ensure that the governing body (i.e., chief and council) are clear about the implications of the different provisions of the FAL. Coming under a FAL can change quite significantly the way the governing body and staff deal with financial decision-making and management, creating new rules that must be complied with (e.g., the need to create a finance committee if one does not already exist, the need for five-year plans, and keeping to critical dates for approving budgets, publishing audits and so on).

The fifth step involves an informal review of a draft FAL by the FMB. Prior to sending the draft FAL to the FMB, the First Nation may, in accordance with its law enactment procedures, consider the FAL for a first time in council or perhaps simply take the FAL to council to have it approved in principle by resolution. Staff may also just send it to the FMB. After FMB receives the draft FAL, it will determine whether any provisions in the sample FAL have been deleted or modified, and will perform an informal review and provide feedback as to whether the modifications or deletions meet the FMB FAL Standards.

On receiving the feedback from the FMB, the First Nation will make any changes necessary to the FAL. At this point, the First Nation will formally enact the FAL (i.e., approves/makes the FAL in accordance with its law enactment procedures).

If a First Nation wishes to become a borrowing member of the First Nations Finance Authority (FNFA) (more fully discussed below) and then actually borrow through the FNFA, the FMB must approve the First Nation's FAL. The sixth and seventh steps in this process are therefore the formal and final review of the FAL by FMB staff, followed by a decision by the FMB Board as to whether to approve the FAL as being in compliance with FMB FAL standards. Seeking FMB approval of a FAL, while legally necessary only in instances where a First Nation is seeking to become a borrowing member of the FNFA, is considered a beneficial exercise, even if the First Nation is not seeking to become a borrowing member. Following the Board decision, the FMB will send a letter of notification to the First Nation informing it of the FMB compliance approval or non-approval of the FAL. If the FAL is not approved, FMB staff will report to the First Nation on what in the FAL is non-compliant with the standards and make recommendations on how the FAL can be altered to be compliant. If approved, the FAL will be published in the First Nations Gazette.

A FAL comes into force on the day on which it is made by the council or on the day of coming into force, as set out in the FAL. In the case of a FAL or amendment to a FAL made by a borrowing member of the FNFA, the FAL comes into force the day after it is approved by the FMB Board. It should be noted that not all sections of a FAL need to come into force at the same time. Certain sections of a FAL, however, must be in force on the date the law comes into force in order for a First Nation to be certified to be eligible to become a borrowing member of the FNFA, and the whole law must be in force within 36 months, including the adoption of any policies required under the FAL.

As of October 2014, 124 First Nations across Canada are scheduled to the FNFMA. Of these, a total of 51 First Nations have made FALs that have been approved by the FMB.

Certification of Financial Management Systems and Performance

In addition to approving FALs made by First Nations, the FMB also certifies that financial management systems developed with the FALs meet its standards. This certification is required for First Nations wanting to borrow through the FNFA and is an additional requirement to having a FAL in place. There are two levels of certification, first for initially becoming a borrowing member and then to actually borrow, and second, for subsequently borrowing as a First Nation establishes a track record of financial management under the FNFMA.

To be fully certified, in addition to having a FAL and key management systems in place and being in compliance with its FAL, the First Nation must also obtain a financial performance certificate in accordance with the FMB Financial Performance Standards. This requires meeting a number of financial performance "ratios" adopted by the FMB.

Analysts use financial ratios to assess and compare the financial health of governments and to better understand trends and potential risks. The FMB is the first time that such ratios are being used systematically in an Aboriginal setting. To assist First Nations through the certification process, the FMB has developed the Financial Performance Certification Procedures (C1) document, available on its website. The Board is required to issue a Financial Performance Certificate when it is of the opinion that the First Nation is in compliance with the Financial Performance Standards.

The financial ratios are used in determining whether a First Nation is in compliance with the Financial Performance Standards, where the First Nation must meet certain minimum financial ratio thresholds. These thresholds are assessed through a comparative approach, using seven financial ratios set by the FMB:

- Fiscal growth ratio
- Liquidity test ratio
- Core surplus ratio
- Asset maintenance ratio
- Net debt ratio
- Budget performance ratio
- Property Taxation collection ratio (if applicable)

The formulas for these ratios can be found in the Financial Performance Standards (C2) document, available on the FMB website. The FMB Standards and Certification staff will perform the financial performance review and calculate the ratios on behalf of the First Nation. The steps to full certification are set out in the table at the end of this chapter, titled, Steps to FMB Certification.

While primarily intended for the purpose of certifying First Nations as borrowing members to facilitate their use of the FNFA certification in future, FMB certification may be used as valuable recognition of the First Nation's financial management capacity by government, other financial institutions or potential business partners or investors.

Checklist: FNFMA — Developing A Financial Administration Law	
1.	First Nation indicates its intention to come under the FNFMA and requests that its name be added to the schedule to the act.
2.	FMB staff provides an orientation to the First Nation. First Nation considers core policy objectives/reasons for developing a FAL.
3.	First Nation and FMB sign a Letter of Co-operation confirming that the First Nation wishes to develop a FAL pursuant to section 9 of the FNFMA, and the FMB provides financial assistance to support the development of the FAL.
4.	First Nation develops a draft FAL, including undertaking community consultation. Depending on the First Nation's law enactment procedures, the FAL may be read a first time by the governing body (i.e., chief and council) or approved in principle by a resolution of the governing body, or simply forwarded by staff to the FMB.
5.	FMB staff provide an informal review of the draft FAL and the First Nation makes revisions to the FAL. The FAL is enacted by the First Nation in accordance with the First Nation's law enactment procedures and three original signed copies of the FAL are forwarded to the FMB along with evidence that it was duly made by the council. The FAL becomes law on the later of the date it is made or the date set in the law.
Additional Steps for Borrowing Members or First Nations Seeking Certification	
6.	Where a First Nation has requested FMB approval of the FAL and a certificate of compliance, FMB staff conduct a formal review of the enacted FAL.
7.	FMB board reviews the FAL with the report from FMB staff and determines compliance of FAL with FMB standards and either approves/certifies FAL or does not. The FMB sends a letter of notification to the First Nation informing it of the FMB board's approval or non-approval of the FAL. If not approved, the FMB will report to the First Nation on reasons for non-compliance and make recommendations on how the FAL can be made compliant. If approved, the FMB publishes the FAL in the First Nations Gazette. The FAL becomes law on the day after the FMB Board approves it.

First Nations Oil and Gas and Moneys Management Act

Another approach to developing financial administration policies or laws that a First Nation may want to consider is found under the *First Nations Oil and Gas and Moneys Management Act* (S.C. 2005, c. 48) (FNOGMMA). While the legislation deals with First Nations jurisdiction and authority over oil and gas, as the name implies, a First Nation does not need to have oil and gas to take advantage of the sections of the act dealing with "Indian moneys" — capital and revenue accounts maintained by Canada in accordance with the *Indian Act*. The ability of a First Nation to take over control of its Indian moneys is separate and distinct from oil and gas jurisdiction. First Nations revenue and capital accounts are currently held in trust under the *Indian Act* and managed by Aboriginal Affairs and Northern Development Canada (AANDC) and can involve considerable amounts of money. The *Indian Act* arrangement is not a satisfactory model, and FNOGMMA provides an opportunity for First Nations to gain control of these accounts.

FNOGMMA provides a sectoral opportunity to gain access to these AANDC accounts in advance of self-government, which normally involves transfer of control of these accounts to the self-governing First Nation. Under FNOGMMA, in order to have control over these accounts, a First Nation must first satisfy AANDC that it has appropriate financial management practices in place. Criteria for transfer of control include the First Nation developing a financial code that is approved by a vote of the members. Note that this is different from a FAL under FNFMA and is perhaps a reflection of how this financial administration option is primarily associated with a First Nation assuming responsibility for its Indian moneys, and Canada is consequently concerned about liability in the transfer and wants full disclosure to the citizens. The code must set out:

- how the moneys transferred from Canada will be held (i.e., either by deposit in an account with a financial institution or paid into a trust, of which the First Nation is the settlor and sole beneficiary) and prescribing the conditions governing future changes from one mode to the other

- the way moneys held by the First Nation in the account or received by it from the trust are expended
- the accountability of council to the members for the expenditure of the moneys transferred
- the procedures for disclosing and addressing conflicts of interest involving council members and First Nation employees in the expenditure of moneys transferred; and
- how the code is amended.

The community must ratify both the financial code and the First Nation's decision to opt into FNOGMMA. Limited funding may be available from AANDC to develop a FNOGMMA financial code. Unlike the FNFMA, FNOGMMA does not recognize specific First Nation law-making authority, and therefore the financial management code is somewhere between a law and a policy of the First Nation. This is curious and may lead to enforcement issues for the financial code, but it does provide an opportunity for First Nations to address financial administration in one form or other. Where a First Nation wants to control its Indian moneys accounts from AANDC and develop its own financial administration laws through a FAL made under the FNFMA, the First Nation should take care to ensure that the FNOGMMA requirements are met in developing the FAL, as the FAL is essentially the financial code under FNOGMMA. If this is the desire, then members of First Nations communities will have to vote on coming under FNOGMMA as well as the FAL made under the FNFMA in order to satisfy the requirements of FNOGMMA. It is hoped that in time, the processes under that act may be modernized to align more effectively with other sectoral initiatives. In March 2014, the 3,000-member Kawacatoose First Nation, located 120 kilometres north of Regina, Saskatchewan, became the first community in Canada to complete the FNOGMMA process, taking full control of oil and gas management as well as moneys held in trust by Canada.

Framework Agreement on First Nation Land Management* and *First Nation Land Management Act

While the *Framework Agreement on First Nation Land Management* (Framework Agreement) and the *First Nations Land Management Act* (S.C. 1999, c. 24) (FNLMA) ostensibly deal with land management, one of the requirements for a First Nations land code is that it includes financial administration rules to deal with revenues derived from on-reserve lands and natural resource activities. This is consistent with other sectoral initiatives that require some form of financial administration before transfer or recognition of jurisdiction in a particular subject area. The First Nations Lands Advisory Board has developed a model land code. This template, as well as land codes passed by First Nations, can be found on the Lands Advisory Board website (www.labrc.com). Land codes under the Framework Agreement and FNLMA include financial administration rules that can be used as a research resource.

For a First Nation that is exercising jurisdiction under the Framework Agreement and also making a FAL under the FNFMA, it will be important, for administrative ease and legal certainty, to ensure that the financial management rules are consistent. Currently, land codes have priority over a FAL with respect to revenues associated with the operation of the land code (e.g., fees and charges levied, lease payments, disposition of natural resource). Whether a FAL is enacted before or after a land code, it may be necessary to amend the land code (which may require a community vote or referendum) to ensure that it is consistent with the FAL. Issues can arise in the timing and determination of budgets, accountability and reporting, year-end dates, and definitions used. There can also be inconsistency in the requirements under a FAL for a finance and audit committee and its composition. For the sake of transparency, the FMB sample FAL includes a provision that clearly states that in the event of a conflict, the land code applies.

First Nations Finance Authority

The original concept for the First Nations Finance Authority (FNFA), which dates back to 1992, grew out of an initiative led by the Westbank First Nation, who were concerned that they did not have access to public debt financing as all other levels of government in Canada did. Accordingly, the FNFA was established to fill the gap and provide a viable mechanism through which First Nations could access capital on the bond market by issuing First Nations debentures (unsecured bonds issued by a government). A bond is a debt instrument creating an obligation for the issuer to pay the holder moneys borrowed, with set terms (time and interest paid plus any other terms). Typically, large governments (national, provincial, municipal) or utilities can manage their own public borrowing or work with financial institutions to issue bonds to raise money to provide for their operations (deficit financing) or for capital purposes (e.g., to build infrastructure). The interest paid by governments to the purchasers of their bonds varies, depending on the credit risk of the government. Governments that are well-run, financially stable and trending in the right direction pay less interest than those that are not. For the market to know which governments are a good credit risk, so that the interest rate of a bond can be set, private institutions provide credit ratings (e.g., Moody's Investment Services, Dominion Bond Rating). In 2013, a total of some $60.632 billion in bonds were issued by all levels of government in Canada.

Access to public financing of this kind was not always available for First Nations or smaller municipalities, which lack both the size and financing expertise to attract investors. However, all First Nations require public financing. Today, First Nations that can are, for the most part, borrowing from the retail side of the banks and other private financial institutions at higher interest costs, often for much shorter terms, and with more restrictions and less control — although this is changing. Most, if not all, First Nations are too small to issue bonds on their own, as the cost of issuing bonds would be prohibitive (i.e., relatively speaking First Nations on their own are typically insignificant players with limited and undiversified economies, and in any case typically need only small amounts of money in any given year — e.g., $20 million or less). The FNFA overcomes these problems through economies of scale by pooling the borrowing requirements of its borrowing members and going to the market collectively on the strength of the FNFA's credit rating.

The FNFA is a not-for-profit First Nations organization established under the FNFMA and governed solely by the First Nations that join as borrowing members. All borrowing members have a FAL in place and have been certified by the FMB. Borrowing members enjoy low-interest loans as well as investment options that are not tied in any way to the borrowing program. Funds borrowed through the FNFA are not for operations (i.e., loans are not for deficit financing). Projects eligible for financing from a wide array of revenue sources include infrastructure, land purchases, independent power projects, community housing and rolling stock/heavy equipment. FNFA loans can be used to refinance existing debt and do not require collateral.

The FNFA raises money by pooling loan requests from First Nations. First Nations authorize their borrowing requests through their own "borrowing laws" and "security issuing resolutions." (Note that there are special rules involving the First Nations Tax Commission when "local revenues" — i.e., property taxes — are being used.) The FNFA pools all of the requests and, through a "syndicate" of underwriters (banks and other financial institutions) prepares for a bond "issue" and approaches investors. Based on advice from its syndicate and the direction of its board, the FNFA issues the bond. Once the issue has been sold through the syndicate, the proceeds of the sale are deposited into the account managed by the FNFA and the proceeds re-loaned to the borrowing members participating in that debt issue. During the life of an issue, the cash collected from borrowing members will be adequate to cover FNFA's liability to bondholders. When the proceeds of the sale have been realized, they are then re-loaned to the First Nations based on their initial requests. There is no limit to the amount that can be borrowed, other than limitations the borrower might have regarding the amount of secure and ongoing revenue needed to repay the loan. Loans can run from five to 30 years.

The FNFA policy is to relend on a "sinking fund" basis. A sinking fund is where the principal and interest payments for the borrowing members each year remain constant. The sinking fund consists of the principal portion of the loan payments collected from the borrowers and not yet due to the bondholder until loan maturity. These principal moneys are invested to the credit of the borrowing member and used to cover the loan due at maturity. The interest payments collected from the borrowing members are paid directly to the bondholders. Borrowing members receive regular statements on each debt issue in which they are participating so the accounting records are complete.

There are a number of credit enhancement features of the FNFA pooled borrowing model that protect borrowing members and investors alike. First, borrowing members are required to borrow 5 percent more than they actually need, which is placed in a Debt-Reserve Fund (DRF). The DRF can be used if needed to meet any shortfall in a payment to the FNFA and is repaid to the First Nation with interest when the loan is paid off. Second, another fund, the Credit Enhancement Fund (CEF), into which Canada has invested $10 million, operates along with the DRF as a further backstop. Third, the revenue stream of the borrowing member that is supporting the debt repayment is intercepted in a secured revenues trust account, from which payments to the FNFA are made first, with the balance being deposited to the account of the First Nation. (Note that this account is not required for "local revenues" — i.e., property taxes regulated under the FNFMA through the FNTC.) Finally, and as described above, in the event that a borrowing member is having serious financial troubles, the FMB has intervention powers. The FNFA received an investment grade credit rating of A3 rating from Moody's Investors Service, a reflection of the strong borrowing model and the checks and balances in place.

The FNFA issued its inaugural First Nations bond in the amount of $90 million on June 20, 2014, and it is expected that the second debenture issuance will take place by March 31, 2015. There are currently 33 FNFA borrowing members, more than half of which are from BC, with more scheduled to join.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All of the comprehensive governance arrangements provide First Nations with broad law-making powers over their Nation's internal financial management. This reflects the changing relationship between the First Nation and the Crown, with the First Nation's governing body primarily accountable to its citizens and not to Canada. The federal policy on negotiating self-government is quite extensive with respect to financial management. Federal negotiators are looking to ensure that there are mechanisms in place for administrative and financial accountability to First Nations citizens and to those receiving programs and services from First Nations. These are expected to be no less stringent than for other governments and institutions of comparable size. Such mechanisms are also expected to respect the principles of transparency, disclosure and redress. Financial records and statements should comply with GAPP for governments and institutions of comparable size. In addition, the federal approach favours having public accounts that must be prepared and made available, with provisions for annual public audits of expenditures.

First Nations governments and institutions are also expected to be accountable to Parliament for funding provided by the federal government. The key for Canada is that FTAs provide a mechanism that enables Parliament to assess the extent to which public funds have contributed to meeting the objectives for which they were authorized to be used by Treasury Board. In most cases, the funding agreements for self-governing Nations are less involved, with fewer reporting requirements to government than for non-self-governing communities. This reflects the legal certainty for First Nations financial administration that exists after self-government. This is not the case under the *Indian Act* (see Section 4.2 — First Nations Revenues).

Some self-government agreements include more detail on the framework for financial management than others. Some Nations have set out their financial administration principles as law in their

constitutions, while others have made a separate financial administration law in accordance with the jurisdiction set out in their self-government agreement. In all cases, these financial administration laws supersede any that may have been previously developed under the *Indian Act* or as part of sectoral governance initiatives. For example, the Westbank Constitution has provisions for internal financial management and allows Westbank to pass laws in relation to financial management consistent with their Constitution. Both the Yale and Tla'amin final agreements have a similar approach, and financial administration regulations will be included in their individual constitutions. Another approach is that of the treaty self-government arrangements for Tsawwassen, where the First Nation has developed a very comprehensive financial administration law separate from its constitution.

First Nations should be able to benefit from opportunities under other sectoral legislative initiatives, even after reaching a self-government agreement. For example, it was the intention of the drafters of the FNFMA that self-governing First Nations (either under a comprehensive self-agreement or treaty) may choose to use or continue to use the financial services of the FNFA under the FNFMA. Accordingly, the FNFMA provides for the making of a federal regulation for a self-governing First Nation that adapts the FNFMA to its self-governing arrangements. However, developing these regulations is proving to be somewhat problematic and is taking longer than expected, because of the requirements of the FNFMA, the provisions of modern treaties and questions of priority of laws. However, the intention remains valid — namely, to allow a First Nation to move forward on self-government and still retain the right to borrow collectively with other First Nations through the FNFA. This will ensure that the First Nation will meet certain conditions before borrowing (including meeting the standards set by the FMB under the FNFMA), even though the FMB does not approve the First Nation's financial administration law after self-government. Regulations are currently being developed for self-governing First Nations, and it is expected that as more First Nations become self-governing, other such regulations or a generic regulation will be made to facilitate the unique and evolving circumstance of self-governing Nations.

Table — Comprehensive Governance Arrangements

	FINANCIAL POWERS	ACCOUNTABILITY FRAMEWORK	CONFLICT OF LAWS
Sechelt	Sechelt has the jurisdiction to make laws with respect to the financial administration of the band. (s. 14(1)(r)) Sechelt has the legal capacity to expend or invest money under the *Sechelt Indian Band Self-Government Act*. (s. 6(c))	*Sechelt Indian Band Self-Government Act* sets out that financial accountability of the band council to be defined in the Constitution. (s. 10(1)(c)) Details of financial accountability are included in the Sechelt Constitution (Sechelt Constitution, Part II, Div (4), (7), (8), and (9)). Upon approval by the council the budget is submitted to the members for review and amendment before ratification.	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act*. (S.C. 1986, c. 27)
Westbank	Westbank First Nation has jurisdiction in relation to the internal financial management of the First Nation. (Part IX, s. 82) Has the legal capacity to expend or invest money. (Part IX, s. 84(b))	The Westbank Constitution addresses financial administration and establishes that the budget will be presented to the members at special membership meeting before ratification by Council. (Westbank Constitution: s. 80.6–80.13) Requires auditor be appointed. (Westbank Constitution: s. 85.1)	Westbank law prevails. (Part IX, s. 86)

Table — Comprehensive Governance Arrangements... ***continued***

	FINANCIAL POWERS	ACCOUNTABILITY FRAMEWORK	CONFLICT OF LAWS
Nisga'a	The Nisga'a Lisims Government may make laws respecting the financial administration of the Nisga'a Nation, Nisga'a villages, and Nisga'a Institutions. (Ch. 11, s. 34(e)) The Nisga'a may make laws regarding the use, possession and management of assets on and off Nisga'a Lands. (Ch. 11, s. 53(a)) Has the legal capacity to expend or invest money. (Ch. 11, s. 5(c))	Required to be set out in Constitution or laws of the Nisga'a in accordance with the Final Agreement. (Ch. 11, s. 9(l)) Nisga'a Constitution provides for the establishment of a system of financial administration, through which Nisga'a Lisims Government will be financially accountable to Nisga'a citizens, and Nisga'a Village Governments will be financially accountable to Nisga'a citizens of those Nisga'a Villages, and that includes standards comparable to those generally accepted for governments in Canada. (Nisga'a Constitution, Ch. 9, s. 52)	Nisga'a law prevails. (Ch. 11, s. 36)
Tsawwassen	The Tsawwassen First Nation may make laws respecting the financial administration of the Tsawwassen First Nation and Tsawwassen Institutions. (Ch. 16, s. 43(d)) Tsawwassen government will make laws regarding the use, possession and management of assets on and off Tsawwassen Lands. (Ch. 16, s. 51–52) Has the legal capacity to expend or invest money. (Ch. 16, s. 7(c))	Required to be set out in Constitution or laws of the Tsawwassen First Nation in accordance with the Final Agreement. (Ch. 19, s. 2(f)(iii)) The Tsawwassen Government will establish standards regarding the collection and spending of Public Money that are comparable to the standards generally accepted by other governments in Canada. (Tsawwassen Constitution, Ch. 10, s. 10.1)	Tsawwassen law prevails. (Ch. 16, s. 47)
Maa-nulth	Each Maa-nulth First Nation Government may make laws with respect to the financial administration of that Maa-nulth First Nation Government, its Maa-nulth First Nation public Institutions and the applicable Maa-nulth First Nation. (s. 13.11.1(d)) Maa-nulth Government will make laws regarding the use, possession and management of assets on and off Maa-nulth Land. (s. 13.12.1, 13.12.2) Has the legal capacity to expend or invest money. (s. 13.2.1(c))	Required to be set out in Constitution or laws of the Maa-nulth in accordance with the Final Agreement. (s. 13.3.1(d)) As set out in the Constitutions of all 5 of the Maa-nulth First Nations, each Maa-nulth First Nation Government will enact a financial administration law that is effective and efficient in the use of Maa-nulth First Nations financial resources, is open and accountable and based on standards comparable to those generally accepted for governments in Canada. (*Maa-nulth First Nations Constitution* Ch. 5, s. 5.1)	Maa-nulth law prevails. (s. 13.11.5)
Yale	Yale First Nation Government may make laws with respect to the election, administration, management and operation of Yale First Nation Government including: financial administration of Yale First Nation and Yale First Nation Institutions. (s. 3.11.1(d))	Yale First Nation Constitution will provide for a system of financial administration with standards comparable to those generally accepted for governments in Canada, through which Yale First Nation Government will be financially accountable to Yale First Nation Members. (s. 3.3.1(d))	Yale First Nation law prevails. (s. 3.11.3)
Tla'amin	The Tla'amin Nation may make laws in relation to the election, administration, management and operation of Tla'amin Government, including: financial administration of the Tla'amin Nation and Tla'amin Institutions (Ch. 15, s. 47(d)) The Tla'amin Nation may make laws in relation to the use, possession, management and disposition of assets on and off Tla'amin Lands. (Ch. 15, s. 56) The Tla'amin Nation has the capacity, rights, powers to raise, spend, invest and borrow money. (Ch. 15, s. 6(c))	Tla'amin Nation Constitution will provide for a system of financial administration with standards comparable to those generally accepted for governments in Canada, through which Tla'amin Nation Government will be financially accountable to Tla'amin Nation Members. (Ch. 15, s. 9(e))	Tla'amin law prevails on Tla'amin Lands. (Ch. 15, s. 59) Federal or provincial laws prevail off Tla'amin Lands. (Ch. 15, s. 60)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 83(b) Expenditure			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Adams Lake		FINANCIAL MANAGEMENT BYLAW NO. 2000-1	Being A Bylaw To Provide For Financial Administration Of First Nations Funds
Blueberry River First Nation		FINANCIAL ADMINISTRATION BYLAW	
Bonaparte		FINANCIAL ADMINISTRATION BYLAW	Being A Bylaw To Set Financial And Administrative Guidelines For Fiscal Management Of First Nation Funds
Canoe Creek	2004-2	FINANCIAL ADMINISTRATION BYLAW	The Bylaw Is Authorized By Paragraphs 83(1)(B), 83(1)(C) And 83(1)(G)
Doig River		FINANCIAL MANAGEMENT BYLAW	
Homalco		HOMALCO FIRST NATION FINANCIAL ADMINISTRATION BYLAW NO. 1	The Bylaw Establishes The Processes Which Govern The Financial Affairs Of The First Nation
Lake Babine Nation		FINANCIAL AND ADMINISTRATION BYLAW NO. 2002-01	
Moricetown		FINANCIAL ADMINISTRATION BYLAW	
Nadleh Whut'en		FINANCIAL ADMINISTRATION BYLAW	Being A Bylaw To Regulate The Receipt, Management And Expenditure Of Funds And Establish The Administrative Structure Of The Nadleh Whut'en Band Funds
Nanoose First Nation		FINANCIAL ADMINISTRATION BYLAW	
Okanagan		OKANAGAN INDIAN BAND FINANCIAL ADMINISTRATION BYLAW	The Bylaw Was Enacted To Provide For The Establishment Of Reserve Funds, Plus Sets The Conditions For The Withdrawal Of Those Funds.
Skeetchestn		FINANCIAL MANAGEMENT BYLAW NO. 1985-2	Bylaw No. 1985-2 (Revised 1996) To Repeal The Original Bylaw No. 1985-2
T'Sou-ke		FINANCIAL ADMINISTRATION BYLAW 1989-1	
West Moberly First Nation		FINANCIAL ADMINISTRATION NO. 2002-3	
Yale First Nation		FINANCIAL ADMINISTRATION BYLAW	The Bylaw Was Enacted Pursuant To Paragraphs 83(1)(B) [The Appropriation And Expenditure Of Moneys Of The Band To Defray Band Expenditures], And 83(1)(C) [The Appointment Of Officials To Conduct The Business Of The Council Prescribing Their Duties…] And 83(1)(G), [Ancillary Powers].
Yekooche		FINANCIAL ADMINISTRATION BYLAW	Being A Bylaw To Institute Financial And Administrative Guidelines For Fiscal Management.

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

CURRENT BORROWING MEMBERS OF THE FNFA (AS OF AUGUST 2014)		
COMMUNITY	**PROVINCE**	**BORROWING AGREEMENT LAW**
Cowichan Tribes	BC	Cowichan Borrowing Agreement — OR, 2013
Cowichan Tribes	BC	Cowichan Tribes Borrowing Law — OR 2014
Douglas	BC	Douglas Borrowing Agreement Law — OR, 2013
Douglas	BC	Douglas Borrowing Law — OR, 2013
Kitselas	BC	Kitselas Borrowing Agrement Law — OR, 2013
Kwadacha	BC	Kwadacha Nation Borrowing Agreement Law — OR, 2013
Lax Kw'alaams	BC	Lax Kw'alaams Borrowing Agreement Law — OR, 2013
Lax Kw'alaams	BC	Lax Kw'alaams Borrowing Law — OR, 2014
Metlakatla	BC	Metlakatla Borrowing Agreement Law — OR, 2014
Metlakatla	BC	Metlakatla Borrowing Law —
Moricetown	BC	Moricetown Borrowing Agreement Law — OR, 2012
Moricetown	BC	Moricetown Borrowing Law — OR, 2013
Mount Currie	BC	Mount Currie Borrowing Agreement Law — OR, 2013
Mount Currie	BC	Mount Currie Borrowing Law — OR, 2-13
Osoyoos	BC	Osoyoos Indian Band Borrowing Agreement Law — OR, 2012
Osoyoos	BC	Osoyoos Indian Band Borrowing Law — OR, 2012
Penticton	BC	Penticton Borrowing Agreement Law — OR, 2013
Penticton	BC	Penticton Borrowing Law — OR, 2014
Shxwhá:y	BC	Shxwha:y Village Borrowing Agreement Law — OR, 2012
Skeetchestn	BC	Skeetchestn Borrowing Agreement Law — OR, 2013
Songhees	BC	Songhees First Nation Borrowing Agreement Law — OR, 2012
Songhees	BC	Songhees First Nation Borrowing Law — OR, 2014
Splatsin	BC	Splatsin First Nation Borrwoing Agreement Law — OR, 2012
Splatsin	BC	Splatsin Borrowing Law — OR, 2012
Squiala	BC	Squiala Borrowing Agreement Law — OR, 2013
Sts'ailes	BC	Sts'ailes Borrowing Agreement Law — OR, 2013
Sts'ailes	BC	Sts'ailes Borrowing Law — OR, 2013
Taku River Tlingit	BC	Taku River Tlinget Borrowing Agreement Law — OR, 2012
Taku River Tlingit	BC	Take River Tlingit Borrowing Law — OR, 2013
Tk'emlups te Secwepemc	BC	Tk'emlups Te Secwepemc Borrowing Agreement Law — OR, 2013
Tla'amin	BC	Tla'amin Borrowing Agreement Law — OR, 2013
Tla'amin	BC	Tla'amin Borrowing Law — OR, 2014
Tsawout	BC	Tsawout First Nation Borrowing Agreement Law — OR, 2012
Tsleil-Waututh	BC	Tsleil-Waututh Nation Borrowing Agreement Law — OR, 2012
Tsleil-Waututh	BC	Tsleil-Waututh Borrowing Law — OR, 2013
Tzeachten	BC	Tzeachten First Nation Borrowing Agreement Law, 2012 (OR)
Tzeachten	BC	Tzeachten Borrowing Law, 2012 (OR)
Wet'suwet'en	BC	Wet'suwet'en First Nation Borrowing Agreement Law — OR, 2014
Wet'suwet'en	BC	Wet'suwet'en Borrowing Law — OR, 2014
We Wai Kai	BC	We Wai Kai Nation Borrowing Agreement Law — OR, 2013
We Wai Kai	BC	We Wai Kai Borrowing Law — OR, 2013
Fisher River Cree Nation	MANITOBA	Fisher River Borrowing Agreement Law — OR, 2013
St. Theresa Point	MANITOBA	St. Theresa Point First Nation Borrowing Agreement Law — OR, 2013
St. Theresa Point	MANITOBA	St. Theresa Point Borrowing Law — OR, 2013

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

COMMUNITY	PROVINCE	BORROWING AGREEMENT LAW
St. Mary's	NEW BRUNSWICK	St. Mary's Borrowing Agreement Law, 2013 (OR)
Membertou	NOVA SCOTIA	Membertou Borrowing Agreement Law — OR, 2012
Membertou	NOVA SCOTIA	Membertou Borrowing Law — OR, 2012
Nipissing	ONTARIO	Nipissing First Nation Borrowing Agreement Law — OR, 2014
Nipissing	ONTARIO	Nipissing Borrowing Law, OR, 2014
Wasausking	ONTARIO	Wasauksing Borrowing Agreement Law OR, 2014
SECTORAL GOVERNANCE INITIATIVES		
FNLMA - FRAMEWORK AGREEMENT - OPERATIONAL	**DATE**	**DESCRIPTION**
Kitselas First Nation	DEC 14, 2010	Kitselas Policy Manual — Financial And Administrative Organization — Budgets
Leq'a:mel First Nation		Leq'a:mel Finance Policy
Leq'a:mel First Nation	OCT 17, 2001	Leq'a:mel Loan Policy For The Purpose Of LFN Membership
Squiala First Nation	JAN 2009	Squiala First Nation Financial Accountability For Non-Government Revenue
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Huu-ay-aht First Nations		Budget Act 2014
Huu-ay-aht First Nations		Financial Administration Act
Huu-ay-aht First Nations		Financial Administration Act Regulations
Huu-ay-aht First Nations		Cash Management Regulation
Huu-ay-aht First Nations		Investment Management Policy Regulation
Huu-ay-aht First Nations		Purchasing Policy Regulation
Huu-ay-aht First Nations		Risk Management Policy Regulation
Huu-ay-aht First Nations		Travel Expense Regulation
Huu-ay-aht First Nations		Governance And Fiscal Agreement Regulation
Ka:'yu:'k't'h'/Che:k:tles7et'h' First Nations	KCFNS 6/2011	Financial Administration Act
Nisga'a Nation	2000/09	Nisga'a Capital Finance Commission Act
Nisga'a Nation	2008/01	Nisga'a Business Development Fund Act
Nisga'a Nation	2008/01	Nisga'a Business Development Fund Regulation
Nisga'a Nation	2009/01	Museum Construction Financing Act
Nisga'a Nation	2007/09	Nisga'a Financial Administration Act
Nisga'a Nation	2001/16	Prince Rupert Real Property Loan Act (July 26 2001)
Nisga'a Nation	2001/17	Temporary Laxgalt'sap Forestry Loan And Guarantee Act — Unofficial Consolidation (January 31 2007)
Sechelt Indian Band	1990-01	Authorize Borrowing
Sechelt Indian Band	1990-02	Authorize Borrowing
Sechelt Indian Band	1990-03	Authorize Borrowing
Sechelt Indian Band	1998-01	Band Member, Employee Debt Set-Offs
Sechelt Indian Band	1999-04	Transfer Of Loans
Sechelt Indian Band	1999-04	Transfer Of Loans To Royal Bank
Sechelt Indian Band	1999-05	Transfer Of Band Loans
Sechelt Indian Band	1999-05	Transfer Of Existing Loans
Sechelt Indian Band	2006-02	Loan To Tsain-Ko Forestry
Sechelt Indian Band (SIGD)	2011-01	Five Year Financial Plan
Toquaht Nation	TNS 6/2011	Financial Administration Act
Toquaht Nation	TNS 5/2014	Five Year Financial Plan Act 2014-2019

Table — BC First Nations' Laws/Bylaws in Force... *continued*

CGA	LAW NO.	DESCRIPTION
Toquaht Nation	TNS 4/2014	Annual Budget Act 2014-2015
Toquaht Nation	TNR 4/2011	Expenditures Regulation
Toquaht Nation	TNR 1/2012	Governance And Fiscal Agreement Regulation
Tsawwassen First Nation	MAR 2014	Appropriations Act, 2014
Tsawwassen First Nation	APR 2009	Financial Administration Act
Tsawwassen First Nation	APR 2009	Members' Guarantees Act
Tsawwassen First Nation	012/2009	Interest On Overdue Accounts Receivable Regulation
Tsawwassen First Nation	014/2010	Social Housing Regulation
Tsawwassen First Nation	032/2009	Special Accounts Regulation
Tsawwassen First Nation		Fiscal Financing Agreement
Tsawwassen First Nation		Own Source Revenue Agreement
Tsawwassen First Nation	029/2009	Other Trust Fund Regulation
Uchucklesaht Tribe	UTS 4/2011	Expenditures Regulation
Uchucklesaht Tribe	UTS 6/2011	Financial Administration Act
Uchucklesaht Tribe	UTS 7/2011	Administrative Decisions Review Act
Uchucklesaht Tribe	UTS 20/2011	Budget Act
Ucluelet First Nations	YFNR 4/2011	Expenditures Regulation
Ucluelet First Nations	YFNS 6/2011	Financial Administration Act
Ucluelet First Nations	YFNS 10/2011	Banking Signatories Regulation
Ucluelet First Nations	YFNS 29/2012	Hasi — 2012-001 Capital Borrowing Act
Ucluelet First Nations	YFNS 21/2013	Way Yurts/Cabins Eco Resort Loan Guarantee Amendment Regulation
Ucluelet First Nations	YFNS 37/2014	YFN Annual Budget Act 2014-2015
Ucluelet First Nations	YFN 36/2014	YFN Construction And Infrastructure 2014-2015 Capital Borrowing Act
Ucluelet First Nations	YFNS 20/2011	Capital Borrowing Act
Ucluelet First Nations	YFNR 20/2013	Statement Of Investment Policy Amending Regulation
Ucluelet First Nations	YFNR 12/2012	Governance And Fiscal Agreement Regulation
Westbank First Nation	2005-01	WFN Long-Term Debt Liability And Guarantees Law

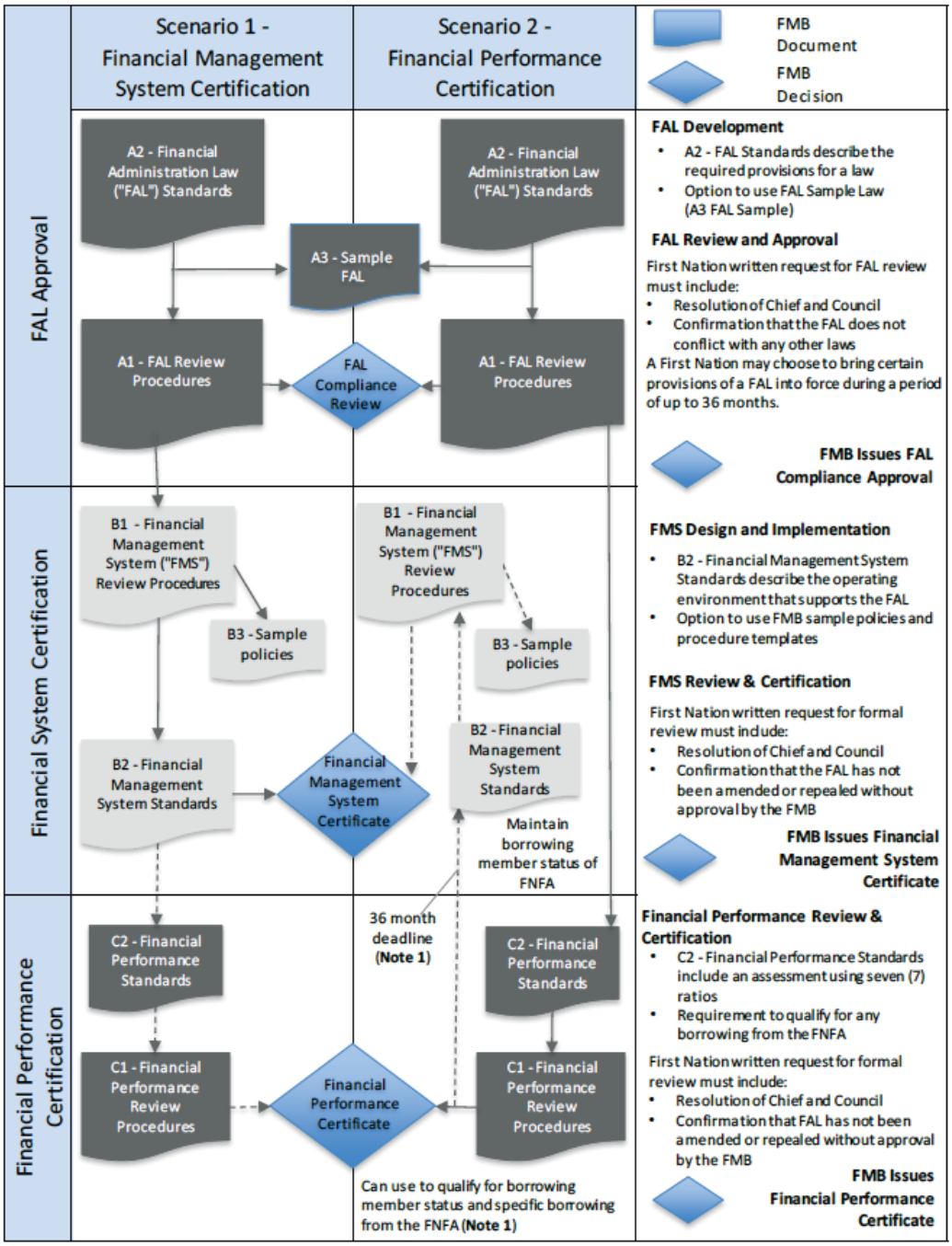
Table — First Nations Who Have FMB Approved Financial Administration Laws

FIRST NATIONS WHO HAVE FMB APPROVED FINANCIAL ADMINISTRATION LAWS		
COMMUNITY	**PROVINCE**	**COMPLIANCE APPROVAL DATE**
Cowichan Tribes	British Columbia	December 19, 2013
Douglas	British Columbia	July 22, 2013
Heiltsuk	British Columbia	October 21, 2014
K'omoks First Nation	British Columbia	March 31, 2014
Kanaka Bar	British Columbia	July 18, 2014
Kitselas First Nation	British Columbia	November 26, 2012
Kwadacha	British Columbia	April 29, 2013
Lax Kw'alaams	British Columbia	July 22, 2013
Lower Kootenay Indian Band	British Columbia	July 18, 2014
Malahat First Nation	British Columbia	October 21, 2014
Metlakatla First Nation	British Columbia	February 15, 2012
Moricetown Indian Band	British Columbia	November 9, 2010
Mount Currie (Lil'wat Nation)	British Columbia	March 28, 2013
Nadleh Whut'en Band	British Columbia	December 19, 2013
Osoyoos Indian Band	British Columbia	November 23, 2011

Table — First Nations Who Have FMB Approved Financial Administration Laws... *continued*

COMMUNITY	PROVINCE	COMPLIANCE APPROVAL DATE
Penticton Indian Band	British Columbia	October 29, 2013
Saulteau First Nations	British Columbia	October 21, 2014
Seabird Island Band	British Columbia	October 21, 2014
Shxwhá:y Village First Nation	British Columbia	September 24, 2012
Skeetchestn Indian Band	British Columbia	July 22, 2013
Sliammon (Tla'amin) First Nation	British Columbia	December 19, 2013
Songhees First Nation	British Columbia	December 15, 2009
Splatsin First Nation	British Columbia	July 30, 2012
Squiala First Nation	British Columbia	March 28, 2013
St. Mary's First Nation	British Columbia	March 28, 2013
Sts'ailes	British Columbia	February 15, 2012
Taku River Tlingit First Nation	British Columbia	June 15, 2012
Tk'emlups te Secwepemc	British Columbia	November 26, 2012
Tsawout First Nation	British Columbia	June 15, 2012
Tsleil-Waututh Nation	British Columbia	June 15, 2012
Tzeachten First Nation	British Columbia	November 23, 2011
Upper Nicola Indian Band	British Columbia	March 31, 2014
We Wai Kai Nation	British Columbia	June 15, 2012
Wet'suwet'en First Nation	British Columbia	October 29, 2013
Williams Lake	British Columbia	July 18, 2014
Siksika Nation	Alberta	July 22, 2013
Cross Lake First Nation	Manitoba	January 26, 2013
Ebb and Flow	Manitoba	October 21, 2014
Fisher River	Manitoba	October 29, 2013
Norway House Cree Nation		October 29, 2013
Rolling River	Manitoba	October 21, 2014
St. Theresa Point	Manitoba	October 29, 2013
Membertou First Nation	Nova Scotia	March 2, 2012
Millbrook Band	Nova Scotia	June 15, 2012
Chippewas of the Thames First Nation	Ontario	October 29, 2013
Mohawks of the Bay of Quinte	Ontario	September 26, 2014
Nipissing First Nation	Ontario	September 25, 2013
Wasauksing First Nation	Ontario	September 24, 2012
Conseil des Montagnais du Lac Saint-Jean	Quebec	March 28, 2013
Yellow Quill Band	Saskatchewan	October 21, 2014

STEPS TO FMB CERTIFICATION



Note 1: A Financial Performance Certificate is required to enter into a new borrowing agreement with the FNFA. To remain in good standing with the FNFA a Financial Management System Certificate must be obtained within 36 months from when the first nation receives proceeds for the first time from a debenture or equivalent financial instrument issued by the First Nations Finance Authority under the terms of a Borrowing Law and a Security Issuing Council Resolution.

RESOURCES

First Nations

AFOA Canada

Suite 1010, 100 Park Royal
West Vancouver, BC V7T 1A2
Phone: 604-925-6370
Fax: 604-925-6390
www.afoabc.org
www.afoa.ca

Suite 301, 1066 Somerset Street West
Ottawa, ON K1Y 4T3
Phone: 613-722-5543
Fax: 613-722-3467
Toll-free: 866-722-2362

- *Preparing Financial Statements Under the Common Government Reporting Model*
- *Financial Reporting by First Nations*
- *Sharing Financial Information*
- *Strategic Management & Accountability for First Nations — Best Practices to Consider*
- *Sample templates and synopses of financial policies and procedures*
- *Sample models of First Nation financial codes*
- *Sample First Nation Operations Manual*

First Nations Financial Management Board (FMB)

Suite 905 – 100 Park Royal
West Vancouver, BC V7T 1A2
Phone: 604-925-6665
Toll-free: 1-877-925-6665
Fax: 604-925-6662
Email: mail@fnfmb.com
www.fnfmb.com

- *Sample Financial Administration Law and other Core Documents*. www.fnfmb.com/core-documents/

First Nations Finance Authority (FNFA)

202 – 3500 Carrington Road
Westbank, BC V4T 3C1
Phone: 250-768-5253
Toll-free: 866-575-3632
Fax: 250-768-5258
Email: info@fnfa.ca
www.fnfa.ca

- The FNFA was created to provide Aboriginal governments with the financial instruments to build their futures on their own terms. Its mandate, set out in the FNFMA and related regulations, is to provide financing, investment and advisory services for Aboriginal governments.

First Nations Tax Commission (FNTC)

Head Office:
Kamloops, BC
Phone: 250-828-9857
Fax: 250-828-9858
Email: mailkamloops@fntc.ca

National Capital Region:
Ottawa, ON
Phone: 613-789-5000
Fax: 613-789-5008
Email: mail@fntc.ca

www.fntc.ca

- First Nations Real Property Taxation Guide. www.fntc.ca/dmdocuments/General/web_english_bw.pdf
- Property Tax Toolkit. www.fntc.ca/index.php?option=com_content&view=article&id=39&Itemid=39&lang=en

First Nations Gazette
c/o Native Law Centre — University of Saskatchewan
Room 160 Law Building, 15 Campus Drive
Saskatoon SK S7N 5A6
Phone: 306-966-6189
Fax: 306-966-6207
Email: nlc.publications@usask.ca
www.fng.ca

First Nations Lands Advisory Board (LAB)
First Nations Land Management Resource Centre
Suite 106, 350 Terry Fox Drive
Kanata, ON K2K 2W5
Phone: 613-591-6649
Fax: 613-591-8373
Email: webadmin@labrc.com
www.labrc.com

- *Framework Agreement on First Nation Land Management*. http://labrc.com/wp-content/uploads/2014/03/Framework-Agreement-Amendment-5-edited.pdf
- Land Codes. http://www.labrc.com/resources/land-codes/

Federal

Public Sector Accounting Board (PSAB)
The Canadian Institute of Chartered Accountants
277 Wellington Street West
Toronto, ON M5V 3H2
Phone: 416-977-3222
Fax: 1-416-977-8585

- CICA Public Sector Accounting Handbook (PSACC). www.castore.ca/Catalogue/ShowSampleToc.aspx?productID=139&spID=10
- Financial Reporting by First Nations. www.frascanada.ca/standards-for-public-sector-entities/resources/reference-materials/item14957.pdf

Aboriginal Affairs and Northern Development Canada
Terrasses de la Chaudière
10 Wellington, North Tower
Ottawa, ON K1A 0H4
Toll-free: 1-800-567-9604
Fax: 1-866-817-3977
Toll-free: 1-866-553-0554
Email: InfoPubs@aadnc-aandc.gc.ca

- www.aadnc-aandc.gc.ca/Indian and Northern Affairs Canada Financial Statements. www.aadnc-aandc.gc.ca/eng/1100100010105/1100100010106

- Financial Transfer Agreements (FTA). www.aadnc-aandc.gc.ca/eng/1100100010068/1100100010069
- Year-end Financial Reporting Handbook. www.aadnc-aandc.gc.ca/eng/1100100010101/1100100010103

SELECT LEGISLATION

Federal

- *First Nations Financial Transparency Act* (S.C. 2013, c.7)
- *First Nations Fiscal Management Act* (S.C. 2005, c. 9)
- *First Nations Oil and Gas and Moneys Management Act* (S.C. 2005, c. 48)
- *First Nations Land Management Act* (S.C. 1999, c. 24)

PART 1 /// SECTION 3.12

Fish, Fisheries and Fish Habitat

3.12

FISH, FISHERIES AND FISH HABITAT

3.12

FISH, FISHERIES AND FISH HABITAT

BACKGROUND

The subject matter of fish, fisheries and fish habitat is one of the most important, but also complex and intricate, areas of jurisdiction being considered by BC First Nations. Culturally and economically, fish are extremely important to First Nations and to their way of life. Generally, "fish" can refer to finfish and shellfish species in freshwater or marine environments. Fishery/fisheries are usually in reference to either aquatic species (fish or shellfish) that are harvested for "food social or ceremonial purposes" or for commercial or recreational purposes, or fish species that are subject to a wide range of management activities. For many First Nations in BC, the continued availability, access and use of "fish" is an important food security concern.

Throughout BC, First Nations have historically harvested a wide variety of fish, perhaps most importantly salmon but also herring, spawn-on-kelp, eulachon, rainbow trout, razor clams, spot prawn, crab, halibut, sturgeon, and so on. First Nations share the same fundamental interests with respect to this subject matter regardless of where they are located, whether on the coast or on inland waters, including areas that drain northwards into the Yukon and Mackenzie rivers.

Access by First Nations people to a variety of aquatic species/resources, marine or otherwise, during different times of the year is an example of the continued use and occupation of ancestral lands and waters. It also demonstrates the importance of these resources for diet, namely access to high-value protein, throughout the year. Further, access to the resource for the purposes of trade, sale or barter between and among tribes and with others remains an important aspect of local First Nation economies. However, given the pressures on certain fish stocks and on fish habitat and competing interest in the fisheries (from commercial and sport fisheries), the ability of First Nations peoples to depend on the resource has been declining in modern times.

What is food security?

People are considered food secure when they have all-time access to sufficient, safe, nutritious food to maintain a healthy and active life.

World Food Programme (WFP)

This subject matter is closely linked to other matters, including wildlife, environment, lands and land management, land and marine use planning, water, traffic and transportation, and culture and heritage, and is affected by economic development (commercial) issues. While fish, and wildlife generally, does relate to on-reserve governance, it has much broader importance with respect to access to natural resources and the exercise of jurisdiction off-reserve and within broader ancestral lands.

BC First Nations Fisheries Action Plan

As a collaborative effort of the BCAFN, Union of BC Indian Chiefs (UBCIC) and the First Nations Summit (FNS), in 2007 the First Nations Leadership Council endorsed the *BC First Nations Fisheries Action Plan*. The action plan sets out a common vision, identifies the priorities of BC First Nations with respect to fisheries, outlines issues of concern to First Nations, and makes recommendations for action. The plan also identified the need to establish a BC First Nations Fisheries Council (FNFC). After community meetings during the spring of 2007 to discuss the composition and framework of the FNFC, the First Nations Leadership Council solicited nominations for an interim council to guide the FNFC. At the end of 2007, the First Nations Leadership Council formally appointed six members, and the FNFC was then registered under the BC *Society Act* in early 2008.

First Nations Fisheries Council of BC

In 2008, the interim FNFC conducted its own series of local community meetings throughout BC and received advice on how the FNFC should be structured to reflect the diversity in geography, expertise and perspectives of BC First Nations. A new structure for the FNFC was ratified at the province-wide 2009 Fisheries Assembly. Under this structure, the FNFC membership is made up of chiefs and delegates from each of BC's 203 First Nations, who meet annually at a Fisheries Assembly to provide overall guidance and direction to the FNFC executive council. The FNFC executive council is composed of 14 delegates selected by BC First Nations in each of the 14 regions in BC. This selection process is done through whatever appointment process the individual regions deem to be appropriate, and with the support and assistance of FNFC staff as required. Through the FNFC executive council, six FNFC directors are then appointed from and by the executive council to represent the FNFC executive council. The BCAFN, UBCIC and FNS endorsed this structure. In 2013, the FNFC updated its bylaws to confirm this structure.

Today the FNFC acts as the umbrella organization that works to advance the interests of all 203 BC First Nations, and to support, protect, reconcile and advance Aboriginal and treaty rights as they relate to fisheries and the health and protection of aquatic resources. Through its executive and staff, FNFC encourages Canada and British Columbia to work collaboratively with First Nations on a range of administrative and resource-management issues, as well as related and evolving jurisdictional arrangements. The primary functions of the FNFC are to:

- be responsible for implementing the *BC First Nations Fisheries Action Plan*
- hold regular province-wide fisheries forums and assemblies to increase open dialogue, co-operation and support on fisheries issues
- support regional or watershed-based forums and processes to deal with local and regional issues
- develop collective First Nations fisheries-related strategies and policy perspectives
- achieve economies of scale by leveraging and building upon the collective efforts of First Nation organizations
- share information on fisheries issues with BC First Nations and support improved data collection and sharing
- support First Nations in developing and implementing their fisheries and aquatic resource plans
- build effective working relationships with First Nations, First Nation organizations, governments, media and others.

To advance the *BC First Nations Fisheries Action Plan* in 2011, the FNFC released *Developing a United Voice for First Nations Fisheries in BC*, a three-year strategic plan for the FNFC (2012–2015). The strategy focusses the direction of the FNFC and sets some priorities. Through the *BC First Nations Fisheries Action Plan* and the strategic plan, the FNFC priorities are to develop effective governance mechanisms, form collaborative relationships among First Nations organizations, and work together to build a cohesive voice on fisheries matters.

Over the last few years, as part of their effort to develop effective governance mechanisms, the FNFC has worked to develop charters between the FNFC, First Nations and regional or watershed-based groups that set out principles and common objectives. The FNFC describes these charters as good-faith agreements between the FNFC and partner organizations that have mutual interests in advancing the priorities and concerns of First Nations fisheries. The charters outline a high-level structure for how partner organizations will call on one another for support, and create a clear mechanism for First Nations to direct the FNFC's priorities. To date, nine charters have been signed, covering over 128 First Nations communities in BC.

The FNFC has established "Regional Areas" that serve as a coordinating point for the development of communication and information processes for BC First Nations to engage in dialogue and to advance their fisheries issues and concerns from a regional to a BC-wide scale. Regional fisheries organizations are empowered to facilitate information-sharing between the provincial level and local communities, while ensuring that broader regional representation is achieved. Having clear processes at regional levels encourages the appropriate engagement of First Nations in a variety of management and advisory processes (e.g., the First Nations Salmon Coordinating Committee, DFO Aquaculture Management Advisory Committee) and helps to build First Nations management capacity and meaningful participation in the face of all too often limited human and financial resources.

The Commercial Fishery

In addition to the governance and management activities of BC First Nations with respect to fish, fisheries and fish habitat, BC First Nations actively participate in the commercial fishery, which at times has been very successful. Historically, those Nations with citizens engaged in a commercial fishery or employed in the fishing industry have been well organized, and they remain so. Well before the protection of First Nations' rights through section 35 of the *Constitution Act, 1982* and the subsequent string of fish-based court cases, including those addressing the commercial right to fish (see below), specific parties within and members of coastal Nations were organized politically around the coastal commercial fisheries. The Native Brotherhood of British Columbia was established in 1931 and was one of the first political organizations in BC. It is still very much in existence and provides a platform for the commercial aspect of First Nations involvement in fisheries. The decline in the commercial salmon industry has affected livelihoods and the quality of life of First Nations and communities, as is reflected in the changed economic circumstances of many residents of coastal Nations.

The Fisheries Management and Governance Challenge

There are numerous challenges around the current management and evolving governance frameworks with respect to fish, fisheries and fish habitat that reflect the nature of the resource and how self-government for First Nations in the modern era is evolving. In this environment, First Nations have challenges with their own governments as well as with the federal government, which, for the purposes of fish management, is organized through the Department of Fisheries and Oceans (DFO). This reality only underscores and reinforces the importance of the mandate of the FNFC.

Part of the difficulty in establishing a framework for overall fisheries management stems from the fact that the jurisdictional boundaries between federal and provincial governments and First Nations are constantly being challenged and contested. This certainly adds to the difficulty of managing a resource that knows no geopolitical boundaries and that can migrate over thousands of kilometres, various waterways and overlapping territorial boundaries, both First Nations and provincial, federal and international. The situation is made more difficult when Nations, or groups of Nations, claim overlapping control over the same fishing territories. Jurisdiction and management of fish, fisheries and fish habitats is further complicated by the wide variety of species of finfish, shellfish (crabs, lobster, prawns, etc.), invertebrates (e.g., sea cucumber and sea urchins) that are harvested by both First Nations and commercial and recreational fishing interests. For example, Canada currently regulates more than 30 federal integrated fisheries management plans (IFMPs) in the Pacific Region alone.

This situation becomes even more complex in the management of, for example, mixed-stock salmon fisheries, where weak or endangered stocks may be present among healthy stocks, travelling along the coast and returning to spawn in hundreds of rivers. It has been a challenge to ensure that all stocks are protected and that all Nations relying on the same runs or on different runs travelling at the same time have access to the resource after conservation needs have been met. This is one area where

While the UN Declaration on the Rights of Indigenous Peoples does not specifically mention foods, it does have clauses that Canada, as a signatory, should consider when fishing rights are discussed. These include:

24(1). Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

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 programmes for indigenous peoples for such conservation and protection, without discrimination.

Article 24 and 29: UN Declaration

co-operation and coordination among First Nations and with other governments is vital. But this can be difficult to achieve, particularly when trying to develop a common position in discussions with DFO.

A challenge for the FNFC is that while First Nation governments share a common interest in being more directly involved in the management of fisheries and in assuming governmental control (either independently or together and/or shared with DFO, as contemplated in comprehensive governance arrangements), First Nations are at many different stages along the governance continuum. While almost all First Nations in BC have some interaction with DFO, given the presence of salmon and other federally regulated waters/species within their ancestral lands and waters, First Nations are not all organized in the same way. Today there is a range of collaborative management mechanisms in BC between DFO and First Nations, and among First Nations. These are becoming increasingly sophisticated, and while this is good on the one hand (it usually means better management practices), on the other hand it can lead to frustrations, particularly when groups have different levels of capacity but all need to be involved in decision-making. Trying to coordinate myriad management or governance arrangements is not easy. In this evolving world of mixed authority and jurisdiction, it is hard at times to unpack the complexity and understand all the moving parts to determine exactly how fisheries are being governed and managed. Undoubtedly, there is a need for regional coordination and strong agreements in order to achieve some degree of regional governance. Management and governance with respect to this subject matter is a work in progress. This is why one of the priorities of the FNFC is to work with the BC First Nations leadership to develop a strategic approach to formalizing such co-operation and coordination.

Before considering the evolving options and sorting though the issues with respect to management or jurisdiction over fish, fisheries and fish habitat (whether with respect to implementing and regulating Aboriginal food, social and ceremonial rights or commercial rights, or ensuring the preservation of stocks and the habitats), it is helpful to have an understanding of how jurisdiction over fish, fisheries and fish habitat has evolved in Canada and, in the process, Aboriginal and treaty rights.

Division of Powers

Section 91(12) of the *Constitution Act, 1867* (respecting "sea coast and inland fisheries") gives the federal government exclusive authority over all fisheries in Canada. These powers are exercised by the Minister of Fisheries and Oceans under the federal *Fisheries Act* (R.S.C. 1985, c. F-14), through the Department of Fisheries and Oceans (DFO). Annually in BC, the governor in council, on the direction of DFO, makes "BC Fisheries Regulations" under the *Fisheries Act*. The BC government manages inland freshwater fisheries and recreational fisheries through the authority provided by these regulations. DFO retains direct management control over migratory salmon fisheries and all marine species in salt water. This is not the case in all parts of the country.

To complicate matters, this exclusive federal jurisdiction should not be confused with ownership of fish where the owner of the bed of the water-course (stream and lake) has rights to fish in those waters. In this case, the fish rights in inland waters are viewed as a "proprietary" right (tied to the land and waters) and are therefore a provincial matter under section 92(13) of the *Constitution Act, 1867*, which deals with the provinces' law-making and other powers over "property and civil rights." After the BC government lost a Supreme Court of Canada case on regulating fish in provincial streams and lakes, *In re British Columbia Fisheries,* [1913] S.C.R. 493, the Province specifically made all stream and lake beds provincial aquatic Crown lands. However, this generally does not affect reserve lands, where the foreshore, or bed of a stream or body of water, was included in the original land survey and set aside as "reserve" (whether title was transferred to Canada or not).

Interestingly, from the federal perspective, who owns the land under streams and rivers on-reserve does raise questions regarding the full application of the federal *Fisheries Act* on-reserve. If the

land and waters above those lands are part of the reserve, then is the *Fisheries Act*, wholly or partly, inapplicable? Conversely, some may argue that First Nations on-reserve don't own the water in the same sense as they own land. This is still an issue to be resolved, because it has not been adjudicated under section 35 or been the subject of post-1982 legislation. First Nations operate on the basis that, with respect to on-reserve governance, they do have and assert jurisdiction over the beds of water-courses. How this issue ultimately will play out for on-reserve jurisdiction over fish, fisheries and fish habitat remains to be seen.

The Aboriginal Rights to Fish

Today, after a hard struggle, First Nations have well-established Aboriginal and treaty rights in fish for food, social and ceremonial purposes (FSC) and, in certain circumstances, commercial purposes. These rights have been established through a string of court cases that have confirmed a constitutional Aboriginal right to fish protected under Section 35 of the *Constitution Act, 1982* (cases such as *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2013 BCCA 300; *R. v. Gladstone*, [1996] 2 S.C.R. 723 *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, which build on prior case law derived from *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, *R. v. Sparrow*, [1990] 1 S.C.R. 1075; and *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010). From the perspective of many First Nations, the interpretation and implementation of these important decisions and treaties have been undermined by changes to the *Fisheries Act* and DFO policy bulletins, which appear to be constraining, categorizing and limiting the scope of the "generous interpretation of the right" as set out in *Sparrow*.

The Sparrow Test

In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Supreme Court of Canada upheld an Aboriginal right to fish for food, social and ceremonial purposes under section 35(1) of the *Constitution Act, 1982*. The court established five criteria with respect to the right: (1) the word "existing" in section 35(1) referred to rights which existed on 17 April, 1982; (2) the intention of the legislature to extinguish a right must be in law and must be clear and express; (3) a right guaranteed may be limited, as the rights recognized and affirmed are not absolute (for example, for conservation purposes); (4) the federal government has a fiduciary role in relation to Aboriginal peoples; and finally (5) section 35(1) must be interpreted liberally.

In setting out the criteria, the court established the *Sparrow* test — a "test" to determine whether a government's activity would unjustifiably infringe an Aboriginal right protected under section 35(1). This test is: 1) does the law or regulation have the effect of interfering with an existing Aboriginal right; and 2) is the limitation justified? In other words: (i) is the limitation reasonable; (ii) does it impose undue hardship; and (iii) does it deny the holders of the right their preferred means of exercising that right?

The Right to Fish for Food, Social and Ceremonial Purposes

In 1984 Ronald Sparrow, a member of Musqueam, was caught fishing with a drift net 45 fathoms (82 m) in length, 20 fathoms (37 m) longer than permitted by the band's fishing licence issued by DFO under the *Fisheries Act*. Mr. Sparrow admitted to all the facts in the charge, but justified them on the grounds that he was exercising his Aboriginal right to fish under section 35(1) of the *Constitution Act, 1982*. The decision of the Supreme Court of Canada in *Sparrow* confirmed that the Musqueam people had a recognized and affirmed, constitutionally protected "existing aboriginal right to fish for food and social and ceremonial purposes." This right has been accepted by Canada to apply to all Aboriginal peoples and policy.

Based on the test set out by the Supreme Court of Canada in this case, now known as the Sparrow test, fish rights for food, social and ceremonial (FSC) purposes come before those of any other potential users of the resource. Those rights are limited only by issues of stock conservation, obligations to other First Nations, and orderly and manageable fisheries. Today, there is a distinct FSC fishery that is regulated and enforced by DFO, with catch levels monitored and access to the fishery controlled. In BC, FSC rights in fish are exercised by most, if not all, First Nations and by the majority of First Nations citizens,

sometimes individually and sometimes as part of the collective. It should be noted, however, that the limits of FSC rights are not accepted by many First Nations who continue to assert that their rights are broader, based on Aboriginal rights protected under section 35(1) of the *Constitution Act, 1982*.

For those First Nations on Vancouver Island, additional treaty rights have been established as a result of the Douglas Treaties, signed between 1850 and 1854. All of the modern treaties also address fish, fisheries and fish habitat and set out modern treaty rights.

The Commercial Right to Fish

While Aboriginal people may be participating in the commercial industry, owning fishing boats and provincially issued licenses, many argue that those opportunities are inadequate, do not reflect, and are not based on their Aboriginal or treaty rights. While in Sparrow the court ruled that First Nations have a right to fish for FSC purposes, it did not rule on the commercial aspect of the fishery. While Sparrow did lead to a designated and regulated FSC fishery, which sometimes includes "economic opportunity fisheries" in which the DFO permits bands to sell limited amounts of salmon, it did not result in a protected Aboriginal commercial fishery. Other cases have now confirmed that there is a protected Aboriginal commercial fishery.

In 1988, William and Donald Gladstone from the Heiltsuk First Nation were both charged with selling herring spawn contrary to the federal *Fisheries Act*. In their defence, the brothers claimed that they had a right to sell herring under section 35(1) of the *Constitution Act, 1982*. At trial, they presented evidence showing that trade of herring spawn was a significant part of the Heiltsuk peoples' way of life prior to contact. In *R. v. Gladstone*, [1996] 2 S.C.R. 723, the Supreme Court of Canada held that the Heiltsuk did, in fact, have a pre-existing right to harvest herring spawn on kelp (herring roe (eggs) on kelp) and that there is a commercial component to their right and they can sell it. The court suggested that in the regulation of commercial fishing, regard should be given to regional fairness among all people when distributing fishing resources.

In 2009, the Nuu-chah-nulth brought their own case forward regarding the commercial right to fish, as part of an Aboriginal title and rights case that prior to European settlement and the present, they owned, used and occupied territories within an area on the west coast of Vancouver Island and extending 100 nautical miles into the Pacific Ocean. They claimed that at contact, they were a fishing people whose way of life was characterized by trade, including trade in fish, and that these pre-contact practices translated into modern Aboriginal rights, including the right to harvest all species of fisheries resources from within their territories for food, social, ceremonial, trade and commercial purposes, and to sell and trade those resources on a commercial scale.

On November 3, 2009, the Supreme Court of BC affirmed that the Ehattesaht, Mowachaht/Muchalaht, Hesquiaht, Ahousaht and Tla-o-qui-aht First Nations (the other "Nuu-chah-nulth" First Nations are a part of the Maa-nulth Treaty) possess Aboriginal rights to fish and to sell fish. The court found that the cumulative effect of Canada's fisheries regime under the *Fisheries Act* and its related regulations and policies, infringed the Nuu-chah-nulth's Aboriginal fishing rights, and gave the parties two years to negotiate a regulatory regime that balanced Nuu-chah-nulth's fishing rights with the rights and interests of other Canadians. The court did not answer the question regarding title to submerged lands, as it did not need to, having found that the right to fish still existed. However, it did express some doubt that the Nuu-chah-nulth had a valid claim of Aboriginal title to the submerged lands where they asserted their Aboriginal right to commercial fishing. Canada appealed the decision, which was upheld by the BC Court of Appeal, and in 2014 the Supreme Court of Canada ruled that it would not hear any further appeal by Canada. In fact, this was the second time the Supreme Court of Canada has rejected a federal attempt to appeal a BC Supreme Court judgment, supported by the BC Court of Appeal, that affirmed the rights of First Nations people to sell their catch.

The Nuu-chah-nulth expect that the decision will give their communities and other First Nations greater opportunities to catch and market salmon, cod, halibut, crab and other species, leading to a new constitutionally protected native commercial fishery. However the need to determine the form and scope of that fishery through a negotiated commercial fishing plan agreement with DFO is proving challenging, and Canada has shown no sign of opening up a commercial fishery as they did with respect to the FSC fishery. To date there has been no recognized commercial fishery in accordance with this right.

The American Experience

Interesting comparisons can a be found in the United States with respect to implementing existing treaties and indigenous peoples rights to fish based on historical numbers of fish and priority access. In Washington state, in holding up the terms of treaties that give native people a defined share of the fish resource (50 percent) that existed at the time the treaty was signed, the state is required to govern fish stocks in co-operation with the tribes to ensure that the treaty commitments can be met. In many ways, the Douglas Treaties in BC are similar to the treaties with the tribes in Washington state, but the approach to implementing them based on court decisions has been quite different. Unlike the situation with the treaties in Washington state that gave rise to the Boldt decision (*United States v. Washington*, 384 F. Supp. 312 [W.D. Wash. 1974]), Canada has never accepted or accommodated the Douglas Treaty right to "carry on their fisheries as formerly," which was at that time primarily a commercial fishery, with fish being sold to settlers. Currently, the optics are that government intends to enter into agreements with First Nations that contain the Aboriginal fishery in order to provide stability and access for other stakeholders to a resource that is being stretched and is in some cases diminishing.

However, there remains a strong desire by First Nations to work with DFO and build capacity and structures to support First Nations regulation, governance and management of the various fisheries in BC, including Aboriginal FSC and commercial fisheries. To this end, and often coordinated though FNFC, local discussions on joint decision-making and collaborative management are underway between groups of First Nations and DFO, with the expectation that some of these options for shared jurisdiction and/or administrative arrangements with First Nations can be established and open the way for more complete jurisdictional arrangements. This is taking place both inside and outside of modern treaty-making.

Implementing Aboriginal Rights to Fish

DFO is Canada's lead agency in all fisheries resources discussions and negotiations, whether over FSC implementation, or jurisdiction and co-management of the fisheries resources, or in treaty negotiations. DFO is responsible for developing and implementing federal policies and programs as well as regulatory changes affecting fisheries.

As stated above, the *Fisheries Act* (R.S.C., 1985, c. F-14) is the main legislation dealing with fish, fisheries and fish habitat in Canada. In 2012, the *Fisheries Act* was amended through the *Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c. 19). Changes to the *Fisheries Act* came into force on November 25, 2013. It remains true that under the act, the waters for fishing are always closed, and the legal instrument to open the waters for any fishing is called a Variation Order. In the case of Aboriginal fishing, this is identified as a Communal Licence under the *Aboriginal Communal Fishing Licences Regulations* (SOR/93-332)(ACFLR). It requires First Nations to negotiate an agreement with the Department of Fisheries and Oceans (DFO) to develop the mechanism for allocations, species, designated participants, locations, and so on; if an agreement cannot be negotiated, the Communal Licence is considered "imposed" and DFO will set parameters for fishing. While FSC rights are now well established and commercial rights are emerging, it is important to note that under the

case law, the FSC right is not an individual right, nor is it exclusive. Unfortunately, unlike land-based Aboriginal rights such as hunting, in the opinion of First Nations the responsible federal and provincial government agencies have not accommodated their rights with respect to fish and fisheries in a way that generally meets their needs. While First Nations legal rights have been established, federal officials responsible for fisheries management have difficulty in accommodating those rights, given the complexity of managing the resource. Officials also cite the need to balance the interests of all resource users (Aboriginal FSC, Aboriginal commercial, non-Aboriginal commercial and sports), even though that is not what the common law requires.

A Three-Tier Process for Consultation

Through the work and support of the BC Aboriginal Fisheries Commission (BCAFC), the BCAFN and DFO signed a Memorandum of Understanding (MoU) in the late 1980s that helped to provide coordination and organization and to focus the discussions on the many complicated and interrelated issues around Aboriginal fishing rights and their implementation. The MoU established that in BC, DFO would provide a three-step process to meet the consultation requirements for identifying, accommodating or mitigating any potential infringements of Aboriginal rights in fish. Today, these operate as follows:

- ***Tier 1:*** Nation engages first in its own internal Aboriginal-only meetings, recognizing obligations to meet adjacent Nations' FSC needs, with traditional protocols playing a role. Tier 1 may also refer to meetings between First Nations. Because of the geospatial range and migratory nature of many marine species, many fisheries management processes necessarily involve multiple First Nations.
- ***Tier 2:*** Meetings between DFO and the Nation to engage in consultations, reviewing the Nation's requests and advice developed in the Tier 1 meetings. Tier 2 meetings can be held between DFO and one or more First Nations; however, DFO has preferred meetings of an "aggregate" (multiple communities/Nations) rather than bilateral meetings with individual Nations.
- ***Tier 3:*** Where other stakeholders might be engaged in discussions with DFO and the Nations, those "third party" meetings take place.

With respect to Fraser River salmon, DFO places its main emphasis on implementing the Tier 1 and Tier 2 processes. However, Nations advise that a robust application would be more effective, and should be in place for all species and in all existing DFO management frameworks. First Nations hold that without these changes, DFO is not meeting the federal government's basic responsibility to accommodate existing Aboriginal rights in fish and fisheries. Tier 1 may also refer to meetings between First Nations. Because of the geospatial range and migratory nature of many marine species, many fisheries management processes involve multiple First Nations. Tier 2 can also be in reference to meetings between DFO and one or more First Nations. First Nations therefore need to be aware that DFO is going to try to use more "aggregate" (involving multiple communities/nations) Tier 2 process in their consultative framework, and fewer direct bilateral meetings with First Nations.

In September 2013, based on the joint work of the First Nations Leadership Council and the FNFC, the First Nations Leadership Council and the DFO signed the *First Nations Fisheries Memorandum of Understanding* (MoU) on fisheries and aquatic resources. The high-level political MoU is particularly important given the significant federal legislative changes in 2012/13 as they relate to fisheries, and the subsequent regulatory changes that affect First Nations. The MoU contains an agreement that the Minister of Fisheries and Oceans will meet with the First Nations Leadership Council twice a year and confirms the department's commitment to meet with the First Nations Leadership Council's technical staff and the FNFC on a quarterly basis.

Knowledge Systems, Planning and Management Processes

There is no question that DFO's responsibilities are significant and that whatever views one may have of DFO's effectiveness in carrying out its work, it is the only government agency with systems that try to regulate fisheries. For example, DFO has well-developed systems for salmon management, despite its seeming inability to accurately estimate returning stocks. This is not surprising, given the commercial importance of salmon and the existence of the Pacific Salmon Treaty with the United States (*Treaty Between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon*, 17 March 1985). However, DFO's management systems for all species, including freshwater, groundfish, pelagics, and so on are now being stretched, in particular by the emerging need for better scientific knowledge of local stocks.

In looking at information to guide policy development and decision-making, including when fisheries will open and what conservation measures are needed, the scientific work must include Aboriginal traditional knowledge. Such knowledge is increasingly being used by First Nations in fisheries habitat work within their territories. Some First Nations experts believe that perhaps there is too much confidence in DFO's scientific models, which do not incorporate Aboriginal traditional knowledge about matters such as tides and other impacts on migratory species. This is why First Nations argue that, despite the size and resources available to DFO, their own jurisdiction must also be respected and accommodated.

Integrated Fishery Management Plans

More recently, the Canadian government has placed an emphasis on fiscal restraint, and this fiscal climate will place a premium on effective cost management. This emphasis, by extension, has led DFO to develop strategic approaches for reducing operations — and led to an "integrated fisheries management approach." Integrated Fishery Management Plans (IFMPs) are species based, and are inclusive of all users, including First Nations. The IFMPs create decision rules that inform managers in-season. First Nations rightly contend that it is inappropriate to develop decision rules that may affect First Nations rights in a Tier 3 setting with other users, and believe that these are more appropriate for bilateral consultations. In order to address the multitude of BC fisheries other than salmon, DFO has developed complex "advisory" processes for the other species, with as many as 27 separate IFMPs for different species. Regardless, DFO accommodates a direct bilateral relationship with First Nations, but generally only with respect to annual plans for communal commercial, commercial salmon and the herring harvest. Although there are other processes for overall fisheries management, First Nations representatives must still, unfortunately, participate in processes designed for third-party stakeholder involvement for species such as halibut, crab and prawn. They take issue with the notion of discussing matters that may affect their section 35 fisheries in the Tier 3 forums.

The First Nations Wild Salmon Alliance (FNWSA) is one group that has come together partly because of lack of confidence in existing management plans. It asserts that there is an absence of a clear, consistent and organized First Nation voice advocating for the protection and well-being of wild salmon runs and reproduction areas in particular and is looking to fill that void. A revised terms of reference for the FNWSA was prepared in February 2014.

Integrated Management of Aquaculture Plans

In the specific case of aquaculture, the FNFC has been working with DFO since 2009 to develop a strategy to engage BC First Nations in the development of the Integrated Management of Aquaculture Plans (IMAPs). DFO continues to engage Nations in Canada, along with other stakeholders, on the development and implementation of the Aquaculture Management Advisory Committees (AMACs), the Tier 3 committees leading the development of marine finfish, marine shellfish, and freshwater IMAPs. Most recently, Nations in BC have directed the FNFC to step back from DFO-driven processes and to

revisit and more clearly define an aquaculture advisory process among BC Nations. While the AMAC/IMAP process has the potential to provide opportunities for First Nations to influence the development of policies and priorities, it also has limitations that will affect First Nations participation and influence in decision-making.

These and other matters between First Nations and DFO could be addressed by recognizing First Nations' shared jurisdiction over fish, fisheries and fish habitat. It should therefore be clearly understood that First Nations participate in these various DFO processes out of practical necessity. These processes do not accommodate or exercise First Nations jurisdiction over fisheries, but should be seen for what they are: a way for Nations to engage with Canada while Canada continues to assume responsibility for fisheries management and exercise its constitutional responsibility until the broader and more complex questions of First Nations jurisdiction and co-management arrangements can be answered.

Considerations for Fisheries-Related Negotiations

Asserting the Right to Govern

First Nations maintain that because fishing rights are established under common law, so too is jurisdiction over First Nations fisheries. As with wildlife management (Section 3.32 — Wildlife) generally and the regulation of the Aboriginal right to hunt, it is logical to assume that if the individual or collective Aboriginal right to fish exists at law, then the concomitant right of the Nation to regulate that right must also exist as an aspect of its inherent right of self-government. While this is an area of the law where governance rights continue to evolve and are not yet settled, most First Nations are proceeding in practice on the basis of this assumption. Certainly, all of the comprehensive governance arrangements under the BC treaty process recognize a role for First Nations governments in making laws in this subject area, to a degree, and set out the right of the Nation to regulate its fishers and fisheries and to participate in the overall management of the resource with Canada. However, until an agreement is reached with the Crown in a treaty arrangement or through a court decision affirming First Nations rights to governance in this area, there is no certainty for those involved in managing fisheries.

To demonstrate in practice what that role should be, First Nations are increasingly exercising authority and jurisdiction (whether recognized by the Crown or not) over fish, fisheries and fish habitat, both on reserves and within their broader ancestral lands and waters. Given the migratory nature of many fish species, First Nations jurisdiction over fish, fisheries and fish habitat also includes an obligation of individual Nations to work with other Nations. Fish, fisheries and fish habitat is an area where asserting and exercising rights through First Nations law-making can be very useful in advancing the resolution of some complicated jurisdictional questions. This is because where fishing rights have been recognized, there is a strong argument that First Nations have the responsibility and obligation to control who can fish and, where necessary, to enforce the collective right of First Nations against individual fishers regardless of what Canada or British Columbia might think or do. Some Nations acknowledge that enforcing rules against their own people can be challenging, just as working toward collaborative management with neighbouring Nations that have rights to the same fisheries can be challenging. However, First Nations are making efforts in this regard — in some cases outside a modern treaty, where this jurisdiction has not been formally recognized by Canada or British Columbia. Where Nations exercise such jurisdiction under treaty, they make it clear that passing laws without enforcing them diminishes the credibility of the laws and ultimately their governments.

The Need for Conservation and Sustainability

Of course, the main reason to regulate fisheries access is to protect the resource itself and ensure sustainability. All BC First Nations desire to rebuild local stocks and participate in the domestic and,

in many cases, small-scale sale or barter of fish or the larger commercial use of fisheries resources. A major interest for First Nations, therefore, must be the protection, restoration and enhancement of fish habitat that is the source of various species of fish, particularly salmon, within their traditional territories. One of the best and most recent examples of success in rebuilding a fishery is with Okanagan Salmon.

First Nations are looking to ensure the sustainability of the fisheries resources, and to ensure that they will be there for future generations to harvest. All governments that claim or have jurisdiction over fisheries resources have an obligation to accommodate the broader interests of sustainability. They must consider conservation targets and rules in management regimes that sustain specific fish stocks of interest to First Nations and, only then, after ensuring priority access, consider the competing interests to harvest the same resource.

The need for First Nations to remain strong and vigilant with respect to conservation and sustainability is evidenced by a recent and a worrying trend, as DFO priorities seem to be shifting away from conservation and protection. The DFO focus seems to be more on contributions to Canada's broader economy and changing policies to make it easier for proponents in other industries (e.g., mining, oil and gas, and other developments) to be approved for projects that may have detrimental effects on fisheries populations and habitats, and consequently not only on section 35.1 fisheries but all fisheries.

Rebuilding the Okanagan Salmon Fishery

Over the last decade, the Okanagan Nation Alliance has worked with governments, utilities and other agencies on both sides of the international boundary to restore the Okanagan salmon fishery. In particular the alliance has worked to restore the passage for salmon up the Columbia River which ultimately meets Okanagan Lake.

Beginning in 2010, salmon stocks had returned to a level that made possible the opening of recreational fisheries in areas, such as Osoyoos Lake.

The k] cpə'lk' stim' Salmon Hatchery, part of the Okanagan Nation Alliance (ONA) sockeye reintroduction program, had its grand opening on September 20, 2014. The hatchery facility is part of a longer-term plan to restore the range of Sockeye in the upper Okanagan watershed, Okanagan Lake, and Skaha Lake systems.

Cultural Survival

Lawmakers (including First Nations) must accommodate First Nations citizens' exercise of their Aboriginal right to fish for FSC as well as for commercial e purposes, along with other policy considerations. First Nations, based on legal reviews, are also pushing the boundaries of conventional thought by indicating that societal use (in the FSC context) has not been fully defined and may have some economic attributes. Nations on the Pacific coast are worried that changes in the commercial fishing industry are reducing coastal Nations' ability to access food from the sea, which may limit their ability to pass on the cultural aspects of fish and fisheries to the next generation. In the Interior, there are similar concerns with respect to the passing on of traditional knowledge around dip-net fisheries, fish processing (Fraser canyon dry-racks), river currents, and so on.

The work of the FNFC on the values and benefits of FSC fisheries indicates that diminished access or diminished participation in the fishery could have significant consequences for First Nations culture, practices and traditions. It would result in fewer people learning how to fish, fewer people receiving ATK or other forms of knowledge from elders, and fewer opportunities for social interactions if people do not participate in communal activities such as canning salmon, processing eulachon grease and so on — all activities that form part of community life in any First Nation where fish and fishing is a part of the local domestic economy. Fish species and aquatic mammals also feature prominently in First Nations art, language and oral history as social markers of how important these species are to Aboriginal peoples in their daily lives.

A Problem of Mandates

There have been and still are continuing attempts to establish negotiating tables to discuss the bigger questions of reconciling First Nations rights and issues with respect to fish, fisheries and fish habitat and to move federal mandates. These have had varying degrees of success. Discussions between First Nations governments and other government bodies are challenging, because competing economic users of fisheries resources make it difficult to meet the requirement to accommodate the Aboriginal rights in fish. It has also proven difficult to achieve major breakthroughs and resolve larger jurisdictional questions in comprehensive governance arrangements.

Fish, fisheries and fish habitat issues have been very challenging in modern BC treaty negotiations. While there are a handful of final agreements and agreements-in-principle, DFO officials have been unable (or perhaps unwilling) to secure mandates to conclude other agreements with particular Nations in the treaty process. Governments currently refuse to seriously negotiate fish and fisheries through the BC treaty process, despite some earlier progress in finalizing treaty arrangements. DFO constantly advises that it does not have the mandate to address Aboriginal rights and refers this to the federal treaty negotiations office or to Aboriginal Affairs and Northern Development Canada (AANDC). In the meantime, it continues to plan and manage fish in the absence of meaningful consideration of Aboriginal rights, despite being the lead for fish and fisheries at treaty tables. Not surprisingly, frustrations arise, and not just among First Nations people at the table.

Some arrangements have been negotiated (and are summarized below) to assist in negotiating the fish chapters in modern treaties. However, this matter was also addressed as part of the Common Table initiative, involving many of the First Nations in treaty negotiations. They came together to develop common positions, options and opportunities for collective negotiations with Canada and British Columbia. Fish and fish habitat were identified by participating First Nations as one of the six "too hard" issues to be addressed by the Common Table. The submissions made during these proceedings are useful and are cited below. Unfortunately, there has been no comprehensive response to the issues raised at the Common Table from DFO or Canada. However, DFO has indicated that it might look at ways to involve First Nations in governance or shared decision-making through an aggregated First Nations approach, on the grounds that co-management is too complex when it involves so many individual First Nation governments with recognized jurisdiction.

Some Nations continue to express concern that part of the failure to reach agreement on jurisdiction over fisheries, whether under the treaty process or otherwise, has more to do with DFO wanting to have First Nations agree to restrict an undefined Aboriginal right to FSC to defined plans and quotas in agreements. In this way, DFO can accommodate other users that currently have lower priority than First Nations. To put it differently, once the rights to take FSC fish have been minimized, only then would DFO look at true co-management, and preferably through an aggregation of First Nations governments on a regional or watershed basis.

Fisheries Issues and Lands Reserved for Indians

Finally, while this discussion has focused on management and jurisdictional questions off-reserve and within ancestral lands, it is important not to forget the fact that almost every community has reserves that are primarily intended to ensure that First Nations have continued access to their sustaining fisheries. Many of these reserves, which are often very small, were designated for fisheries use by the original Reserve Commissioners.

For these lands, the *Indian Act* has provisions for a band to make bylaws over fish and fish habitat, and some communities have been able to govern and manage their fishery to some degree on-reserve by exercising this bylaw-making power. However, AANDC may be reluctant to allow such bylaws, specifically where there are issues of ownership of the bed of the river, or where the water body is or was wholly or partly outside the boundaries in the original reserve survey. Where First Nations do have validly enacted fish bylaws, these displace federal and provincial laws and regulations in this area within the jurisdictional boundary of the reserves.

***INDIAN ACT* GOVERNANCE**

Section 81(1)(o) of the *Indian Act* provides for a First Nation to make bylaws with respect to "the preservation, protection and management of fur bearing animals, fish and other game on reserve." This is one area where a First Nation may have some difficulty in receiving ministerial approval, as

there are 28 communities that have at least one bylaw that can protect fish and fisheries, while a further 43 bylaws (sometimes more than one per community) have been disallowed. Further, all but one of the approved bylaws (Cowichan First Nation) fall under "wildlife" as opposed to falling directly under fish or fisheries. The rest were passed as wildlife bylaws, although a number specifically refer to fish, fishing or the protection of fish.

SECTORAL GOVERNANCE INITIATIVES

There are currently no broad sectoral governance initiatives dealing with jurisdiction over fish, fisheries and fisheries habitat. However, questions of jurisdiction are, of course, raised by Nations and in the work of the FNFC.

FNFC has also undertaken a province-wide review with First Nations of the transfer of jurisdiction for fish farms and shellfish tenures from British Columbia to Canada, which occurred in December 2010. BC First Nations have taken a strong position, insisting that a First Nation must have an identified role in the permitting process for all stationary commercial fisheries enterprises located in its territory and an ongoing role in environmental monitoring as these enterprises operate.

As discussed above, DFO has also expressed an interest in regional approaches to jurisdiction over fish and fish habitat, and a major initiative, the Fraser Salmon Road Map Process, is underway between DFO and the First Nations who use Fraser salmon. The hope is that this could eventually result in a more formal collaborative management agreement, with some aspects of management undertaken jointly by First Nations and DFO.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

Treaty arrangements address access to fisheries and allocations for a Nation, and provide law-making authority to the Nations over the licensing of their fishery, designating fishers and trading, bartering and, in the case of Nisga'a, selling fish. Provisions are also made for joint Crown–First Nation committees to participate in the management and administration of the fisheries, along with the right of the Nation to be involved in any other processes that may be established to manage fisheries on a regional or watershed basis. Subject to the terms of the treaty, DFO remains responsible for the overall management and administration of fish, fisheries and fish habitat, and Canada's overarching jurisdiction is confirmed.

Given the way the treaties have been constructed, jurisdiction can be described as essentially following the ownership of the resources (the "proprietary interest" in the fish). While jurisdiction is basically proprietary, the Nation's influence then expands through the further definition of its relationships with the Crown. Thus, fisheries is one of the subject areas for which the parties to the treaties have ended up creating joint management bodies, in this case the Joint Fisheries Committee. When looking at the BC treaties, it is therefore important to consider what goes into developing fishing plans and managing the resource, and then to look at the law-making authorities of the Nations that would follow with respect to those plans.

Sechelt and Westbank are different, as their agreements are restricted to on-reserve and do not address access to the resource and allocations based on the Aboriginal right in fish. Sechelt has jurisdiction over fish but has not enacted laws under this jurisdiction. The *Westbank First Nation Self-Government Agreement* does not provide any new jurisdiction over fish, but keeps the bylaw-making powers of the *Indian Act*. This is one of only a handful of areas in which Westbank law-making authority remains under the *Indian Act* (the others are health and property taxation).

Table — Comprehensive Governance Arrangements

	FISH AND FISH HABITAT	LICENSING REQUIREMENTS	JOINT MANAGEMENT BODIES
Sechelt	Legislative powers of council to make laws on preservation, protection and management of fish on Sechelt Lands as authorized by the Sechelt Constitution. (s. 14(1)(k)) The Sechelt Constitution sets out that the Band Council may provide for the Band to enter into contracts with other jurisdictions for joint management in relation to the preservation, protection and management of fish on Sechelt lands. (Sechelt Constitution, Part III, Division (1), s. 8)	No provisions.	No provisions.
Westbank	Westbank First Nation does not have additional jurisdiction over fish and fish habitat, but retains its bylaw making powers under the *Indian Act*. (Part XII, s. 135; and Part XXXI, s. 274)	No provisions.	No provisions.
Nisga'a	Minister of DFO is responsible for the management of fisheries and fish habitat. (Ch. 8, s. 68)	Nisga'a Lisims Government has the ability to make laws to establish and administer licensing requirements, for the harvest of fish or aquatic plants. (Ch. 8, s. 70(a))	On the effective date, the Parties will establish the Joint Fisheries Management Committee to facilitate cooperative planning and conduct of Nisga'a fisheries and enhancement initiatives in the Nass Area. (Ch. 8, s. 77)
Tsawwassen	Minister of DFO is responsible for the management of fisheries and fish habitat. (Ch. 9, s. 14)	No provisions.	The Parties established a Joint Fisheries Committee to facilitate cooperative assessment, planning, and management of the exercise of the Tsawwassen fishing right; enhancement initiatives and stewardship activities by Tsawwassen; monitoring and enforcement activities in relation to TFN fisheries; and other matters as the Parties may agree. (Ch. 9, s. 68)
Maa-nulth	The Minister of DFO retains authority for managing and conserving fish, aquatic plants and fish habitat. (s. 10.1.8)	No provisions.	The Parties established a Joint Fisheries Committee to facilitate cooperative planning, and management of the exercise of the Maa-nulth First Nations fishing right; stock assessment, enhancement initiatives and stewardship activities and fish habitat; monitoring and enforcement activities in relation to Maa-nulth fisheries; environmental protection and ocean management activities, and other matters as the Parties may agree. (s. 10.4.1)
Yale	The Minister retains authority for managing and conserving fish, aquatic plants, and fish habitat. (s. 8.1.16) The Joint Fisheries Committee will have the ability to make recommendations to the Parties concerning: the protection of fish, fish habitat and aquatic plants in the Domestic Fishing Area. (s. 8.11.10(c))	Yale First Nation Government may make laws with respect to the documentation of individuals and vessels who are designated to harvest fish and aquatic plants under the Yale First Nation Right to harvest fish. (s. 8.3.3(a))	The Parties will establish a Joint Fisheries Committee for the cooperative planning of: the exercise of the Yale First Nation Right to harvest fish; activities of the Yale First Nation related to fisheries monitoring and enforcement; and other matters as agreed to by the Parties. (s. 8.11.1)
Tla'amin	The Minister retains the authority for managing and conserving fish, aquatic plants and fish habitat. (Ch. 9, s. 5)	Except where not required under the Tla'amin Fisheries Operational Guidelines, any vessel used to harvest fish and aquatic plants under the Tla'amin Fishing Right, will be a vessel that has been designated by the Tla'amin Nation. This provision does not alter the application of federal or provincial law with respect to foreign fishing vessels in Canadian waters. (Ch. 9, s. 21 and 22)	The Parties will establish a Joint Fisheries Committee for the cooperative assessment, planning and management of: the exercise of the Tla'amin Nation's fisheries under the Tla'amin Fishing Right; enhancement initiatives and stewardship activities; monitoring and enforcement activities; Tla'amin's activities related to environmental protection and ocean management; and other matters as agreed to by the Parties. (Ch. 9, s. 85)

Table — Comprehensive Governance Arrangements... *continued*

	OTHER FISHERIES MANAGEMENT BODIES	COMPLIANCE WITH FISHING PLANS	DESIGNATION OF FISHERS
Sechelt	No provisions.	No provisions.	No provisions.
Westbank	No provisions.	No provisions.	No provisions.
Nisga'a	If Canada or BC proposes to establish fisheries management advisory bodies for areas that include any part of the Nass Area, Canada or BC will consult with the Nisga'a Nation in developing those bodies and, if appropriate, will provide for the participation of the Nisga'a Nation in those bodies. (Ch. 8, s. 83)	Nisga'a Lisims Government may make laws that require Nisga'a citizens and the authorized agents, contractors, and licensees of Nisga'a Lisims Government to comply with Nisga'a annual fishing plans. (Ch. 8, s. 74(b))	Nisga'a Lisims Government will make laws to require the designation and documentation of persons who harvest fish or aquatic plants under this Agreement or the Harvest Agreement. (Ch. 8, s. 70(b))
Tsawwassen	Where a regional fisheries committee is proposed or established for Aboriginal fisheries in an area that includes part of the Tsawwassen Fishing Area or Tsawwassen Intertidal Bivalve Fishing Area and that committee has functions and activities similar to those of the Joint Fisheries Committee, the Parties will determine which functions or activities of the Joint Fisheries Committee can be addressed more effectively by a regional fisheries committee, and will discuss the mechanism for participation by Tsawwassen First Nation in this committee. (Ch. 9, s. 81) Where Canada or BC proposes to establish a public fisheries management advisory process for an area of the Fraser River watershed that includes any part of the Tsawwassen Fishing Area or Tsawwassen Intertidal Bivalve Fishing Area, Canada or BC will consult with Tsawwassen First Nation in developing that public fisheries management advisory process and, if appropriate, will provide for participation by Tsawwassen First Nation. (Ch. 9, s. 89)	No provisions.	Tsawwassen Government may make laws with respect to the designation of individuals and vessels to harvest fish and aquatic plants under the Tsawwassen Fishing Right. (Ch. 9, s. 51(a))
Maa-nulth	Where a regional fisheries committee is proposed or established for Aboriginal fisheries in an area that includes all or part of the Domestic Fishing Area and that committee has functions and activities similar to the Joint Fisheries Committee, Canada and the Maa-nulth First Nations will determine which functions and activities of the Joint Fisheries Committee can be more effectively undertaken by a regional fisheries committee and discuss the mechanism for the Maa-nulth First Nations' participation in the regional fisheries committee. (s. 10.4.17)	No provisions.	Each Maa-nulth First Nation Government may make laws for the designation of individuals or vessels used to harvest under the Maa-nulth First Nation fishing right of that Maa-nulth First Nation. (s. 10.1.39(b))
Yale	Yale First Nation will participate in any regional management advisory process for Aboriginal fisheries established by the Minister for the purpose of exchanging information between the Minister and Aboriginal groups relevant to the management of fish and aquatic plants within an area that includes all or part of the Domestic Fishing Area. (s. 8.2.1)	Yale First Nation fishing plans will set out the preferences of Yale First Nation with respect to notification, catch monitoring, identification, reporting and other aspects of monitoring of the harvest and Yale First Nation enforcement activities. (s. 8.14.3)	Yale First Nation Government may make laws for the designation of individuals and vessels who may harvest fish and aquatic plants under the Yale First Nation Right to Harvest Fish. (s. 8.3.1(b))
Tla'amin	Where a regional management advisory process for Aboriginal fisheries exists or is established by Canada or BC for the coordination of fisheries for an area that includes all or a portion of the Tla'amin Fishing Area, the Tla'amin Nation will participate in that process and where a function or activity of the Joint Fisheries Committee will be carried out by a regional management advisory process for Aboriginal fisheries the Parties will discuss the operating procedures for participation by the Tla'amin Nation in the regional process. (Ch. 9, s. 102 and 109)	A Tla'amin Annual Fishing Plan will include, as appropriate the Tla'amin Nation's enforcement activities. (Ch. 9, s. 83(g))	The Tla'amin Nation may make laws with respect to the designation of individuals and vessels to harvest fish and aquatic plants under the Tla'amin Fishing Right or under fishing licences that are issued to the Tla'amin Nation but are not Tla'amin Harvest Documents. (Ch. 9, s. 66(a) and 68(a))

Table — Comprehensive Governance Arrangements... *continued*

	TRADE AND BARTER	SALE OF FISH OR AQUATIC PLANTS	CONFLICT OF LAWS
Sechelt	No provisions.	No provisions.	N/A
Westbank	No provisions.	No provisions.	Federal Law prevails (Part V, s. 37)
Nisga'a	Nisga'a Lisims Government will make laws to require that any fish transported outside Nisga'a Lands for the purpose of trade or barter be identified as fish for trade or barter. (Ch. 8, s. 74 a)	Nisga'a Lisims Government may make laws with respect to sale, in accordance with the Final Agreement, of fish or aquatic plants that are harvested under the Final Agreement or the Harvest Agreement. (Ch. 8, s. 72)	Nisga'a law prevails with respect to licensing requirements, designation of fishers and trade and barter. (Ch. 8, s. 71) Federal or provincial laws prevail with respect to the sale of fish or aquatic plants. (Ch. 8, s. 73)
Tsawwassen	Tsawwassen Government may make laws respecting the trade and barter by Tsawwassen Members of fish and aquatic plants harvested under the Tsawwassen Fishing Right. (Ch. 9, s. 53(c))	No provisions.	Tsawwassen law prevails with respect to the designation of fishers and the distribution of fish and aquatic plants among Tsawwassen members. (Ch. 9, s. 52) Federal or provincial laws prevail with respect to the trade and barter of fish and aquatic plants. (Ch. 9, s. 54)
Maa-nulth	Each Maa-nulth First Nation Government may make laws for the Trade and barter of fish and aquatic plants harvested under the Maa-nulth First Nation fishing right of that Maa-nulth First Nation. (s. 10.1.41(c))	No provisions.	Maa-nulth First Nation law prevails with respect to the designation of fishers and the distribution of fish and aquatic plants among respective Maa-nulth First Nation members. (s. 10.1.40) Federal or provincial laws prevail with respect to the trade and barter of fish and aquatic plants. (s. 10.1.42)
Yale	Yale First Nation Government may make laws for the trade and barter of fish and aquatic plants harvested by Yale First Nation Members under the Yale First Nation Right to Harvest Fish. (s. 8.3.3(b))	No provisions.	Yale First Nation law prevails with respect to the designation of fishers and the distribution of fish and aquatic plants under the Yale First Nation Right to Harvest Fish. (s. 8.3.2) Federal or provincial laws prevail with respect to the trade and barter of fish and aquatic plants. (s. 8.3.4)
Tla'amin	Tla'amin Nation may make laws with respect to the trade and barter by Tla'amin Citizens of fish and aquatic plants harvested under the Tla'amin Fishing Right. (Ch. 9, s. 68(c))	No provisions.	Tla'amin Nation law prevails with respect to the designation of fishers and the distribution of fish and aquatic plants under the Tla'amin Fishing Right. (Ch. 9, s. 67) Federal or provincial laws prevail with respect to the designation and documentation of individuals and vessels to harvest fish and aquatic plants under licenses that are not Tla'amin Harvest Documents, and with respect to the trade and barter of fish and aquatic plants. (Ch. 9, s. 69)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(o) Protection and management of fur-bearing animals, fish and other game on reserve			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Ahousaht	1985-1	WILDLIFE	Bylaw Concerning Fishing
Bridge River	1-1980	WILDLIFE	Bylaw Respecting Fishing
Campbell River	1985-1	WILDLIFE	Bylaw Regarding Fish.
Cowichan	1	WILDLIFE	To Provide For The Preservation, Protection And Management Of Fish In The Cowichan Res
Cowichan	2-1983	WILDLIFE	Bylaw Respecting Fishing
Cowichan	2000-1	FISHING AND HUNTING	Bylaw Respecting Fishing
Ditidaht		WILDLIFE	Bylaw Concerning Band Fisheries Conservation Officers
Gitanmaax		WILDLIFE	Bylaw For The Preservation, Protection And Management Of Fish
Gitwangak		WILDLIFE	Bylaw For The Preservation, Management, Conservation And Use Of Fish On The Reserve
Huu-ay-aht	0	WILDLIFE	Fishing Bylaw And Band Fisheries Conservation Officers
Heiltsuk	18-1987	WILDLIFE	Bylaw Respecting Fisheries
Hesquiaht		WILDLIFE	Bylaw Respecting Fishing
Homalco	1984-1	WILDLIFE	A Fish And Fish Protection Bylaw
Kispiox		WILDLIFE	Bylaw Regarding Preservation, Protection And Management Of Fish On The Reserve
Kispiox	10	WILDLIFE	To Provide For The Preservation, Protection And Management Of Fish On Reserve
Kitselas		WILDLIFE	Bylaw Respecting Fishing
Moricetown		WILDLIFE	Bylaw For The Preservation, Management Conservation And Use Of Fish
Moricetown	1	WILDLIFE	To Provide For The Preservation, Protection And Management Of Fish And Game
Musqueam	3	WILDLIFE	Being A Bylaw For The Preservation, Protection And Management Of Fish In Designated Musqueam Indian Band Waters
Namgis First Nation	14	WILDLIFE	Being A Bylaw Concerning The Preservation And Management Of Fish
Nuxalk Nation	11	WILDLIFE	To Provide For Preservation, Protection And Management Of Fish And Game On The Bella Coola Reserve No. 1
Okanagan	2	WILDLIFE	To Provide For The Preservation, Protection And Management Of Fish And Game
Old Massett Village Council	4	WILDLIFE	Bylaw Respecting Protected And Sensitive Species
Qualicum First Nation	1985-4	WILDLIFE	Bylaw Concerning Fishing
Qualicum First Nation	3-1980	WILDLIFE	Bylaw For The Preservation, Protection And Management Of Fish On The Reserve
Skeetchestn	1985-1	WILDLIFE	Bylaw Respecting Fishing
Squamish	16	WILDLIFE	To Provide For Preservation, Protection, And Management Of Fish On The Reserve
Stellat'en First Nation	1	WILDLIFE	To Provide For Preservation, Protection And Management Of Furbearing Animals, Fish And Game
Tahltan	1-79	WILDLIFE	Bylaw For The Preservation, Protection And Management Of Fish
Tla-o-qui-aht First Nations		WILDLIFE	Bylaw Respecting Fishing
Tseshaht		WILDLIFE	Bylaw Concerning Band Fisheries Conservation Officers
Upper Nicola	80-1	WILDLIFE	Bylaw For The Preservation - Protection And Management Of Fish
Xaxli'p	1-1980	WILDLIFE	Bylaw For The Preservation, Protection, And Management Of Fish On The Reserve

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Huu-ay-aht First Nations		Resource Harvesting Act
Huu-ay-aht First Nations		Fisheries Regulation
Ka:'yu:'k't'h'/Che:k:tles7et'h' First Nations	14/2011	Resources Harvesting Act
Nisga'a Lisims	2000/16	Nisga'a Fisheries And Wildlife Act
Sechelt Indian Band	1993-03	Fishery Management
Toquaht Nation	TNR 14/2011	Resources Harvesting Act
Toquaht Nation	TNR 5/2011	Fisheries Regulation
Toquaht Nation		Domestic Fish Distribution Policy
Tsawwassen First Nation		Fisheries Operational Guidelines
Tsawwassen First Nation		Fisheries, Wildlife, Migratory Birds And Renewable Resources Act
Tsawwassen First Nation		Fisheries Regulation
Uchucklesaht Tribe	UTS 14/2011	Resources Harvesting Act
Uchucklesaht Tribe	UTR 5/2011	Fisheries Regulation
Ucluelet First Nations	YFNS 14/2011	Resources Harvesting Act
Ucluelet First Nations	YFNR 5/2011	Fisheries Regulation

RESOURCES

First Nations

Coastal First Nations
Suite 1660 – 409 Granville Street
Vancouver, BC V6C 1T2
Phone: 604-696-9889
Fax: 604-696-9887
Email: www.coastalfirstnations.ca/contact
www.coastalfirstnations.ca

Coastal Guardian Watchmen Network
Suite 1051 – 409 Granville Street
Vancouver, BC V6C 1T2
Email: info@coastalguardianwatchmen.ca
www.coastalguardianwatchmen.ca

First Nations Fisheries Council
202 – 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 778-279-2900
Email: info@fnfisheriescouncil.ca
www.fnfisheriescouncil.ca

- First Nations Leadership Council. *The British Columbia First Nations Fisheries Action Plan*, (May 2007). www.fns.bc.ca/pdf/FNLC_FisheriesActionPlan.pdf

Fraser River Aboriginal Fisheries Secretariat
c/o The Nicola Tribal Association
PO Box 188
Merritt, BC V1K 1B8
Phone: 250-378-4235
Fax: 250-378-9119
Email: frafs15@gmail.ca
www.frafs.ca

Haida Nation Fisheries
Old Massett — Phone: 250-626-3302
Skidegate — Phone: 250-559-8945
www.haidanation.ca

- Haida Fisheries Programs

Musqueam Nation
6735 Salish Drive
Vancouver, BC V6N 4C4
Phone: 604-263-3261
Toll-free: 1-866-282-3261
Fax: 604-263-4212 or 604-269-3369
Email: webinfo@musqueam.bc.ca
www.musqueam.bc.ca

Native Brotherhood of British Columbia (NBBC)
110 – 100 Park Royal South,
West Vancouver, BC V7T 1A2
Phone: 604-913-2997
Email: nativebrotherhood.ca/contact-us/
www.nativebrotherhood.ca

Native Fishing Association
Suite 110 – 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-913-2997
Fax: 604-913-2995
Email: reception@shoal.ca
www.shoal.ca

Prince Rupert Office
Phone: 250-624-3888
Fax: 250-624-9729
Email: nfa@citytel.net

Skeena Fisheries Commission
3135 Barnes Crescent
Kispiox, BC V0J 1Y4
Phone: 250-842-2213 (ext. 26)
Fax: 250-842-2253
www.skeenafisheries.ca

Uu-a-thluk Fisheries (Nuu-chah-nulth Tribal Council)
PO Box 1383
Port Alberni, BC V9Y 7M2
Phone: 250-724-5757
Fax: 250-724-2172

Email: info@uuathluk.ca
www.uuathluk.ca

- Appeal in Fishing Rights Case

Provincial

Pacific Salmon Commission
600 – 1155 Robson Street
Vancouver, BC V6E 1B5
Phone: 604-684-8081
Fax: 604-666-8707
Email: info@psc.org
www.psc.org

- *Treaty Between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon*, 17 March 1985. www.psc.org/about_treaty.htm

Federal

Aboriginal Affairs and
Northern Development Canada
Terrasses de la Chaudière
10 Wellington, North Tower
Ottawa, ON K1A 0H4
Toll-free: 1-800-567-9604
Fax: 1-866-817-3977
TTY: 1-866-553-0554
Email: InfoPubs@aandc-aadnc.gc.ca

- *Conveyance of Land to Hudson's Bay Company by Indian Tribes* ("Douglas Treaties"), found in: Papers Connect with the Indian Land Question, 1850-1875, Victoria, R. Wolfenden, 1875. www.aadnc-aandc.gc.ca/eng/1100100029052/1100100029053

Cohen Commission
Inquiries directed to:
Lana Gauthier, A/Chief, Mail, Messenger and Conference Services
Privy Council Office
Ottawa, ON K1A 0A3
Phone: 613-952-7573
Email: lana.gauthier@pco-bcp.gc.ca
epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/cohen/cohen_commission/LOCALHOS/EN/INDEX.HTM

Fisheries and Oceans Canada (DFO) —
Pacific Region Headquarters
Suite 200 – 401 Burrard Street
Vancouver, BC V6C 3S4
Phone: 604-666-0384
Fax: 604-666-1847
Email: info@dfo-mpo.gc.ca
www.dfo-mpo.gc.ca

SELECT LEGISLATION

Federal

- *Fisheries Act* (R.S.C. 1985, c. F-14)
  - *Aboriginal Communal Fishing Licences Regulations* (SOR/93-332)
- *Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c.19).

COURT DECISIONS

- *Supreme Court of Canada In re British Columbia Fisheries* [1913] S.C.R. 493
- *United States v. Washington*, 384 F. Supp. 312 [W.D. Wash. 1974]
- *R. v. Sparrow*, [1990] 1 S.C.R. 1075
- *R. v. Gladstone*, [1996] 2 S.C.R. 723
- *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010)
- *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220
- *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, (2013) BCCA 300
- *Tsilhqot'in Nation v. British Columbia,* (2014) SCC 44

PART 1 /// SECTION 3.13

Forests

3.13

FORESTS

3.13

FORESTS

BACKGROUND

First Nations have relied on forest resources to support traditional and cultural activities throughout history. Many established Aboriginal rights are associated with having access to or protecting the forested lands within a Nation's ancestral territories. Indeed, the *Tsilhqot'in* case originated in the Xeni Gwet'in people challenging a 1983 Carrier Lumber Ltd. forestry licence within their caretaker area as part of the Tsilhqot'in territories. While use of the forests to support traditional economies has been an integral part of First Nations societies since ancient times, and still is today, in the modern era some First Nations have become engaged in industrial logging and other related activities. In fact, to some degree, there has been an Aboriginal component to the forest sector workforce since contact. And today many Nations actively own and run commercial logging operations through the economic development arms of their Nations. It is fair to say that the contemporary uses of the forested lands by First Nations are varied.

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.

Article 26: UN Declaration

Subject to Aboriginal title, forested lands in BC (representing about two-thirds of the province, or some 60 million hectares) are largely on Crown lands held by the Province and managed under provincial laws. On private lands, forests are the property of the title (fee simple) holder. A small percentage of the lands in BC are federally owned lands, and "Lands reserved for Indians" are found in this category. Lands and resources are managed differently on federal reserve land than on provincial Crown lands, which in turn are managed differently from privately held lands. Current proprietary and governance models for the most part continue to restrict First Nations' access to and governance of forests within their ancestral land as a function of unresolved issues respecting Aboriginal title and rights. Consequently, while looking to reconcile with respect to Aboriginal title and rights, First Nations are often restricted to accessing forest resources based on other governments' governance models. However, many First Nations have been "successful" in achieving increased access to forest land in the past 30 years, in part because of outstanding Aboriginal title and rights issues.

This subject matter is linked to land management, land and marine use planning, water, environment, emergency preparedness, heritage and culture, and wildlife. There are also similarities with approaches to and issues for other renewable and non-renewable natural resource areas, such as minerals and precious metals; oil and gas; and fish, fisheries and fish habitat — particularly with regard to the distinction between "ownership" and "jurisdiction" as aspects of Aboriginal title lands.

BC First Nations Forestry Council

First Nations in BC have established the First Nations Forestry Council under the auspices of the BC Assembly of First Nations, the First Nations Summit and the Union of BC Indian Chiefs to address forestry issues. The council is politically accountable to the First Nations of BC. Similar to the Energy and Mining Council, this body's focus is primarily off-reserve, but by implication any discussion of jurisdiction and ownership of forests would include considerations for on-reserve governance and land tenures. The council's stated mission is to:

- implement processes to restore the land and ecosystem;
- advocate on forestry matters on behalf of First Nations communities;
- support First Nations in managing the mountain pine beetle epidemic through implementation of the BC First Nations Mountain Pine Beetle Action Plan, including addressing development and capacity issues at the community level;

- work with governments and others to ensure that First Nations'needs, values and principles are factored into forestry-related policy and program development, including monitoring, evaluating, influencing and providing policy advice and research;
- promote forestry-related opportunities for First Nations;
- provide effective communications to First Nations, governments and the general public with respect to forestry-related matters and the mountain pine beetle infestation;
- work with partner organizations, such as the First Nations Leadership Council and others, to increase efficiencies and benefits to First Nations communities; and
- advocate on forestry matters on behalf of First Nations communities.

Constitutional Division of Property and Powers

Who owns the forests and rights to timber and who governs these rights are two separate but related questions that need to be answered when considering First Nations governance over forested lands. Property rights in Canada, such as over land (which in turn can include renewable and non-renewable resources such as timber), may belong to the Crown, Aboriginal peoples, corporations and individuals. Who owns the property and which government is actually responsible for legislating with respect to that property are not one and the same. And governments can own property, but they may or may not also have jurisdiction over that property.

The Canada's Constitution clearly divides the property rights of the Crown (mainly in s. 108 and 109 of the *Constitution Act, 1867*) and, somewhat less clearly, the legislative powers of the Crown (s. 91 and s. 92). Under section 109, all lands, including forested lands, are given to the provinces. However, this division of property rights is subject to all pre-existing property rights, including Aboriginal title to land. Because of the exclusive proprietary nature of Aboriginal title where Aboriginal title exists (e.g., as now recognized by the court for the Tsilhqot'in people), the Province's underlying title to Aboriginal title land does not include the beneficial proprietary interest in the land. This means that the forests belong to, and are "owned" by, the Aboriginal title holder.

With respect to jurisdiction over forests, the provinces have authority under section 92(13), "Property and Civil Rights in the Province" of the *Constitution Act, 1867*. In addition, section 92A, which was added by the *Constitution Act, 1982*, clarified that the provinces have jurisdiction over non-renewable natural resources, forestry resources, and electrical energy sites and facilities within their borders.

While the distinction between property rights and jurisdiction over property is well established within Canadian law, it is not so clear when one considers the status of First Nation lands (whether ancestral lands, Aboriginal title lands, treaty settlement lands or reserve lands). With respect to Aboriginal title lands, the property aspect of Aboriginal title is clear. The Supreme Court has said that Aboriginal title is "a right to the land itself" (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 140) and encompasses the right to exclusive use and benefit of those lands.

However, as discussed elsewhere in this report, Aboriginal title also has a jurisdictional aspect. This is because the decision-making authority that Aboriginal peoples have over Aboriginal title lands is governmental in nature. This right to self-government is inherent: it is not derived from, and does not depend on, Canada's Constitution. This is not the case for property held by the other two levels of government, given the constitutional division of powers and the way property has been distributed. That said, and while federal and provincial authority over Aboriginal title land is not proprietary, both the federal and provincial governments do have jurisdictional authority over Aboriginal title lands, although these powers are significantly constrained by both the proprietary and the jurisdictional aspects of Aboriginal title. Governments cannot legislate in such a way as to unjustifiably impair or infringe upon the property interests of the Aboriginal title holder or that title holder's inherent decision-making power that is incidental to the title. The application of each government's laws and their relationship to each other will have to be sorted out in order to determine how Aboriginal title lands will be addressed. With respect to forests, we already have a good idea how this will unfold. In the *Tsilhqot'in* case, because of its origins in

challenging a provincial forestry licence, the court actually drew from provincial forestry-related legislation for examples of which types of provincial legislation continued to apply on Tsilhqot'in Aboriginal title lands and which did not.

The court said that, given title has been established, the timber on it no longer falls within the definition of "Crown timber" and therefore the provincial *Forest Act* no longer applies. The court went on to say, however, that it remains open to the provincial legislature to amend the *Forest Act* to cover lands over which Aboriginal title has been established, provided Province observes applicable constitutional restraints. In this regard, the court confirmed that, under section 35 of the *Constitution Act, 1982*, an Aboriginal right will be infringed by legislation if "the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right" (*R. v. Sparrow*, [1990] 1 S.C.R. 1075). In this way, the court clarified that "general regulatory legislation," such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will usually pass this test and therefore no infringement will result. On the other hand, said the court, the issuance of a timber licence on Aboriginal title land, which would be like a direct transfer of Aboriginal property rights to a third party "will plainly be a meaningful diminution in the Aboriginal group's ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent."

The strict test for how a government may lawfully infringe and limit an Aboriginal right was set out in *Sparrow* (addressing the application of federal fishing regulations to a First Nations fisher, Ronald Sparrow from Musqueam — see Section 3.12 — Fish, Fisheries and Fish Habitat). In *Haida Nation v. British Columbia (Minister of Forests)*, ([2004] 3 S.C.R. 511) (*"Haida"*), the Supreme Court of Canada established that before granting third-party interests or exploiting resources, the government has a duty to consult and accommodate First Nations' interests in lands where Aboriginal title is claimed, even before the First Nation has proved Aboriginal title. The court, as is the legal tradition, again set out a test for when and how this consultation and accommodation needs to occur. These decisions were reiterated and built upon in subsequent cases, including by the Supreme Court in *Taku River Tlingit First Nations v. British Columbia*, (2004 S.C.C. 74) and in *Gitanyow First Nation v. British Columbia (Minister of Forests)*, (2004 B.C.S.C. 1734). As discussed above, the requirements for consultation and accommodation and the test the Crown must meet for infringement were recently considered in Tsilhqot'in with respect to the most important of Aboriginal rights — namely, title to the land (both the property right and the governance right).

With respect to forest resources, whether the Province would ever be able to justify such an infringement is, of course, the question. Were it to occur on private lands, it would amount to an expropriation of private property rights. In the case of Aboriginal peoples, it would be an "expropriation plus" given the special nature of Aboriginal title and the fiduciary obligations owed by the Crown to Aboriginal peoples. As a consequence it is unthinkable it would ever be attempted or that it could not be successfully challenged.

Notwithstanding the implications of Aboriginal title underlying "Lands reserved for Indians," several ongoing and practical considerations about the ownership of, and jurisdiction over, forests on-reserve need to be taken into account. These considerations are discussed below.

Forest Management On-Reserve

For the most part, existing reserve lands in BC have limited or few forest resources, primarily because of the small size of these reserves. Although there are some exceptions, reserve lands in BC are barely large enough to support communities of people and, in the case of sustainable forest management, provide only very minor or infrequent opportunities for traditional activities (e.g., hunting, trapping, gathering) or for commercial and economic development opportunities. Even in areas

where there are sufficient forests, past logging may have taken place under federal control without consideration for sustainability or regrowth or for the views of the community and its vision.

The limited forestry resources on reserve lands are governed in accordance with the antiquated *Indian Timber Regulations* (C.R.C., c. 961) made under the *Indian Act*. These regulations, discussed below, are extremely paternalistic and require the "band" or an individual "Indian" to seek the permission of the Minister before on-reserve timber can be cut, moved or sold.

Over the past 30 years, events surrounding Clayoquot Sound have brought the issue of sustainable management of forest resources to the forefront. In 1984, the Tla-o-qui-aht and Ahousaht Nations declared Meares Island a Tribal Park in response to logging activities there. A year later, a court injunction was granted against logging on Meares Island pending a treaty settlement. Eventually, in 1993, opposition to logging operations in Clayoquot Sound led to widespread civil disobedience and blockading of logging operations by both First Nations and the general public. In reaction to this uprising, the BC government put together a special panel of scientists and First Nations representatives and tasked it with making recommendations on special forest practices appropriate to Clayoquot Sound. The government of BC entered into an interim measures agreement in 1994 with five Nuu-chah-nulth First Nations (Ahousaht, Hesquiaht, Tla-o-qui-aht, Toquaht and Ucluelet) that provided for joint management of the lands and resources of the Nuu-chah-nulth traditional territory until the completion of treaty negotiations. In 1995, the panel completed a series of reports that described how to manage the forests in Clayoquot Sound sustainably, and the panel's 127 recommendations were unanimously adopted by the BC government. Logging was greatly restricted and, since 2007, both logging tenures in Clayoquot Sound have been controlled by Aboriginal logging companies.

Another example of the organization of First Nations around forestry issues was the Intertribal Forestry Association of BC. Established in 1987, it was BC's first province-wide Aboriginal forestry organization. It chaired a task force on native forestry and conducted a review of Aboriginal forestry and forest management. It also helped establish the National Aboriginal Forestry Association.

The current Aboriginal Forestry Initiative (formerly the First Nations Forestry Program) is led by Natural Resources Canada, through the Canadian Forest Service, in partnership with over 15 federal departments and agencies. The initiative's focus is economic development, and it seeks to serve as a knowledge centre for Aboriginal forestry and forest sector innovation and to facilitate knowledge exchange and coordination of federal support to Aboriginal forest projects and partnerships. The Canadian Forest Service has identified the following priority areas for Aboriginal economic development in forestry: bioenergy; forest-based services to industry and governments; and value-added wood products. The federal government has directed the Canadian Forest Service to focus its knowledge and facilitation of resources on projects that are "opportunity ready," appeal to multiple partners and funding agencies, and have the potential for regional economic development. Limited multi-year funding may be available for such projects.

Today a few, but still limited, AANDC programs address First Nations on-reserve forestry management. Some of these have been developed in part to support First Nations in other parts of Canada where the size of reserves is considerably greater than in BC and where there are more forest resources and persons wanting access to those resources. The Strategic Partnerships Initiative is a program administered by AANDC and supported by 13 federal departments and agencies. Its intent is to support Aboriginal participation in the economy, with a particular focus on opportunities in the natural resource sectors. These federal departments and agencies identify what they feel are complex emerging economic opportunities across the country and require funding from multiple federal departments. A lead department develops a funding proposal, which is then prioritized by an inter-departmental Investment Committee that includes officials from AANDC. Recommendations from this Investment Committee are then presented to the Federal Coordination Committee for Aboriginal Economic

Development (an Assistant Deputy Minister level committee co-chaired by AANDC and Natural Resources Canada) for ratification. The types of activities that are supported by this initiative include:

- feasibility studies, planning, diagnostic studies, information gathering and proposal development;
- community economic development planning, including activities such as local-level engagement and communications, skills assessments and business inventories;
- negotiations, research activities and access to expertise;
- organizational capacity to support economic development project implementation;
- skills development, including management and technical training not funded by Employment and Social Development Canada; and
- project design activities, such as construction, architectural and engineering requirements.

Eligible funding recipients include: First Nations, Métis and Inuit communities; tribal councils, self-governing First Nations, and local government of Inuit communities; Aboriginal corporations, associations, cooperatives and institutions (both for-profit and not-for-profit); and Aboriginal businesses, partnerships and joint ventures. An annual budget of $14.45 million is earmarked for this initiative.

Implementing Aboriginal Title and Rights

As discussed above, Aboriginal title to the land includes the forests and other natural resources. Furthermore, Aboriginal rights to forest resources extend beyond Aboriginal title lands and into the broader ancestral lands of the respective First Nation. Over these lands, Aboriginal peoples would typically, at the very least, have the right to use the forests for hunting, trapping, gathering and other traditional practices. Consequently, any use of forests and forest resources by others would necessarily have some impact on Aboriginal rights and could potentially infringe those rights.

Accordingly, First Nations are seeking recognition of their property and governance rights to regulate forest use for cultural and other purposes, including the harvesting of timber, not only on their existing reserves but over Aboriginal title lands and within their ancestral lands. In fact, this subject is an area where First Nations have actively developed strategies and successfully implemented them to gain increased access to timber resources and to govern forests based on their Aboriginal title and inherent rights.

For example, in 1999, the Westbank First Nation, under the authority of a permit issued by the Okanagan Nation, began cutting timber on a cutblock located in close proximity to one of its reserves. This small block had previously been laid out under the “small business” program of the provincial Forests ministry and was going to be sold. The ministry applied for an injunction to stop the logging, but the court refused to grant the injunction because there was a fair issue to be tried about who owned the timber, given unresolved issues of Aboriginal title and, in this case, the potential Aboriginal right to harvest timber (*R. v. Westbank*, [1999] CanLII 4251 (BC SC)). The judge did request, however, that Westbank voluntarily stop logging and try to negotiate a resolution with the Province. Westbank complied and, in the ensuing negotiations, secured a 55,000-hectare “community forest” licence (Community Forest Agreement) covering approximately 45,000 hectares of land immediately west of the Westbank First Nation’s reserves on the west side of Okanagan Lake. This action in large part led to the establishment of a provincial program to offer all BC First Nations the option of entering into a Forest Consultation and Revenue Sharing Agreement (FCRS) given that most, if not all, First Nations with forest resources and a desire to log would do the same thing as Westbank. The program has now been superseded by another, discussed below.

In addition to the commercial aspect of logging and using forest resources as the “owner” of the timber, First Nations have been advancing their uses of forests and their management for domestic

and cultural purposes. The courts have already established that there is an Aboriginal right to cut timber for such purposes (see *R. v. Sappier; R. v. Gray,* [2006] 2 S.C.R. 686) as the right to harvest.

While First Nations are seeking recognition through the domestic courts, followed by reconciliation with governments, some First Nations are looking outside Canada for a remedy. In 2007, the Hul'qumi'num communities (Cowichan, Chemainus, Penelakut, Lyackson, Halalt and Lake Cowichan) petitioned the Inter-American Court on Human Rights (IACHR) based on an 1887 federal land sale to Robert Dunsmuir to finance construction of the E&N Railroad. The sale dispossessed the communities of approximately 85 percent of their land, and is a dispute that remains unresolved through years of negotiations. What makes this case of interest here is that today the lands are owned by three timber companies that have logged most of the old-growth forest and sold some of the cleared land for real estate development. In a preliminary proceeding, the IACHR agreed, over Canada's objections, to hear the complaint, ruling that "legal proceedings … do not seem to provide any reasonable expectations of success because Canadian jurisprudence has not obligated the State to set boundaries, demarcate, and record title deeds of lands of indigenous peoples, and, therefore, in the case of HTG [the Hul'qumi'num], those remedies would not be effective under recognized general principles of international law." A decision of the IACHR was still forthcoming as of October 2014.

As a result of advances in the recognition of Aboriginal title and rights, there are now a number of forestry-related agreements and arrangements between First Nations and the Province that have been negotiated and implemented — perhaps more so than in any other resource sector. First Nations, despite issues of Aboriginal title not being conclusively resolved, are playing an increased role in land use decisions, including having a say on the nature and scope of forest developments within ancestral lands. A number of these agreements and arrangements are discussed below in the section "Sectoral Governance Initiatives."

BC Regulatory Scheme for Forestry Activity

Management over the forests, including the granting of access to forest resource by third parties, is a provincial responsibility. The Province of BC generally maintains control of the forest resources and grants access through forest tenures, which are primarily rights to harvest timber. British Columbia's forest areas are divided into 70 management units. The chief forester determines how much wood can be harvested sustainably. This is known as the allowable annual cut (AAC). Once the AAC is determined, the Minister of Forests, Lands and Natural Resource Operations divides the AAC into short- and long-term tenures. Tenure terms can run anywhere from a few weeks to 20 years. Provincial forestry resource management has varied considerably over the past 30 years, depending on the political inclinations of the ruling government.

For much of the province's history, forestry has been an important part of the economy and, consequently, how forests have been managed to facilitate commercial logging has had a significant impact on land use decisions. While Crown land is managed for multiple uses (e.g., hunting, trapping, grazing, guiding, recreation use, water use, and energy and mineral exploration), the harvesting of timber from forests has been, and remains, a primary objective of the provincial government, for the purposes of building wealth through natural resource extraction, product development, employment, taxes and resource rents ("stumpage"). Impacts to other resource values in the forest have typically been managed so as to minimize impacts on timber harvesting. In the more recent history of the province, policy-makers have also had to consider and balance the increased public concern with the environment and sustainability and with practices such as clearcutting (where large areas of forested land are cut using industrial logging practices). As a consequence, changes to logging practices have resulted, with other forest values gaining greater influence over public policy. First Nations have played a large role in effecting this shift.

In BC, rights to harvest timber are provided to individuals and companies through a system of licensing and permitting governed under the *Forest Act* (R.S.B.C. 1996, c. 157), *Forest and Range Practices Act* of British Columbia (R.S.B.C. 2002, c. 69), *Foresters Act* (S.B.C. 2003, c. 19) and other affiliated legislation, regulations and policy as amended from time to time. Private companies must conduct their business consistent with legislation and policy related to forests and forest management, and they have been granted considerable latitude in managing the forest resources to ensure values other than just timber values are protected. There are several types of forests-related licences and permits in BC. Some of these are described briefly below:

Types of Forest-Related Licences and Permits in BC

- Forest Licence;
- Timber Licence;
- Tree Farm Licence;
- Community Forest Agreement;
- First Nations Woodland Licence;
- Community Salvage Licence;
- Woodlot Licence;
- Pulpwood Agreement;
- Timber Sale Licence;
- Licence to Cut;
- Free Use Permit;
- Christmas Tree Permit; and,
- Road Permit.

- Historically, Forestry Licences have been powerful legal instruments, and forestry interests have had significant influence on the landscape of the province.
- The largest interest a logging company can hold is called a Tree Farm Licence (TFL), which is an area-based, long-term assignment of forest lands for sustained yield rather than volume-based harvesting. A TFL gives the licence holder considerable managerial discretion within its operating area. There are currently 34 TFLs in BC.
- Like a TFL, a Community Forest Agreement carries significant management responsibilities and discretion. These agreements are made with local governments, community groups and First Nations for the benefit of the entire community, as opposed to other forms of licence where the primary benefits accrue to the private tenure holder. While a primary purpose of these agreements is still for harvesting activities (tenure holders have to meet minimum AAC requirements), the areas in question are managed for other forest uses and values too, reflecting community priorities (e.g., recreation, hunting, trapping, fishing, gathering, range). These areas can include private or reserve land.
- In the case of Woodlot Licences, the Province makes small areas of land available to augment private lands that a person may want to log. In exchange for the access to Crown land timber, the tenure holders are required to log their private lands in accordance with the provincial rules that apply to Crown land (and on private land would not otherwise apply).

Responsibilities for tenure management vary by the type of licence or private interest held. One of the most important requirements is for reforestation (silviculture).

Depending on the type of licence or permit, tenure holders are required to submit plans for their logging operations and are expected to consult with stakeholders in the development of such plans. The degree to which the logging industry should be self-regulating has been a subject of some public debate given the obvious bias a company may have if its primary objective is timber harvesting rather than environmental stewardship or other purpose (such as granting Aboriginal access to forests). In exchange for rights granted to third pates to harvest timber, the government collects resource rents called stumpage. Stumpage rates vary across the province depending on the type of licence or permit, provincial inputs and the cost to log, and the species of tree. For more detailed information on forest tenures and the legislative framework under which they are governed, visit the BC Ministry of Forests, Lands and Natural Resource Operations website (see the “Resources” below).

First Nation Business Initiatives

First Nations’s participation in the forest sector through economic or business opportunities granted in interim accommodation deals has grown significantly in the past 15 years. In fact, for almost all the types of provincial licences and permits described above, there are examples of First Nations or their economic development arms holding such tenures. The current estimate is that First Nations collectively hold 13 percent of the total provincial annual harvest. The BC Forests ministry can issue direct tenure awards to First Nations and has been fairly consistent in doing so: 13 times in 2013, 15 times in 2012 and 12 times in 2011.

According to ministry data, BC harvested a total of 62.6 million cubic metres of timber in 2012/13. While that was down slightly from 63.2 million cubic metres harvested in 2011/12, stumpage fees rose significantly in 2012/13, to more than $375 million. A compendium of the licences First Nations hold is included to the end of this chapter.

Important to note, however, is that the business interests of First Nations should not be confused with the governmental interests: First Nations involved in negotiations usually advocate for both interests to be properly accommodated. This business interest is sometimes referred to as the "economic component" of Aboriginal title that was talked of in *Delgamuukw*. This Supreme Court of Canada case that confirmed Aboriginal title exists clearly described the characteristics of that title and set out the test for proving it, although the case failed to grant an actual declaration of title for the Gitxsan and Wet'suwet'en peoples.

Furthermore, it is important to remember that while First Nations are now actively operating provincial tenures in forest management, the legal obligation for how forestry is conducted on these tenures falls within the provincial legal framework. First Nations are not practising governance or shared decision-making over these tenured economic opportunities.

Options for Governance Reform

All sectoral governance initiatives on reserves that deal with land also deal with forestry. And all comprehensive governance arrangements also deal with forestry governance on reserve and treaty settlement lands. Treaty arrangements can have additional provisions that affect governance off-reserve or affect access to forestry resources for economic purposes. In addition to these options, there are also provincial options for increased participation in decision-making within ancestral lands.

In negotiations and as borne out by the existing agreements, Canada is prepared to relinquish control of on-reserve forestry, which means full First Nation control is achievable. However, off-reserve the Province still remains reluctant to recognize First Nations shared decision-making and jurisdiction within a Nation's ancestral lands, although in the last five years significant advances have been encouraging. In addition to lack of political will, part of the reason there may be not as many examples as there could be is attributable to uncertainty with respect to identification of the proper Aboriginal title holder. There also remains some uncertainty as to how institutions of shared decision-making would operate in practice. With examples of shared decision-making now being implemented, we are beginning to get an idea of how it can work. Consequently, arrangements by other Nations that build on agreements already entered into will likely follow in due course.

INDIAN ACT GOVERNANCE

As noted above, Indian Reserve lands are federal lands and are managed under federal laws. Access to timber or other forest resources requires a process under the federal laws that apply:

Section 93 of the *Indian Act* prohibits removal of wood from a reserve:

> 93. A person who, without the written permission of the Minister or his duly authorized representative,
>
> (a) removes or permits anyone to remove from a reserve
>
> (i) minerals, stone, sand, gravel, clay or soil, or
>
> (ii) trees, saplings, shrubs, underbrush, timber, cordwood or hay, or
>
> (b) has in his possession anything removed from a reserve contrary to this section, is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars, or to imprisonment for a term not exceeding three months or to both

The *Indian Timber Regulations* apply to the cutting of timber on reserve lands or on reserve lands that have been surrendered (the community votes to "surrender" the lands for development) under the *Indian Act*. The Regulations stipulate that it is forbidden to cut timber on reserve or surrendered lands without a licence from the Minister. The Regulations also define different instruments for forest management on reserves. There are three main types of instruments under the Regulations, whose use depends on the type of operator and the object of the operation:

1) *Permit to cut timber for Indian use:* Granted to a First Nations council for "band" purposes or to a "member or group of members" of a First Nation to cut timber and fuel wood for individual use.

2) *Permit to cut timber for sale:* Granted to a First Nations council or to a "member or group of members" of a First Nation to cut timber and fuel wood for sale.

3) *Licences:* Granted to any other person or company (third parties) for any purpose (usually for sale). When on surrendered lands, this can be issued by the Minister without the consent of the First Nations council, but when it involves timber on reserve lands, no licence of this nature will be issued without the consent of council.

Under the regime instituted by the *Indian Timber Regulations*, First Nations could be assigned various roles, including participating in the drafting of cutting licences and permits. However, the Minister and AANDC are always responsible for signing such instruments and no rights under the Regulations arise without a permit or licence from the Minister.

Curiously, the *Indian Timber Harvesting Regulations* (C.R.C. SOR/2002-109) create different rules for First Nations identified on the Schedule to these Regulations. Ministerial permits are still required, but exceptions are made for harvesting on non-allotted lands (i.e., not allotted to an individual member) on-reserve for use on-reserve, and for harvesting for use on allotted lands by holders of Certificates of Possession. Only one First Nation, the Tl'azt'en Nation, is listed on the Schedule to these Regulations.

Because Aboriginal rights exist on reserve lands, any analysis of the impact of the *Indian Timber Regulations* must take into account any Aboriginal right to harvest timber under section 35 of the *Constitution Act, 1982*. If those rights have been established, it would put the onus on the Crown to justify that these Regulations do not unduly restrict the Aboriginal right to harvest timber. It is hard to imagine that, for most First Nations, timber was not harvested pre-European contact in a manner that meets the test of Aboriginal rights established by the courts. Moreover, if one assumes reserves are Aboriginal title lands, then not only would there be legal issues with respect to governance of the lands by Canada, but the property nature of the interest would presumably trump any federal ability to say how the property right (in this case, timber) can be disposed of.

SECTORAL GOVERNANCE INITIATIVES

There are not many reserves in BC in which the lands that have any significant forests and there are no specific on-reserve sectoral governance initiatives respecting forests, although forested lands are addressed as an aspect of land management under the *Framework Agreement on First Nation Land Management*. Not surprisingly, most of the sectoral governance initiatives have been focused on ancestral lands; and, while many of these do not address forest governance directly, they do provide recognition of a First Nation's property rights over timber and other forest resources — all be it, under provincially created tenures. These tenures may come with delegated administrative and management responsibilities, as the provincial government often passes on such responsibilities in forest licences and tenures (e.g., with a TFL or a community forest), as described above. In many cases,

and whether through the governing body or through the governing body of a separate legal entity, the First Nation can be involved in the management and administration of these tenures and therefore can be making stewardship as well as operational decisions with respect to forest management plans. This is the case particularly with an area-based tenure such as a community forest or TFL. In this way, there is a de facto governmental role, even if it is not legally recognized by the Province as such.

Sectoral Initiatives On-Reserve

***The* Framework Agreement on First Nation Land Management**

As pertains to land management, the *Framework Agreement on First Nation Land Management* (Framework Agreement) includes provisions for renewable and non-renewable resources on First Nation lands that are subject to a First Nation's land code. Included are all the interests, rights and resources that belong to that land, to the extent that these are under the jurisdiction of Canada and are part of that land. This applies to forest resources. While the Framework Agreement may cover only reserve lands in developing institutions of government and laws on reserve, it can help inform discussions when a First Nation is negotiating broader arrangements with the Crown or third parties with respect to the Nation's natural resources — such as timber — located off reserve within its ancestral lands.

If a First Nation has significant forestry resources on reserve, then the Framework Agreement and the *First Nations Land Management Act* (FNLMA) provide a mechanism to exercise jurisdiction of forestry on reserve lands. For example, McLeod Lake First Nation, which gained access to sizeable forestry resources as a result of its adherence agreement to Treaty 8, used the Framework Agreement to displace the *Indian Act* and the *Indian Timber Regulations*. The adhesions to Treaty 8 are somewhat unusual. Although these arrangements were made quite recently, they are not made through the BC treaty process. For example, the *Indian Act* continues to apply to the First Nations that adhered to Treaty 8, which is why options like FNLMA were and are available.

Sectoral Initiatives within Ancestral Lands

Provincial "Governance" Initiatives

Some First Nations have negotiated Reconciliation Agreements or Strategic Engagement Agreements (SEA) with BC. These include a commitment to consult and potentially accommodate the Nation's interests with respect to forests located within its ancestral lands and Aboriginal title lands (see Section 1.3 — Sectoral Governance Initiatives). These agreements can provide for shared decision-making.

Kunst'aa guu — Kunst'aayah Reconciliation Protocol: The *Kunst'aa guu — Kunst'aayah Reconciliation Protocol* and associated legislation provide for the creation of the Haida Gwaii Management Council, a joint BC/Haida statutory decision-making body that can make land and resource use decisions (see Section 3.20 — Lands and Land Management). One of underlying drivers for this agreement was forestry issues, and forestry therefore figures significantly in the protocol. Issues between the Haida and the Province with respect to logging on Haida Gwaii have been longstanding and at times controversial. Disputes over logging, resulting in road blocks and arrests, go back to the stopping of industrial logging on Lyell Island in 1985 and the creation of the Gwaii Haanas National Park, to the Haida forestry consultation case, and now to the signing of the significant *Kunst'aa guu — Kunst'aayah Reconciliation Protocol*.

Under the protocol with respect to forest "governance," the Haida Gwaii Management Council determines and approves the AAC for Haida Gwaii. The protocol also provides that the council will develop a comprehensive Haida Gwaii forestry management strategy that "maintains ecological

integrity and supports a sustainable Haida Gwaii economy" for consideration by the Haida Nation and the Province. With respect to forest "ownership," the Province reaffirms in the Protocol a 2005 commitment to provide a forest tenure of 120,000 cubic metres to the Haida Nation. In addition, BC provides to the Haida Nation, $10 million for the purpose of forest tenure acquisition. This funding is an incremental payment of the total benefits to the Haida Nation available through a reconciliation agreement. With this money the Haida have been acquiring all major forest licences on Haida Gwaii. In addition to these elements of the protocol, the parties also agree to share "carbon offsets" and to work together to develop "environmentally credible and marketable forest carbon offsets." These offsets would be associated with the additional sequestration and resulting greenhouse gas reductions from the creation of protected areas and changes to forestry practices in areas identified in the agreement.

In summary, today, with respect to forests, the Haida Nation has shared decision-making throughout Haida Gwaii and own or control approximately 81 percent of the AAC for the TFLs on Haida Gwaii. Since the Haida Nation have been actively on their path of Nation rebuilding, the AAC has in fact decreased from 1,786,000 cubic metres in 2000 to 931,000 cubic metres today. There are also now forest development plans in place that, in accordance with Haida legal traditions, must ensure sustainable development and the protection of the natural world.

Strategic Engagement Agreements: As discussed elsewhere in this Governance Report, a number of First Nations and BC have entered into a SEA. While final decision-making remains with BC, these agreements do provide for a degree of shared decision-making. In accordance with their terms, the SEAs provide for a shared decision-making framework and a more detailed matrix that has four "shared decision levels" and a fifth "strategic shared decisions" level (a sample matrix is reproduced in Section 3.20 — Lands and Land Management). Essentially, the matrix scales decision-making with a corresponding description of the First Nation's involvement in the land and resource use decisions being made by the Province. The matrix makes specific reference to the involvement of the Aboriginal group with respect to "Forests and Range." This includes a description of the types of decisions and First Nations involvement in those and over what aspects of forest and range management, administration and decision-making. The matrix is complex and covers low-level administrative decisions, from minor changes to range boundaries and use of fertilizers through to the granting of licences, setting of cut levels, issuance of permits, and development of forest stewardship plans. The Province provides financial resources to support a First Nation to participate in a SEA.

It should be noted that shared decision-making mechanisms are still in the early stages of being developed and tested for their efficiency and effectiveness. Other options may be developed both as sectoral governance initiatives or as part of comprehensive arrangements, and any of these arrangements should properly reflect the developments in the law of Aboriginal title and rights, including treaty rights. Further, and as is the case with the SEAs, the mechanisms should typically not be restricted to a single matter such as forestry. Shared decision-making over traditional territories can involve other matters such as mining, land use planning, alternative energy, watershed management, and the environment.

Forest Consultation and Revenue Sharing Agreement: The originally developed Forest and Range Agreements and Forest Opportunity Agreements have evolved into the new Forest Consultation and Revenue Sharing Agreement (FCRS), which allow for consultation and revenue sharing, and the complementary Tenure Opportunity Agreement (TOA), which allows for direct award tenure allocation. This change separates the governance function of revenue sharing from the economic function of tenure, a differentiation between governance and business. These agreements are designed so that revenue shares are calculated based on the harvesting activities within individual traditional territories rather being based on the per-capita method. Furthermore, the new FCRS agreement has an incentive built in to how much provincial forest revenue will be shared with each First

Nation. This varies by the type of agreement with the ministry and government, whether an interim accommodation agreement, Strategic Engagement Agreement (SEA), Reconciliation Agreement, or treaty. Basically the further along the process toward a treaty, the more revenue sharing a First Nation receives. In calculating which Aboriginal group is entitled to what share of timber rents, assuming they wish to take them, the BC Ministry of Forests, Lands and Natural Resource Operations has devised a complicated overlay of reserves, treaty settlement lands, land claims maps (e.g., "statement of intent" maps filed with the BC Treaty Commission or other maps), tribal council boundaries, and so on. Since 2003, the provincial government has signed agreements that have included 171 First Nations in BC, with more than $242 million in shared revenues.

Provincial "Economic Development" Initiatives

While not specifically governance oriented (i.e., no recognition of law-making authority, or jurisdiction or shared-jurisdiction), there have been a number of significant forest-related initiatives that provide forestry opportunities for First Nations, and which have evolved from the recognition of Aboriginal rights and title. While many First Nations feel these initiatives do not go far enough in recognizing the extent of their interests in forest resources, the arrangements are, nonetheless, options that many Nations have taken up, as discussed above. Indeed, some of the most successful small to medium-sized logging operations in BC are First Nation owned.

Tenure Opportunity Agreement: BC First Nations can apply for direct volume-based tenure awards under a May 2002 amendment to the *Forest Act*. Tenure Opportunity Agreements (TOA) allow First Nations to receive tenure awards, with the timber volume for those licences coming from beetle-kill and fire-damaged timber and from other forest licences that have unused timber attached to them. The TOAs can be awarded as part of an interim measures agreement, treaty-related measures agreement, or economic measures agreement. The Province has signed more than 100 such agreements since introducing the process and they are listed in the tables below.

First Nations Woodlands Licence: Introduced in 2011, the First Nations Woodlands Licence is specifically for First Nations communities. It is intended to deal with concerns raised about the short-term nature (five years) of previous tenure opportunities and about not allowing for incorporation of First Nations values and principles into stewardship. The new First Nations Woodlands Licence, which allows for a longer term and is area-based, gives licensees the ability to write their own forest management plans (and so include First Nations' stewardship values). Woodlands licences have been issued twice to date: to Huu-ay-aht First Nation (December 2011) under a 25-year agreement that allows them to harvest 70,000 cubic metres of timber annually; and to Canim Lake First Nation (January 2013) through an agreement of at least 25 years that allows for the harvesting of 20,000 cubic metres per year from Crown land near the reserve.

Community Forest Agreements: Introduced in 1988, Community Forest Agreements were originally five-year pilot projects with seven communities, designed to offer greater participation to communities and First Nations in local forest management. Augmented by the Community Forest Agreement Regulation of the Forest Practices Code (2000) and the *Forest and Range Practices Act* (2002), these agreements tested the viability of community-based Crown tenures. Three additional communities were added in 2000 and in 2004, including Westbank First Nation. The program was expanded to include 16 communities which included the following First Nations: Barriere, Bella Coola, Burns Lake, Clearwater, Creston, Esketemc, Fort St. James, Harrop-Proctor, Kaslo, Logan Lake, Masset, Port Alberni, Powell River, Sechelt, Terrace and Ucluelet. While the Province does not intend to issue any new licences, probationary agreements entered into for an initial five-year term, if successful, can subsequently be extended or rolled over into long-term agreements. In 2009, the *Forest Act* was amended to transition five-year probationary agreements into 25- to 99-year Community Forest Agreements.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All of the comprehensive governance arrangements provide jurisdiction over forestry and forested lands on reserve or settlement lands, as the case may be. It should also be noted that when forest issues are discussed in treaty negotiations in BC, they are linked to issues of fire prevention on Crown lands and forest health.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	The First Nation manages the forestry resources as the owner of the resource. (Sechelt Constitution Part 1, Division (3), s. 1–4)	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the act (37, 38 of the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27)
Westbank	Westbank has jurisdiction over preservation and management of the forestry resource. (Part XII, s. 135)	Westbank law prevails. (Part XII, s. 140)
Nisga'a	Nisga'a Lisims Government has law making authority with respect to the management of timber resources and non-timber forest resources on Nisga'a Lands. (Ch. 5, s. 6–8)	No provision, but laws will include forest standards that meet or exceed those established under *Forest Practices Code of British Columbia Act*, the *Forest Act*, or any regulation under those Acts. (Ch. 5, s. 8)
Tsawwassen	Tsawwassen has jurisdiction over management of forest resources on Tsawwassen Lands. (Ch. 8, s. 2)	Tsawwassen law prevails. (Ch. 8, s. 3)
Maa-nulth	Maa-nulth First Nations may make laws with respect to forestry resources, forest practices and range practices. (s. 9.2.1)	Federal or provincial laws prevail. (s. 9.2.2)
Yale	Yale may make laws with respect to Forest Resources, Forest Practices and Forest Resources on its land. (s. 16.2.1)	Federal or provincial laws prevail. (s. 16.2.2)
Tla'amin	Tla'amin may make laws with respect to, Forest Resources, Forest Practices and Range Practices on its land. (Ch. 8, s. 5)	Federal or provincial laws prevail. (Ch. 8, s. 6)

Table — BC First Nations' Laws/Bylaws in Force

SECTORAL GOVERNANCE INITIATIVES		
FNLMA - FRAMEWORK AGREEMENT - OPERATIONAL	**LAW NO.**	**DESCRIPTION**
McLeod Lake Indian Band (Tsekani)		McLeod Lake Indian Band Forest Practices Code Act
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Huu-ay-aht First Nations	2011	Resource Harvesting Act
Huu-ay-aht First Nations	2011	Land Act
Ka:'yu:'k't'h'/Che:k:tles7et'h' First Nations	14/2011	Resources Harvesting Act
Ka:'yu:'k't'h'/Che:k:tles7et'h' First Nations	12/2011	Land Act
Nisga'a Lisims Goverment	2000/15	Nisga'a Forest Act
Nisga'a Lisims Goverment	2000/10	Nisga'a Land Act
Toquaht Nation	14/2011	Resource Harvesting Act
Toquaht Nation	12/2011	Land Act
Tsawwassen First Nation		Harvest Agreement
Tsawwassen First Nation	Apr 2009	Land Act
Uchucklesaht Tribe	14/2011	Resources Harvesting Act
Uchucklesaht Tribe	12/2011	Land Act
Ucluelet First Nations	14/2011	Resources Harvesting Act
Ucluelet First Nations	12/2011	Land Act

Table — Forestry Tenures

FOREST CONSULTATION AND REVENUE SHARING AGREEMENTS (FCRSA)

British Columbia has introduced a new type of forestry agreement, the Forest Consultation and Revenue Sharing Agreement (FCRSA) that provides First Nation communities with economic benefits, which return directly to the community and are based on harvest activities in the traditional territory. The changes to the revenue-sharing model will reflect what is happening 'on the ground' in First Nations communities so that, for the first time, communities will see more direct economic benefits returning from harvest activities taking place in their traditional territory. As the forest sector recovers, the amount of revenues shared with First Nations will increase.

AGREEMENT	DATE SIGNED	AGREEMENT	DATE SIGNED
Adams Lake Indian Band	April 23, 2012; Amendment Signed October 22, 2013	Namgis First Nation	March 31, 2011
Ahousaht First Nation	February 21, 2014	Nazko First Nation	April 26, 2011
Ashcroft Indian Band	December 20, 2011	Nee-Tahi-Buhn Indian Band	March 31, 2011
Bonaparte Indian Band	March 1, 2011	Neskonlith Indian Band	February 19, 2013
Boston Bar First Nation	March 14, 2012	N'Quatqua	April 26, 2011
Burns Lake Band	March 31, 2011	Nuchatlaht First Nation	March 31, 2011
Canim Lake Band	November 21, 2011	Nuxalk Nation	January 3, 2013
Cape Mudge Indian Band	March 31, 2011	Okanagan Indian Band	February 14, 2014
Chawathil First Nation	January 3, 2013	Osoyoos Indian Band	February 1, 2011
Cheam First Nation	February 13, 2012	Pacheedaht First Nation	March 8, 2011
Cheslatta Carrier Nation	March 31, 2011; Renewed April 8, 2014	Penelakut First Nation	December 8, 2010
Coldwater Indian Band	September 10, 2013	Peters Band	July 8, 2013
Cowichan Tribes	March 31, 2011	Popkum Indian Band	January 15, 2014
Da'naxda'xw'/Awaetlala First Nation	July 29, 2011	Qualicum First Nation	February 7, 2013
Daylu Dena First Nation	September 8, 2011	Quatsino First Nation	March 31, 2011
Dease River First Nation	June 10, 2011	Scia'new First Nation	March 11, 2013
Ditidaht First Nation	April 26, 2011	Scowlitz First Nation	April 10, 2012
Dzawada'enuxw First Nation	March 27, 2013	Seabird Island Indian Band	April 11, 2011
Ehattesaht First Nation	March 14, 2012	Sechelt Indian Band	April 16, 2012
Esketemc First Nation	March 31, 2011	Shuswap Indian Band	October 18, 2011
Gitga'at First Nation	April 26, 2011	Shxw'ow'hamel First Nation	October 30, 2012
Gwa'sala-'Nakwaxda'xw First Nation	April 26, 2011	Simpcw First Nation	January 28, 2011
Haisla Nation	April 26, 2011	Siska Band	April 26, 2011
Halalt First Nation	April 26, 2011	Skawahlook First Nation	March 31, 2011
Heiltsuk First Nation	April 26, 2011	Skeetchestn Indian Band	April 23, 2012; Amendment Signed October 22, 2013
Hesquiaht First Nation	February 19, 2013	Skin Tyee Nation	April 26, 2011
High Bar First Nation	July 31, 2012	Skwah First Nation	April 23, 2012; Amendment Signed October 1, 2013
Homalco Indian Band	February 9, 2011	Snaw-naw-as First Nation	February 7, 2013
In-Shuck-Ch	April 26, 2011	Splatsin First Nation	March 14, 2012; Amendment Signed October 22, 2013
K'omoks First Nation	April 26, 2011	Squamish Nation	August 12, 2011
Katzie First Nation	April 26, 2011	Stellat'en First Nation	December 20, 2011
Kitasoo/Xaixais First Nation	April 26, 2011	Sts'ailes First Nation	December 17, 2010
Kitselas Indian Band	April 26, 2011	Stswecem'c/Xgat'tem First Nation	February 13, 2012
Kitsumkalum Indian Band	May 11, 2011	Stz'uminus First Nation	May 9, 2013
Ktunaxa First Nation	September 8, 2011	Sumas First Nation	October 11. 2013

Table — Forestry Tenures... ***continued***

AGREEMENT	DATE SIGNED	AGREEMENT	DATE SIGNED
Kwadacha Band	March 31, 2011	Taku River Tlingit First Nation	October 30, 2012
Kwantlen First Nation	April 10, 2012	T'eqt'aqtn'mux	November 21, 2011
Kwaw-Kwaw-Apilt	April 23, 2012; Amendment Signed October 1, 2013	T'it'q'et First Nation	October 30, 2012
Kwiakah First Nation	October 5, 2011	Tk'emlúps te Secwepemc	April 23, 2012; Amendment Signed October 22, 2013
Kwicksutaineuk First Nation	April 3, 2012	Tla'amin First Nation	July 6, 2011
Kwikwetlem First Nation	March 14, 2012	Tlatlasikwala Nation	December 20, 2011
Lake Babine First Nation	December 19, 2011	Tlowitsis First Nation	April 23 2012
Lake Cowichan First Nation	September 8, 2011	Ts'elxweyeqw Tribe	April 26, 2011
Lax Kw'alaams	March 31, 2011	Tseshaht First Nation	April 26, 2011
Leq'a:mel First Nation	April 26, 2011	Ts'kw'aylaxw First Nation	April 26, 2011
Lhoosk'uz Dene Nation	March 31, 2011	Tsleil-Waututh Nation	March 31, 2011
Lhtako	June 10, 2011	T'Sou-ke First Nation	February 7, 2013
Lil'wat Nation	December 14, 2010	Ulkatcho First Nation	April 23, 2012
Little Shuswap Indian Band	April 26, 2011	Union Bar First Nation	July 31, 2012
Lower Similkameen Indian Band	April 26, 2011	Upper Similkameen First Nation	February 13, 2013
Lyackson First Nation	June 6, 2013	We Wai Kum First Nation	September 8, 2011
Malahat First Nation	October 30, 2012	Westbank First Nation	March 31, 2011
Matsqui First Nation	July 8, 2013	Wet'suwet'en First Nation	February 16, 2012
Mamalilikulla Qwe'Qwa'Sot'Em First Nation	February 20, 2012	Wuikinuxv First Nation	April 26, 2011
Metlakatla First Nation	April 26, 2011	Xat'súll (Soda Creek Indian Band)	August 22, 2012
Moricetown Band	December 20, 2010	Xaxli'p First Nation	January 3, 2013
Mowachaht/Muchalaht First Nation	March 10, 2014	Yale First Nation	December 3, 2010
		Yekooche First Nation	April 26, 2011

FOREST AND RANGE AGREEMENTS

These agreements, introduced in 2003, provide for revenue-sharing and forest tenure opportunities. The timber volume comes from unlogged timber from existing forest licences and from timber that will be made available once the province-wide timber reallocation process is completed. The Ministry's approach to negotiating Forest and Range Agreements is outlined in the Strategic Approaches to Accommodation Policy.

www.for.gov.bc.ca/haa/fn_agreements.htm

DATE SIGNED	FIRST NATION	REGION	LOCATION	REVENUE SHARING (000,000)[1]	TOTAL TIMBER VOLUME M3 (000)
2009/03	Takla Lake #3	Northern Interior	Prince George	1.52	n/a
2009/03	Shackan	Southern Interior	Merritt	.28	30
2009/03	Hupacasath	Coast	Port Alberni	.57	n/a
2009/03	Tsilhqot'in Nation[B-6] (May 2009 Amendment)	Southern Interior	Williams Lake	7.7	844
2009/03	Penticton	Southern Interior	Penticton	2.2	236
2008/10	Mowachaht Muchalaht	Coast	Gold River	1.29	77
2008/10	Nicomen	Southern Interior	Lytton	.271	29
2008/10	Okanagan	Southern Interior	Vernon	4.14	n/a
2008/08	Gwawaenuk	Coast	Port McNeill	.088	30
2008/09	Williams Lake	Southern Interior	Williams Lake	1.195	130
2008/08	Popkum	Coast	Chilliwack	.075	n/a
2008/07	Cook's Ferry	Southern Interior	Spences Bridge	.701	117
2008/01	Matsqui	Coast	Matsqui	.526	32

Table — Forestry Tenures... *continued*

DATE SIGNED	FIRST NATION	REGION	LOCATION	REVENUE SHARING (000,000)[1]	TOTAL TIMBER VOLUME M3 (000)
2008/01	Tsawataineuk (March 2008 Amendment)	Coast	Campbell River	1.225	73[incl abt]
2008/02	Klahoose	Coast	Campbell River	.714	50
2008/02	Coldwater	Southern Interior	Merritt	1.794	207
2008/03	Nooaitch	Southern Interior	Merritt	.466	50
2008/03	Tl'azt'en	Northern Interior	Fort St James	3.56	TBD
2008/04	Haida	Coast	Massett	9.49	n/a
2008/04	Ahousaht	Coast	Tofino	4.34	n/a
2008/04	Peters	Coast	Chilliwack	.295	18
2008/04	Lower Nicola	Southern Interior	Merritt	2.37	257
2007/10	Neskonlith	Southern Interior	Chase	1.4	152[incl abt]
2007/07	Hesquiaht	Coast	Tofino	1.7	n/a
2007/07	T'it'q'et	Southern Interior	Lillooet	.872	52
2007/06	Taku River Tlingit	Northern Interior	Atlin	.920	TBD
2007/05	Stz'uminus	Coast	Ladysmith	2.65	[+abt]
2007/04	Sumas	Coast	Abbotsford	.622	37
2007/04	Union Bar	Coast	Hope	.230	14
2007/01	Lyackson	Coast	Chemainus	.444	[+abt]
2006/12	Xaxli'p (June 2006 Amendment)	Southern Interior	Lillooet	2.57	128[incl abt]

[B-6] Denotes the number of bands participating in the Forest and Range Agreement.
[+ abt] Denotes this agreement has an Area Based Tenure associated with it. The Woodlot volume is EXCLUDED from the Timber Volume value. Please refer to the Agreement for specifics.
[incl abt] Denotes this agreement has an Area Based Tenure associated with it. The Woodlot volume is INCLUDED with the Timber Volume value. Please refer to the Agreement for specifics.

FOREST TENURE OPPORTUNITY AGREEMENTS — DIRECT AWARDS

In May 2002, an amendment to the *Forest Act* allowed the Minister of Forests to invite First Nations to apply for forest licences without competition. The timber volume for these licences comes from beetle-kill and fire-damaged timber as well as from unlogged timber from other forest licences. The following is a link to the Ministry's Direct Award Policy.

www.for.gov.bc.ca/haa/fn_agreements.htm

Agreements

DATE SIGNED	FIRST NATION	REGION	LOCATION	TOTAL TIMBER VOLUME M3 (000)
2013/03	Tk'emlups te Secwepemc	Southern Interior	Kamloops	690
2013/03	Tk'emlups te Secwepemc	Southern Interior	Kamloops	606
2013/03	Ktunaxa Communities	Southern Interior	Cranbrook, Kootenay, Invermere	765.6
2013/03	Moricetown Band	Northern Interior	Bulkley, Morice	245.57
2013/03	Shuswap	Southern Interior	Invermere	180
2013/03	Kitasoo/Xaixais First Nation	Northern Interior	Tree Farm Licence 25	265.8
2013/02	Malahat First Nation	Coast	Malahat	n/a
2013/02	Kwaw-Kwaw-Apilt First Nation	Coast	Fraser	6.765
2013/02	Skwah First Nation	Coast	Chilliwack	6.661
2013/02	Hupacasath First Nation	Coast	Great Central Lake	20
2013/02	Xwemalhkwu First Nation (Aka Homalco)	Coast	Sunshine Coast/Strathcona	7.877
2013/01	Tseshaht First Nation	Coast	Sproat Lake	52
2013/01	Lheidli T'enneh Band	Northern Interior	Prince George	509.44
2012/12	Nanwakolas First Nation	Coast	Midcoast, Tree Farm Licence 39	257.28
2012/12	Neskonlith Indian Band	Southern Interior	Kamloops	22.48
2012/11	Lower Similkameen Indian Band	Southern Interior	Okanagan	202.5
2012/11	Neskonlith Indian Band	Southern Interior	Kamloops	400

Table — Forestry Tenures... ***continued***

DATE SIGNED	FIRST NATION	REGION	LOCATION	TOTAL TIMBER VOLUME M3 (000)
2012/10	Kwadacha, Tsay Keh, Dene And McLeod Lake	Northern Interior	Mackenzie	880
2012/09	Kwiakah First Nation	Coast	Strathcona	5.13
2012/09	Haisla Nation	Coast	Haisla	n/a
2012/08	Splatsin First Nation	Southern Interior	Arrow	85.05
2012/07	Canim Lake Band	Southern Interior	Canim Lake	n/a
2012/05	Nak'azdli Band	Northern Interior	Prince George	150
2012/03	Osoyoos Indian Band	Southern Interior	Oliver	70
2012/01	Nadleh Whuten Band	Northern Interior	Prince George	375
2012/01	T'it'q'et	Southern Interior	Lillooet	26
2012/01	Splatsin	Southern Interior	Enderby	105
2011/12	Seabird Island	Coast	Agassiz	215
2011/12	Ts'kw'aylaxw (f. Pavilion)	Southern Interior	Lillooet	108
2011/09	Sts'ailes (f. Chehalis)	Coast	Chilliwack	139
2011/08	Esketemc	Southern Interior	Williams Lake	320
2011/08	Skeetchestn	Southern Interior	Savona	312
2011/06	Ashcroft	Southern Interior	Ashcroft	250
2011/05	Osoyoos Indian Band	Southern Interior	Osoyoos	215
2011/04	Canim Lake Band	Southern Interior	100 Mile House	300
2011/03	Westbank (3 Years)	Southern Interior	Kelowna	53
2011/02	Simpcw (f. North Thompson)	Southern Interior	Barriere	500
2011/02	Upper Nicola	Southern Interior	Merritt	300
2011.01	Westbank	Southern Interior	Kelowna	75
2010/12	Lytton	Southern Interior	Lytton	1425
2010/10	Simpcw (f. North Thompson)	Southern Interior	Barriere	599
2010/09	Ktunaxa Nation Council	Southern Interior	Cranbrook	77
2010/09	Bonaparte	Southern Interior	Cache Creek	489
2010/09	Nadleh Whut'en	Northern Interior	Fraser Lake	275
2010/07	Penticton	Southern Interior	Penticton	102
2010/07	Stellat'en	Northern Interior	Fraser Lane	375
2010/06	Moricetown	Northern Interior	Smithers	154
2010/05	St'at'imc (f. Lillooet Tribal Council)	Southern Interior	Lillooet	3000
2010/04	McLeod Lake	Northern Interior	McLeod Lake	4000
2010/03	Canim Lake	Southern Interior	Canim Lake	100
2010/03	Upper Similkameen	Southern Interior	Keremeos	15
2010/03	?Esdilagh (f. Alexandria)	Southern Interior	Quesnel	250
2009/12	Coldwater	Southern Interior	Merritt	250
2009/10	Red Bluff (15 Years)	Southern Interior	Quesnel	1125
2009/09	Snuneymuxw (1 Year)	Southern Interior	Nanaimo	11
2009/07	Nooaitch	Southern Interior	Merritt	100
2009/07	Shuswap (5 Years)	Southern Interior	Invermere	23
2009/05	Ktunaxa Nation (5 Years)	Southern Interior	Cranbrook	100
2009/05	Nicomen (5 Years)	Southern Interior	Lytton	20
2009/03	Shaken	Southern Interior	Merritt	75
2009/01	Lower Nicola (5 Years)	Southern Interior	Merritt	35
2009/01	Whispering Pines/High Bar/Little Shuswap/Shuswap (15 Years)	Southern Interior	Kamloops	3000

Table — Forestry Tenures... ***continued***

DATE SIGNED	FIRST NATION	REGION	LOCATION	TOTAL TIMBER VOLUME M3 (000)
2009/01	Cook's Ferry (5 Years)	Southern Interior	Merritt	39
2009/01	Lower Similkameen (5 Years)	Southern Interior	Keremeos	30
2008/12	Siska	Southern Interior	Lytton	752008/11
2008/11	Mowachaht/Muchalaht	Coast	Gold River	200
2008/11	Lower Similkameen (3 Years)	Southern Interior	Keremeos	56
2008/10	Tl'etinqox-T'in (f. Anaham) (10 Years)	Southern Interior	Williams Lake	2490
2008/10	Kwicksutaineuk/Ah-kwa-mish	Coast	Alert Bay	4
2008/10	Snaw-naw-as	Coast	Lantzville	15
2008/10	Malahat	Coast	Mill Bay	15
2008/09	Williams Lake	Southern Interior	Williams Lake	300
2008/05	Lower Nicola (Five Years)	Southern Interior	Merritt	378
2008/05	Canoe Creek	Southern Interior	100 Mile House	390
2008/05	Xat'súll (Aka Soda Creek)	Southern Interior	Williams Lake	150
2008/03	Canoe Creek	Southern Interior	100 Mile House	175
2008/02	Esketemc	Southern Interior	Williams Lake	740
2008/01	Bonaparte	Southern Interior	100 Mile House	250
2008/01	Osoyoos	Southern Interior	Osoyoos	47
2007/11	Whispering Pines/Clinton	Southern Interior	100 Mile House	75
2007/11	Nee Tahi Buhn	Northern Interior	Burns Lake	277
2007/10	Adams Lake	Southern Interior	Chase	81
2007/10	Skeetchestn	Southern Interior	Savona	130
2007/09	Ulkatcho	Southern Interior	Anahim Lake	300
2007/09	Neskonlith	Southern Interior	Chase	66
2007/09	Xat'súll (Aka Soda Creek)	Southern Interior	Williams Lake	300
2007/09	Canim Lake	Southern Interior	100 Mile House	115
2007/09	Esketemc	Southern Interior	Williams Lake	75
2007/07	Wuikinuxv	Coast	Port Hardy	200
2007/06	Skin Tyee	Northern Interior	Southbank	268
2007/06	Kwadacha	Northern Interior	Prince George	360
2007/05	Lower Similkameen	Southern Interior	Keremeos	52
2007/05	Lower Similkameen	Southern Interior	Keremeos	24
2007/04	Splatsin (Aka Spallumcheen)	Southern Interior	Enderby	82
2007/04	Cheslatta Carrier Nation	Northern Interior	Burns Lake	796
2007/04	Upper Nicola	Southern Interior	Merritt	96
2007/03	Westbank	Southern Interior	Kelowna	142
2007/03	T'Sou-ke	Coast	Sooke	+abt
2007/03	Blueberry River (October 2008 Amendment)	Northern Interior	Buick Creek	100
2007/03	Little Shuswap	Southern Interior	Chase	34
2007/03	Shuswap	Southern Interior	Kamloops	300
2007/02	Nazko First Nation	Southern Interior	Quesnel	625
2007/01	Upper Similkameen	Southern Interior	Keremeos	256
2006/12	Ashcroft (3 Years)	Southern Interior	Ashcroft	20
2006/12	Ulkatcho	Southern Interior	Anahim Lake	500
2006/12	Burns Lake (September 2008 Amendment)	Northern Interior	Burns Lake	208

Table — Forestry Tenures... ***continued***

DATE SIGNED	FIRST NATION	REGION	LOCATION	TOTAL TIMBER VOLUME M3 (000)
2006/11	Adams Lake	Southern Interior	Chase	86
2006/11	Splatsin (Aka Spallumcheen)	Southern Interior	Enderby	87
2006/10	Skeetchestn (3 Years)	Southern Interior	Savona	102
2006/08	McLeod Lake	Northern Interior	McLeod Lake	875
2006/07	Kamloops (3 Years)	Southern Interior	Kamloops	124
2006/06	Bonaparte	Southern Interior	Cache Creek	100
2006/05	Tlowitsis (2 Years)	Coast	Campbell River	41
2006/02	Simpcw (f. North Thompson)	Southern Interior	Barriere	200
2006/02	Little Shuswap (3 Years)	Southern Interior	Chase	36
2006/02	Red Bluff	Southern Interior	Quesnel	250
2006/02	Lhoosk'uz Dene	Southern Interior	Quesnel	500
2005/12	Kaska Dena	Northern Interior	Lower Post	0
2005/11	Ehattesaht	Coast	Zebellos	119
2005/06	Esketemc	Southern Interior	Williams Lake	107
2004/12	Simpcw (f. North Thompson)	Southern Interior	Barriere	300
2004/06	Squamish Nation	Coast	Squamish	Up to 18 [+abt]
2004/04	Tla'amin	Coast	Powell River	110[3]
2004/03	Okanagan (Silver Star Park Tree Removal)	Southern Interior	Vernon	35
2004/03	Nadleh Whuten	Northern Interior	Fraser Lake	750
2004/01	Kitselas/Kitsumkalum	Northern Interior	Terrace	500
2003/12	KNC (B-4) (December 2006 Amendment)	Southern Interior	Cranbrook	271
2003/12	Westbank First Nation	Southern Interior	Kelowna	100
2003/12	Splatsin (Aka Spallumcheen)	Southern Interior	Enderby	80
2003/11	Northern Nlaka'pamux National Tribal Council	Southern Interior	Lytton	100
2003/11	Okanagan Indian Band	Southern Interior	Vernon	100
2003/11	Shuswap Nation Tribal Council And Little Shuswap Indian Band (B-8)	Southern Interior	Kamloops	1035
2003/09	Skidegate	Coast	Skidegate	10
2003/08	Stellat'en	Northern Interior	Fraser Lake	450[2]
2003/08	Burns Lake Indian Band (Replaced By March 2004 Fra)	Northern Interior	Burns Lake	75[2]
2003/08	Wet'suwet'en	Northern Interior	Burns Lake	75
2003/05	Toquaht	Coast	Barkley Sound	162
2003/05	Office Of The Wet'suwet'en	Northern Interior	Burns Lake	500
2003/04	Ktunaxa Kinbasket Tribal Council (B-5)	Southern Interior	Cranbrook	[+abt]
2003/03	Lheidli T'enneh	Northern Interior	Prince George	150[incl abt]
2003/03	Saik'uz (Replaced By Nov 2003 Fra)	Northern Interior	Vanderhoof	450[2]
2003/01	Huu-Ay-Aht And Uchucklesaht	Coast	Port Alberni	265
2003/01	Ditidaht And Pacheedaht	Coast	Port Alberni	300
2002/11	Westbank[1]	Southern Interior	Kelowna	7.5
2002/09	Westbank	Southern Interior	Kelowna	275[incl abt]

[+abt] Denotes this agreement has an Area Based Tenure associated with it. Please refer to the FRA for specifics.
[#yr] Denotes Mtn Pine Beetle Agreement is over a # year period.
[1] Not a Direct Award Agreement. Direct award of forest licence (over one year) to further September 2002 Direct Award Agreement, pursuant to section 47.3 of the *Forest Act*.
[2] Reflects volumes from this agreement. Additional volumes became available through subsequent agreements.
[3] Maximum volume amended as a result of Tla'amin First Nation Interim Measures Agreement dated April 11, 2006.

RESOURCES

First Nations

BC First Nations Forestry Council
Suite 745, 1979 Marine Drive
North Vancouver BC V7P 3G2
Phone: 604-921-4488
Fax: 604-921-4401
Email: fnforestrycouncil@gmail.com
www.fnforestrycouncil.ca

National Aboriginal Forestry Association
Suite 300, 396 Cooper Street
Ottawa, ON K2P 2H7
Phone: 613-233-5563
Fax: 613-233-4329
Email: nafa@web.ca
www.nafaforestry.org

- The National Aboriginal Forestry Association (NAFA) was established to promote sustainable forestry as a necessary condition for Aboriginal economic development, the repair of environmental degradation, and the restoration of cultural and community spiritual health for Aboriginal people across the country.

Provincial

Ministry of Forests, Lands and Natural Resource Operations
PO Box 9049 Stn Prov Govt
Victoria, BC V8W 9E2
www.gov.bc.ca/for/index.html

Ministry of Aboriginal Relations and Reconciliation
PO Box 9100 Stn Prov Govt
Victoria, BC V8W 9B1
www.gov.bc.ca/arr

Federal

Aboriginal Affairs and Northern Development
Terrasses de la Chaudière
10 Wellington, North Tower
Ottawa, ON K1A 0H4
Toll-free: 1-800-567-9604
Fax: 1-866-817-3977
Toll-free: 1-866-553-0554
www.aadnc-aandc.gc.ca

LINKS AND RESOURCES

First Nations

- BC First Nations Forestry Action Plan: www.fnforestrycouncil.ca/resources/publications
- First Nations Mountain Pine Beetle Action plan: www.fnforestrycouncil.ca/programs/mountain-pine-beetle-program/bc-first-nations-mountain-pine-beetle-action-plan
- *Kunst'aa guu scc.lex'aayah Reconciliation Protocol* (Haida Protocol), 11 December 2009. www.haidanation.ca/Pages/Agreements/pdfs/Kunstaa%20guu_Kunstaayah_Agreement.pdf

Provincial

- BC — New Relationships with Aboriginal People and Communities in BC, Annual Report on Progress 2012-13: www2.gov.bc.ca/gov/DownloadAsset?assetId=BB8CADC2C2F241ADA23DFFDCBB2C85D7&filename=marr_annual_progress_report_2012-2013.pdf
- Ministry of Aboriginal Relations and Reconciliation, 2013/14 Service Plan Report: www.bcbudget.gov.bc.ca/Annual_Reports/2013_2014/pdf/ministry/arr.pdf
- Just the Facts — A review of silviculture and other forestry statistics: www.for.gov.bc.ca/hfp/publications/00001/index.htm
- Working Roundtable on Forestry. *Moving Toward a High Value, Globally Competitive, Sustainable Forest Industry* (March 2009): www.for.gov.bc.ca/mof/forestry_roundtable/Moving_Toward_a_Globally_Competitive_Forest_Industry.pdf

SELECT LEGISLATION

Provincial

- Bill 13 — *Forests and Range (First Nations Woodland Licence) Statutes Amendment Act, 2010*
- *Forest Act (R.S.B.C. 1996, c. 157)*
- *Forest Practices Code of British Columbia Act* (R.S.B.C. 1996, c. 159)
- *Foresters Act* (S.B.C. 2003, c. 19)
- *Forest and Range Practices Act of British Columbia* (R.S.B.C. 2002, c. 69)

Federal

- *Indian Timber Regulations* (C.R.C., c. 961)
- *Indian Timber Harvesting Regulations* (C.R.C. SOR/2002-109)
- Section 93 of the *Indian Act* (R.C.S. 1985, c. I-5) prohibits removal of wood

COURT DECISIONS

- *R. v. Westbank First Nation*, 1999 CanLII 4251 (BC SC)
- *R. v. Sappier; R. v. Gray*, [2006] S.C.R. 686
- *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2008 BCCA
- *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 (*"Haida"*)
- *Tsilhqot'in Nation v. British Columbia (2014) S.C.C 44*

PART 1 /// SECTION 3.14

Gaming

3.14

GAMING

3.14

GAMING

BACKGROUND

In Canada, gaming activity is regulated under the *Criminal Code* of Canada (R.S.C. 1985, c. C-46), and is consequently a matter of federal responsibility. However, for a fee, Canada has backed out of the business of gaming in favour of the provinces. Today, in all provinces throughout Canada, there is gaming to various degrees, which in some cases is both regulated and operated by the province or a Crown entity. While some First Nations are involved in gaming to some degree across Canada, no First Nation is currently regulating or administering gaming as a recognized jurisdiction.

Whether gaming should be supported or, indeed, encouraged, raises a number of public policy issues, not least of which are concerns around the morality and social impact of gaming. Nevertheless, many governments around the world have become increasingly reliant on income generated from gaming activities, and international gaming opportunities have expanded, with many new gaming centres opening up. Historically, many First Nations cultures had some form of gaming, including bone games and stick games. In the modern era, "Indian gaming" has flourished in the United States but to a much lesser extent in Canada because of politics and various federal and provincial laws.

"Indian Gaming" in the United States

The late 1980s and 1990s saw rapid expansion of casinos on Tribal lands in the United States. Such gaming is regulated under Tribal laws. In 1988, Congress passed the *Indian Gaming Regulatory Act*, recognizing the right of a Tribe to establish gaming facilities on its reservations in states with legal gambling. Numerous agreements between states and Tribes were negotiated and some of the most profitable casinos in North America, and internationally, were built. In fact, the largest casino in North America is not in Las Vegas, but rather is Foxwoods in Connecticut (www.foxwoods.com), owned by the Mashantucket (Western) Pequot Tribal Nation (www.mptn-nsn.gov). Thirty states in the US have legalized Indian casinos, with about 240 Tribes now operating some 420 gaming establishments. In 2012, these establishments generated $27.9 billion in revenue. Indian gaming in the US has therefore become a significant economic contributor for many Tribes and is an increasingly important source of government revenue for them.

"Indian Gaming" in Canada

The history of "Indian gaming" in Canada has been less remarkable and there are only a dozen or so First Nations casinos scattered over five provinces. This is the result of the different legal reality in Canada (i.e., federal legislation and Canadian court decisions) and the manner in which Aboriginal jurisdiction and Aboriginal rights are evolving. Indian gaming has also been affected by the politics of gaming, including the debate on the perceived negative effects of gaming and the growing dependency of other Governments on gaming revenues — and those governments not wanting to share, or prepared to share only a minimum of those revenues with First Nations.

First Nations view jurisdiction over gaming on First Nations lands as part of the inherent right of self-government, which is constitutionally protected by section 35(1) of the *Constitution Act, 1982*. The Supreme Court of Canada, however, has to date explicitly rejected First Nations' claims to an inherent right to conduct gaming activities. In 1996, the Supreme Court of Canada, in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, held that gaming, or the regulation of gaming, was not an integral part of the cultures

of two Ontario First Nations at the time of European contact. The court ruled that the First Nations bringing the case had not established the factual basis required to meet the test for the Aboriginal right. However, the Supreme Court did not say that such a constitutional right could never be recognized. Nevertheless, *Pamajewon* remains the most resounding defeat to date with respect to a case brought about regarding a specific power (jurisdiction) as being an aspect of the inherent right of self-government; using the test from *R. v. Van der Peet*, [1996] 2 S.C.R. 507, the court found that high stakes bingo did not meet the "integral to the distinctive culture" test. Future court cases, which will address issues of equity and governance or be based on stronger factual evidence of gaming being an integral part or defining feature of a Nation's distinctive culture, are being contemplated.

Constitutional Framework for Gaming

In Canada, the federal government has primary jurisdiction over gaming under its criminal law responsibility, namely section 91(27) of the *Constitution Act, 1867*. Under Part VII of the *Criminal Code*, all forms of gaming are illegal unless the gaming activity or operation can be brought within the exemptions set out in section 207. Section 207(1)(a) makes it lawful for a provincial government to manage and conduct a "lottery scheme," which is broadly defined as "a game or any proposal, scheme, plan, means, device, contrivance or operation." The term "lottery scheme" includes bingo games and table, card and wheel games normally played at casinos. Slot machines can only be operated at gaming operations that are managed and conducted by a province alone (s. 207(1)(a) and 207(4)(c)). Section 207(1)(b) makes it lawful for charitable or religious organizations, where licensed by a province, to conduct lottery schemes (i.e., bingo, table, card and wheel games). The provinces also claim legislative jurisdiction over aspects of gaming under sections 92(7), 92(9) and 92(13) of the *Constitution Act, 1867*.

In 1979, the federal government struck a tentative deal with the provinces to cease lottery operations in return for a $24-million annual payment. However, before the deal was formalized, the minority federal government in power was defeated and the incoming government decided to ignore the deal in favour of re-establishing a federal presence in the marketplace through sports pools. The provinces initiated litigation against the federal government, seeking to have the terms of the 1979 agreement upheld. In 1984, before the matter reached the courts, there was another change in the federal government.

In June 1985, the government of Canada and each of the provinces entered into an agreement regarding the management and conduct of gaming, which they characterized as an extension of the 1979 federal-provincial lottery agreement. Under the agreement, the government of Canada agreed to "refrain from re-entering the field of gaming and betting … and to ensure that the rights of the Provinces in that field are not reduced or restricted." The federal government also agreed to amend the *Criminal Code* to divest itself of any capacity to conduct lottery schemes. In exchange, the provinces agreed to pay $100 million over three years to the government of Canada, to be directed towards the federal government's financial commitment to the 1988 Winter Olympics in Calgary. In addition to the $100 million, the $24-million annual payment (adjusted according to the Consumer Price Index) under the 1979 agreement was reaffirmed. Each province would contribute a share calculated in proportion to its gaming revenue. Financially, this was probably the best deal the provinces have ever made with the federal government.

To implement the 1985 agreement, the federal government amended the *Criminal Code*, making it lawful for a provincial government to manage and conduct lottery schemes (e.g., bingos, casinos) (section 207(1)(b) and (2)). The constitutional validity of the 1985 agreements has been considered and was upheld in *R. v. Furtney*, [1991] 3 S.C.R. 89. Unfortunately, First Nations' interests were not considered in the 1985 agreement, notwithstanding that the federal government has jurisdiction over "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. As a result of its combined jurisdiction over gaming under section 91(27) and Indian lands under 91(24), Canada arguably has jurisdiction to regulate gaming on reserve lands.

The federal government has declined to negotiate sectoral gaming arrangements with First Nations based on its undertakings in the 1985 agreement with the provinces. However, there is nothing in the 1985 agreement that removes or narrows the jurisdiction of the federal government to regulate gaming on First Nations lands under the authority of sections 91(24) and 91(27) of the *Constitution Act, 1867*. If the power to regulate gaming on First Nations lands was not transferred as part of the 1985 agreement, then regulation over gaming on First Nations lands would arguably be within the federal jurisdiction and, in the absence of any other legally compelling argument, gaming on reserves would require federal legislative action.

Interestingly, Canada's Inherent Right Policy on negotiating governance arrangements includes gaming as a jurisdictional subject matter that can be negotiated with First Nations. Gaming is included in the second list of subjects that Canada views as going beyond matters integral to Aboriginal culture or strictly internal to an Aboriginal group, but will negotiate on two conditions. The first condition is the extent to which the federal government has jurisdiction over an area. Since concluding the 1985 agreement with the provinces, the federal government has maintained that its jurisdiction over the licensing of lottery schemes (i.e., bingos, casinos) has been significantly restricted. The second condition is that primary law-making authority over gaming must remain with the federal or provincial government, as the case may be, and their laws would prevail in the event of a conflict with First Nation laws.

Gaming in British Columbia

Gaming in BC is regulated and controlled by a government entity that contracts with private companies to operate gaming facilities on the government's behalf as contractors. The BC Lottery Corporation (BCLC) was established in 1984 and by Order in Council No. 579 April 1, 1987, was given broad powers to regulate gaming activities in BC. In turn, BCLC activities are overseen by the Gaming Policy and Enforcement Branch of the Ministry of Public Safety and Solicitor General. The BCLC is responsible for regulating gaming in the province and was established as the authority in BC responsible for issuing licences under section 207 of the *Criminal Code*. These licences permit a company to operate or conduct a permitted gaming activity on behalf of the province with operators having very little control with the respect to the manner in which gaming is conducted. In addition to its other responsibilities, the BCLC is responsible for screening and supervising operators who manage casino and bingo operations on behalf of the province. BC has passed a *Gaming Control Act* (S.B.C. 2002, c. 14) and there are regulations and numerous directives and policies issued by the Gaming Policy and Enforcement Branch to guide the BCLC.

Gaming in BC has evolved from being limited to racetrack betting and small charitable casinos (no slots) and low-stakes bingo halls (where charities ran nightly events) to larger casinos (with tables and slots) and gaming centres (bingo and slots). It has basically moved from the realm of being a carnival activity to the mainstream, although it is still not as competitive or varied as in other jurisdictions across North America and beyond that permit more competition between operators with no government monopoly. Gaming revenues in BC are now collected centrally by the provincial government, with a portion distributed to charities and the balance going to general revenues.

The expansion of gaming in BC in the 1990s was in part a response to the growth of gaming in Canada and elsewhere and a growing public acceptance of gaming in the province. In 1996, the BC government put out a call for proposals for the establishment of what were then called "Destination Casinos" (including slots) and "Destination Bingos." There were high expectations that substantial new business opportunities would be created, including opportunities for First Nations. However, many larger gaming operators declined to participate, since they would essentially be working for the province, with little or no opportunity to make the profits possible in other more "gaming-friendly" jurisdictions that supported market-based gaming. Unfortunately, in the 1996 call for proposals, there

were no special opportunities for First Nations, although some First Nations and their partners did submit proposals; three were accepted (Penticton, Merritt, Cranbrook), but only one casino was actually built (Casino of the Rockies in Cranbrook), and that was subsequently restructured owing to financial challenges.

Gaming in BC continues to evolve and there are now 19 community gaming centres (bingo and slots), 7 bingo-only gaming licences and 18 casino locations (tables and slots). However, operators still work for the province under management contracts (there are no marketable licences), with most of the revenues (70 percent for casinos and slots) going to the province and the balance held by the operator for running the facility and as profit. New locations are determined by the BCLC strictly on the basis of whether there is enough market demand. In 2013/14, the total revenues (before expenses) from gaming (casinos, lotteries, bingo halls and community gaming centres) in BC were approximately $2.79 billion, with the province receiving about $1.165 billion in net gaming revenue.

First Nations in BC have been trying to become more involved in gaming. Despite the general restrictions on gaming within the province and the absence of special initiatives for First Nations, there are now three gaming operations located on-reserve: the Casino of the Rockies at the St. Eugene's Resort in Cranbrook; Chances Cowichan, a community gaming centre located on the Cowichan reserves on Vancouver Island; and Chances Squamish, another community gaming centre located on Squamish Nation lands near Squamish. As of October 2014, another Chances Casino is slated to open in Salmon Arm in co-operation with the Adams Lake Indian Band. The Casino of the Rockies is now operated by a consortium of First Nations from across Canada, including Nations involved in the gaming industry elsewhere (Rama First Nation of Ontario, Samson Cree Nation of Alberta) as well as the Ktunaxa Nation, on whose territory the resort sits. For the other two facilities, the operating agreements with the province are not held by either First Nation (or their subsidiary). However, Cowichan and Squamish First Nations (and soon the Adams Lake Indian Band) are the "host local government" and are therefore entitled under provincial policy (as any host local government would be) to 10 percent of revenues. The Ktunaxa Nation also receives these revenues as the host local government for the Casino of the Rockies. This revenue is of significant benefit to these Nations, as they share in the profits without any risk. In addition, the First Nation may be the landlord of the facility and generate rental income as well.

In 2010, BC First Nations leadership supported the establishment of a BC First Nations Gaming Commission to apply further pressure with the aim of opening up more gaming opportunities for BC First Nations. The Commission's mandate is to pursue all forms of gaming opportunities on First Nations lands throughout the province. Under this mandate, the commission is challenging the authority of the province and BCLC to operate on reserve lands, and is positioning itself to oversee the expansion and regulate the activities of First Nations–controlled gaming on reserve lands. In addition, the national AFN, through the Chiefs-in-Assembly, resolved in 2014 to establish a National First Nations Gaming Confederacy (NFNGC) to promote First Nations gaming generally across Canada.

Another area of gaming that has only been tapped since the rapid expansion of the Internet is online gambling. In Canada, as with other forms of gaming, online gaming is illegal unless provincially regulated. Nevertheless, both provincially regulated and non–provincially regulated Internet gaming is an expanding industry in Canada, as it is in the United States (where it is sometimes vigorously prosecuted). Most online gaming corporations are off-shore companies. However, the Mohawk in Quebec are acknowledged as having one of the most cutting-edge and hi-tech online gambling centres (poker, casino games and sports betting) in the world. The Kahnawake Gaming Commission generates Internet-based business by offering online gambling licences for poker, casino and sports betting. Mohawk Internet Technologies (MIT), a data centre located within Mohawk territory, hosts and manages many Internet gambling websites, and provides its people with high-tech employment. MIT is the closest and fastest source for hosted gambling websites for North American players.

Established in 1998, by 2006 MIT was host to hundreds of operators. According to Christiansen Capital Advisors, online gambling revenues overall grew from approximately $3 billion in 2001 to almost $25 billion in 2010. Another firm, H2 Gambling Capital, estimates that revenues will top $40 billion by 2015. In British Columbia, online gaming is the sole domain of the BCLC. There are no recorded online gambling companies currently being operated by BC First Nations.

INDIAN ACT GOVERNANCE

The *Indian Act* does provide some opportunity for a First Nation to regulate gaming. Section 81(1)(m) of the *Indian Act* states:

> 81(1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister for any or all of the following purposes, namely:
>
> (m) the control and prohibition of public games, sports, races, athletic contests and other amusements.

Section 81 bylaws are, of course, subject to Ministerial disallowance under section 82(2) of the *Indian Act*. On May 12, 1979, the Pas Band (now known as the Opaskwayak Cree Nation) passed a bylaw under section 81(1)(m) of the *Indian Act* — The Pas Indian Band, bylaw No. 14 for the Regulation of Public Games and Amusements, May 29, 1979. The Pas gaming bylaw was not disallowed by the Minister and came into force. Although the Pas gaming bylaw is limited in scope, it is still one of the most extensive gaming bylaws enacted under section 81(1)(m) of the *Indian Act*. In British Columbia, 24 bylaws have been allowed by the Minister under section 81(1)(m) respecting gaming and other amusements in a number of cases authorizing the holding of bingos. These bylaws do not displace federal or provincial jurisdiction with respect to authorizing gaming activities, but rather regulate their conduct if and when approved under provincial jurisdiction.

SECTORAL GOVERNANCE INITIATIVES

There are no Nation-wide sectoral governance initiatives involving the government of Canada that address First Nations gaming. However, there are a number of sectoral gaming arrangements between the provinces and First Nations. Some recognize First Nations control over gaming to a degree, and others make gaming opportunities available to First Nations under provincial jurisdiction, while not transferring authority or jurisdiction. In BC, there are no sectoral arrangements with respect to gaming. The BC First Nations Gaming Commission is trying to change this. Given that gaming is one of the few areas in BC where there are limited initiatives, it is important to provide an overview of what is happening in other parts of the country.

Alberta

The government of Alberta introduced its First Nations Gaming Policy in January 2001. Based on Alberta's charitable gaming model, the First Nations Gaming Policy provides First Nations in Alberta with the opportunity to develop casino facilities on reserve. According to the policy, First Nations casinos can be located on reserve land, be regulated by the Alberta Gaming and Liquor Commission, and operate on the same terms and conditions as off-reserve casinos. The 2001 policy provided for the allocation, by the Alberta Lottery Fund, of slot machine proceeds from First Nations casinos to a First Nations Development Fund Grant Program. As with the Alberta Lottery Fund, First Nations are able to apply for grants to support economic, social and community development projects. The slot machine proceeds are allocated as follows: 30 percent to traditional Alberta Lottery Fund initiatives and 40 percent to a First Nations Development Fund Grant Program, of which 75 percent is available to the host First Nations and 25 percent is shared among other First Nations in Alberta. Alberta's

policy also recognizes the unique needs of First Nations and allows them to use their revenues in areas where other gaming facilities cannot, such as on-reserve housing or addictions treatment. All First Nations casinos are subject to the Alberta Gaming and Liquor Commission's eight-step application process. The policy stipulates that the First Nations community must have a prominent role in determining whether casinos are introduced into the community. Alberta currently has five First Nations casinos: Stoney Nakoda Casino on Stoney Nakoda First Nation, near Morley; Eagle River Casino and Travel Plaza in Whitecourt; Tsuu T'ina First Nations' Grey Eagle Casino, located just west of Calgary; Cold Lake First Nations' Casino; and River Cree Resort and Casino on the Enoch Cree Nation lands, west of Edmonton.

Saskatchewan

On May 18, 1994, the government of Saskatchewan entered into an agreement with the Federation of Saskatchewan Indian Nations (FSIN) to establish two casinos in Regina and Saskatoon. The agreement also provided for the establishment of a First Nations Fund and required that 25 percent of the net profits of the casino operations be paid into the fund for distribution to all First Nations on a "fair and equitable basis." On June 10, 1995, the FSIN enacted a *First Nation Gaming Act* (although the jurisdiction to do so is not included in the 1994 agreement) and established the Saskatchewan Indian Gaming Authority (SIGA) as both a management and regulatory body to develop, conduct, manage and operate on-reserve and off-reserve casinos. SIGA was incorporated on January 11, 1996, as a non-profit organization under Saskatchewan law. SIGA's six casinos are located across the province: Bear Claw Casino, at Moose Mountain Provincial Park; Dakota Dunes Casino, in Saskatoon; Gold Eagle Casino, in North Battleford; Living Sky Casino, in Swift Current; Northern Lights Casino, in Prince Albert; and Painted Hand Casino (Yorkton). SIGA revenues are distributed among a number of beneficiaries, including Saskatchewan's First Nations communities, the provincial treasury and community development corporations located across the province.

On June 11, 2002, Saskatchewan and FSIN signed a 25-year Gaming Framework Agreement, replacing the original agreement from 1995. The Framework Agreement allowed for the continued operation of casinos in the province through SIGA. After a review by the province and the FSIN, the Gaming Framework Agreement was amended. Effective June 11, 2007, the amendments included changes to the casino revenue-sharing formula (with the First Nations Fund now receiving 37.5 percent), improved accountability provisions respecting the operation of community development corporations, and increased funding for problem gambling awareness, prevention and treatment. The agreement undergoes a mandatory review every five years.

Manitoba

In Manitoba, First Nations can enter into gaming agreements with the Province to establish self-licensing First Nations Gaming Commissions, which are then designated as a licensing authority by both a provincial Order in Council and a resolution of the First Nation. Once designated as a licensing authority, a First Nations Gaming Commission has the power to license charitable and religious organizations to conduct gaming (i.e., bingos, lottery and break-open ticket sales, Monte Carlo casino events and ticket raffles) on First Nations lands, but cannot license or operate permanent bingo or casino facilities on First Nations lands. There are three First Nations casinos in Manitoba: Aseneskak Casino at Opaskwayak Cree Nation adjacent, to The Pas (2002); South Beach Casino on Brokenhead Ojibway First Nation, north of Winnipeg (2005); and Sand Hills Casino at Swan Lake First Nation, east of Brandon (2014). Revenues from Sand Hills will be shared with all Manitoba First Nations. Under a policy has been in place since 1992, Manitoba First Nations can also enter into separate agreements with the government of Manitoba to operate video lottery terminals on First Nations lands. The machines are owned and operated by the province but operated by First Nations under site-holder agreements with the Manitoba Lotteries Commission.

Ontario

In Ontario, there are three First Nations casinos: Casino Rama, Rama (1996); Golden Eagle Charity Casino, Kenora (1994); and Great Blue Heron Charity Casino, Port Perry (1997). Casino Rama is a joint venture with the government of Ontario and Ontario First Nations to establish a for-profit casino on the reserves of the Chippewas of Mnjikaning (Rama) First Nation. Casino Rama is one of the most successful casinos in Canada. Until 2011, all profits from Casino Rama were shared by Ontario First Nations. Under a new agreement reached by the Province and First Nations, First Nations now receive 1.7 per cent of all gross revenues from all Ontario slot facilities, casinos and lotteries. This money, an estimated $120 million in 2012/13, is distributed to the 132 Ontario First Nations through the Ontario First Nations Limited Partnership. An agreement has also been signed between the Ontario Lottery and Gaming Corporation and Chippewas of Mnjikaning (Rama) First Nation to ensure the continued operation of Casino Rama on Rama First Nation lands. As part of that agreement, Rama receives 1.9 percent of the casino's gross revenues as the site landlord. It was anticipated that the community's share of revenues generated at Casino Rama would increase from more than $5 million each year before the new agreement to more than $8 million annually under the new agreement. First Nations in Ontario can also enter into gaming agreements with the government of Ontario to establish self-licensing First Nation Licensing Authorities. These authorities are established by provincial Order in Council and by a First Nation resolution and can license charitable gaming events on First Nations lands, including bingos, break-open tickets and raffles.

Quebec

In Quebec, First Nations can enter into gaming agreements with the government of Quebec to establish self-licensing gaming boards, which are limited to licensing bingo events and break-open tickets on First Nations lands. As noted earlier, the Mohawk also run extensive online gaming operations.

New Brunswick

In New Brunswick, First Nations can enter into self-licensing agreements with the government of New Brunswick. First Nations licensing authorities are established by a provincial Order in Council and a First Nation resolution. Once established, First Nations licensing authorities can license bingos, raffles and break-open tickets. There are currently three gaming facilities in New Brunswick located on First Nations land: the Eagles Nest Gaming Palace on Woodstock First Nation, the Tobique Gaming Center on Tobique First Nation, and the Four Winds Bingo Hall at Fort Folly First Nation.

Nova Scotia

Nova Scotia entered into a series of gaming agreements with First Nations communities beginning in 1995. These agreements provide for a sharing of the profits of the casino in Sydney (50 percent share of the "cash available for distribution") and allow the communities to retain video lottery terminal revenues generated on First Nations lands. All First Nations in Nova Scotia have gaming agreements with the Province. However, Bear River and Pictou Landing do not have video lottery terminals in their communities.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

In BC, two of the existing comprehensive governance arrangements address gaming in a limited way. None of the agreements recognizes any jurisdiction, authority or revenue-sharing. While no agreement was reached on Westbank's jurisdiction over gaming, the agreement does set out the intention of Westbank First Nation to seek further negotiations with British Columbia and Canada to

set out jurisdictional arrangements with respect to gaming. In other words, the agreement leaves the door open for the Westbank First Nation to continue negotiating jurisdictional arrangements with Canada and British Columbia with respect to gaming.

The only other self-government arrangement in BC that contains gaming provisions is the *Nisga'a Final Agreement*. The agreement makes it clear that any licensing or approval of gambling or gaming facilities on Nisga'a lands must be consistent with federal and provincial laws of general application. However, the door is left open for the Nisga'a to benefit from future federal or provincial policy or legislation that "permits the involvement of Aboriginal peoples in the regulation of gambling and gaming."

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	No provisions.	No provisions.
Westbank	Currently Westbank does not have jurisdiction but can seek further negotiations with Canada and BC on future jurisdictional arrangements for gaming. (Part XXIV, s. 222(f))	No provisions.
Nisga'a	BC will not licence or approve gambling or gaming facilities on Nisga'a Lands other than in accordance with any terms and conditions established by Nisga'a Government that are not inconsistent with federal and provincial laws of general application. (Ch. 11, s. 108) Any change in federal or provincial legislation or policy that permits the involvement of aboriginal peoples in the regulation of gambling and gaming will, with the consent of Nisga'a Lisims Government, apply to Nisga'a Government. (Ch. 11, s. 109)	No provisions.
Tsawwassen	No provisions.	No provisions.
Maa-nulth	No provisions.	No provisions.
Yale	No provisions.	No provisions.
Tla'amin	No provisions.	No provisions.

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(m) Prohibition of public games and other amusements			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Beecher Bay	94-1	PROHIBITION OF PUBLIC GAMES	Bylaw Respecting Gaming And Other Amusements
Kamloops	2004-07	PROHIBITION OF PUBLIC GAMES	Bylaw Respecting Regulations For Recreational Facilities Owned By The Band
Lax Kw'alaams	1981-1	PUBLIC GAMES	Bylaw Respecting Establishment And Regulation Of The Lach Goo Alams Recreation Commission Bylaw
Lax-Kw'alaams	1981-2	PUBLIC GAMES	Bylaw Amending Bylaw No. 1981-1, Concerning The Establishment And Regulation Of Lach Goo Alams Recreation Commission
Nazko	5	PUBLIC GAMES	To Establish A Recreation Commission Nazko-Kluskus Recreation Commission - 1974
Secwepemc	2004-07	PROHIBITION OF PUBLIC GAMES	Bylaw Respecting Regulations For Recreational Facilities Owned By The Band
Snuneymuxw First Nation	6	PROHIBITION OF PUBLIC GAMES	Bylaw Respecting The Prohibition Of Certain Amusements And Special Events
Westbank	1995-06	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Special Events On Reserve

RESOURCES

First Nations

Aseneskak Casino
Opaskwayak Cree Nation
PO Box 10880
Opaskwayak, MB R0B 2J0
Phone: 204-627-7100
Fax: 204-623-5263
Email: info@opaskawak.ca
www.opaskwayak.ca/casino.php

Casino of the Rockies
7777 Mission Place
Cranbrook, BC V1C 7E5
Phone: 250-417-2772
www.steugene.ca/casino

BC First Nations Gaming Initiative
c/o Okanagan Nation Alliance
3255C Shannon Lake Road
Westbank, BC V4T 1V4
Phone: 250-707-0095

Casino Rama
Mnjikaning First Nation
PO Box 178, RR#6
5899 Rama Road
Rama, ON L0K 1T0
Phone: 1-800-832-PLAY (7529)
Fax: 705-329-3325
www.casinorama.com

Federation of Saskatchewan Indian Nations (FSIN)
Asimakaniseekan Askiy Reserve
Suite 100, 103A Packham Avenue
Saskatoon, SK S7N 4K4
Phone: 306-665-1215
Fax: 306-244-4413

Regina Sub-Office
490A Hoffer Drive,
Regina, SK S4N 7A1
Phone: 306-721-2822
Fax: 306-721-2707

Office of Treaty Governance Processes
Suite 100, 103A Packham Avenue
Saskatoon, SK S7N 4K4
Phone: 306-667-1876
Fax: 306-477-5115

Golden Eagle Charitable Casino
Anishinabe of Wauzhushk Onigum First Nation
PO Box 2860 Stn Main
Kenora, ON P9N 3X8
Phone: 807-548-1332
Fax: 807-548-5831
www.bingokenora.com

Great Blue Heron Charity Casino, Port Perry
Mississaugas of Scugog Island First Nation
21777 Island Road
Port Perry, ON L9L 1B6
Phone: 1-888-29-HERON (1-888-294-3766)
Fax: 905-985-4888
www.gbhcasino.com

Saskatchewan Indian Gaming Authority (SIGA)
250 – 103C Packham Avenue
Saskatoon, SK S7N 4K4
Phone: 306-477-7777
Fax: 306-477-7582
Email: siga@siga.sk.ca
www.siga.sk.ca

Provincial

Alberta Gaming and Liquor Commission
Head Office: 50 Corriveau Ave.
St. Albert, AB T8N 3T5
Phone: 780-447-8600
Toll-free: 1-800-272-8876
www.aglc.gov.ab.ca

British Columbia Lottery Corporation
Head Office: 74 West Seymour Street
Kamloops, BC V2C 1E2
Phone: 250-828-5500
Fax: 250-828-5631
www.bclc.com

Ministry of Public Safety and Solicitor General
Gaming Policy and Enforcement Branch
Licensing and Grants Division
PO Box 9310, Stn Prov Govt
Victoria, BC V8W 9N1
Phone: 250-387-5311
www.gaming.gov.bc.ca

- BC Gaming policies and applications: www.gaming.gov.bc.ca/contact/index.htm

International

Foxwoods Resort Casino Connecticut
Mashantucket Pequot Tribal Nation
P.O. Box 3060
Mashantucket, CT 06339
Phone: 860-396-6500

Foxwoods Resort Casino
39 Norwich Westerly Road
Mashantucket, Connecticut 06338
Phone: 1-800-FOXWOODS
Phone: 1-800-200-2882 (Box Office)
http://500nations.com/casinos/ctFoxwoods.asp

National Indian Gaming Commission, Portland Regional Office
Solomon Building, Suite 212
620 SW Main Street
Portland, OR 97205
Phone: 503-326-5095
Fax: 503-326-5092
www.nigc.gov

SELECT LEGISLATION

Provincial

- *Gaming Control Act* (S.B.C 2002, Chapter 14)
- *Gaming Control Regulations* (B.C. Reg. 2008/202)

Federal

- *Criminal Code* (R.S.C., 1985, c. C-46)

PART 1 /// SECTION 3.15

Health

3.15

HEALTH

3.15

HEALTH

BACKGROUND

Section 92(7) of the *Constitution Act, 1867*, gives the provinces exclusive jurisdiction over "the establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals." However, in practice, the federal and provincial governments divide responsibility for health services, including the provision of health care, given the important role that the federal government plays in providing financial support for health care through the *Canada Health Act* (R.S.C., 1985, c. C-6). With respect to First Nations people, depending on the location and type of service required, federal, provincial or First Nations authority applies. In BC generally, the current provincial health system is focused on sickness — it is essentially a treatment system that absorbs half of the provincial budget. Recognizing that this system is not sustainable, the province is looking to create a system that supports health prevention and promotion rather than treatment alone. With respect to health care delivery for First Nations people in BC, there have been a number of important developments in the past few years, not the least of which is the establishment of the (BC) First Nations Health Council (FNHC) and the (BC) First Nations Health Authority (FNHA), a non-profit society incorporated under the BC *Society Act* (R.S.B.C. 1996, c. 433).

There are many considerations in addressing health services and evolving First Nations self-government. Providing health services is now the single largest budgetary expenditure for all governments collectively in Canada, and the cost is growing as the population ages and medical treatments and programs and services become more advanced. All governments are looking for ways to share the costs of and responsibility for the growing health care burden. Health partnerships are seen as critical to ensuring that health services are effective and sustainable over time. The provision of health services to First Nations people and the question of whether First Nations should seek recognition of jurisdiction or administrative authority in the health area are approached in this chapter with these realities in mind.

Provincial Laws

Under the *Constitution Act, 1982* and the *Canada Health Act* (enacted in 1984), the provinces and territories of Canada have the primary responsibility for organizing and delivering health care to their citizens, including First Nations and Aboriginal peoples, regardless of residence.

The BC Ministry of Health provides overall policy direction and strategic planning for the provincial health system; this includes funding and providing direction to the six health authorities in BC. The ministry directly manages a number of provincial programs and services, including the Medical Services Plan, which covers most physician services; PharmaCare, which provides prescription drug insurance for British Columbians; and the BC Vital Statistics Agency, which registers and reports on vital events such as a birth, death and marriage.

The ministry is also responsible for provincial legislation and regulations that govern the provision of health care in BC, including the *Medicare Protection Act* (R.S.B.C 1996, c. 286), for enrollment and payment of practitioners, and the *Health Professions Act* (R.S.B.C. 1996, c. 183), which regulates health professions. The Aboriginal Health Directorate applies an "Aboriginal lens" to health policy development and program implementation for the Ministry of Health, and provides guidance and support on Aboriginal health issues to other ministries.

In BC, responsibility for direct service delivery rests with six health authorities established under the *Health Authorities Act* (R.S.B.C. 1996, c. 180). There are five regional health authorities: Northern, Interior, Island, Vancouver Coastal and Fraser. They are responsible for the design, planning and management, and delivery of a full continuum of health services to meet the needs of the population within their respective geographic and administrative regions, including the quality, coordination and accessibility of those services. A sixth health authority, the Provincial Health Services Authority (PHSA), is responsible for province-wide health programs. These include the specialized programs and services provided through the BC Cancer Agency, BC Centre for Disease Control, BC Renal Agency, BC Transplant, Cardiac Services BC, BC Emergency Health Services (which provides ambulance services across the province), BC Mental Health and Substance Use Services, and Perinatal Services BC. PHSA is also responsible for the BC Children's Hospital and Sunny Hill Health Centre for Children and the BC Women's Hospital and Health Centre.

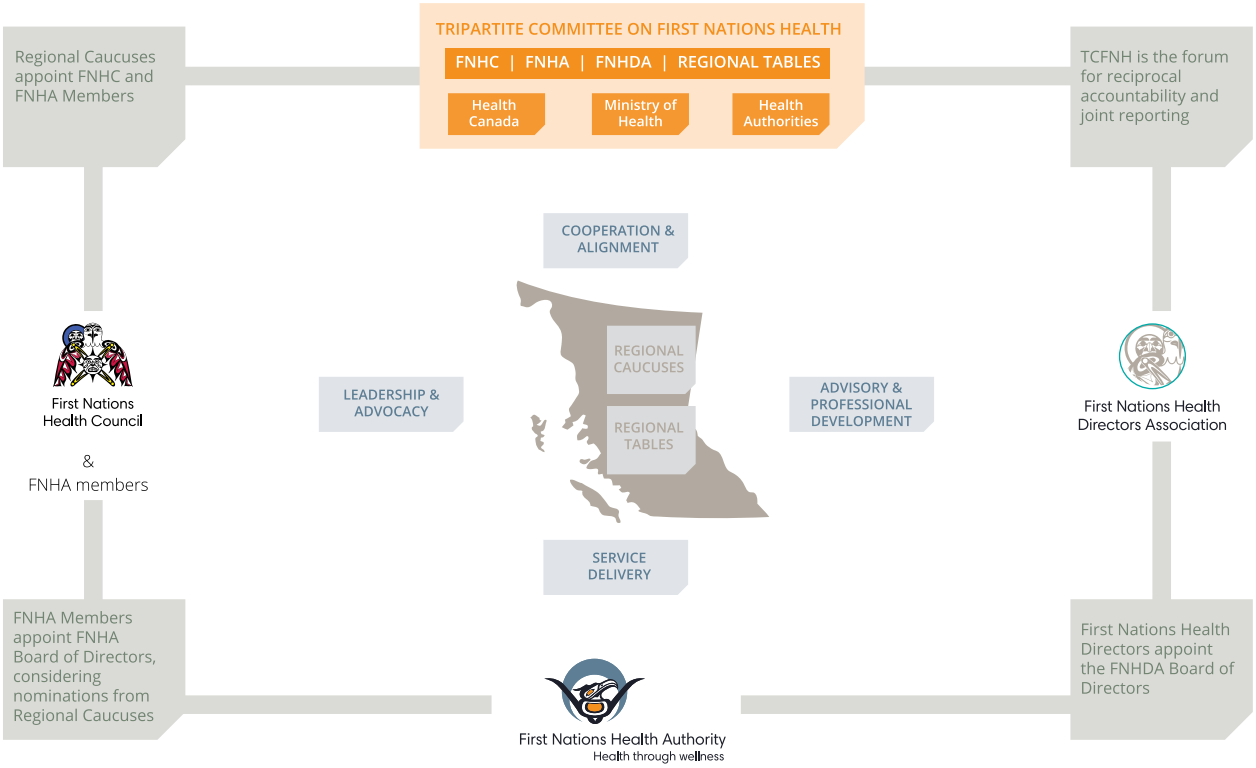
Federal Laws and the Provision of Health Care Services to First Nations in BC

The *Department of Health Act* (S.C. 1996, c. 8) makes provision for health matters for those over whom Canada has jurisdiction. The *Hospital Insurance Diagnostic Services Act* (1957) and *Medical Care Act* (1968) originally established universal hospital and medical insurance systems. The current *Canada Health Act* (CHA) sets out Canada's universal health care policy and is supported by comparable legislation in every province. The CHA also sets out health insurance plan funding qualifications for the provinces.

Pursuant to its constitutional responsibilities under section 91(24) of the *Constitution Act, 1867*, Canada has assumed specific authority for health services for persons registered as Indians under the *Indian Act* (R.S.C. 1985, c. I-5) in addition to the responsibilities it has for all Canadians. Under the *Indian Act*, the governor in council can make regulations with respect to the prevention, mitigation and control of disease and to provide for medical treatment and health services to Indians. This has not been done. Instead, responsibility for Indian health, in addition to what is provided for under laws of general application to Indians by way of the national system of health care or provincially, has been transferred to Health Canada.

Health Canada's role in First Nations and Inuit health goes back to 1945, when Indian health services were transferred from Indian Affairs to the Department of Health. In 1962, Health Canada provided direct health services to First Nations people on-reserve and for the Inuit in the north. The provision of health programs and services by Health Canada to First Nations and Inuit is set out in the Federal Indian Health Policy, 1979. There is no federal legislation specific to the provision of health services to First Nations people or on reserve lands. By the mid-1980s, work began to have First Nations and Inuit communities administratively control more health services, using health transfer agreements negotiated and implemented under federal jurisdiction. Health Canada's programs and services to First Nations and Inuit are still a matter of policy, using the *Annual Appropriation Acts* to obtain parliamentary approval. (For a discussion of how this policy works and an overview of the role of Health Canada in First Nations and Inuit health care, see the annual "Health Canada's Plans and Priorities" a link to these documents can be found at the end of this chapter in the Resources).

Today, Aboriginal Affairs and Northern Development Canada's (AANDC) role is really quite minor with respect to First Nations health care; it is largely restricted to assisting communities in creating health bylaws using the limited jurisdiction under the *Indian Act* and promoting communication between First Nations and Health Canada. Health Canada has the primary role in any negotiations regarding increased First Nations delivery of federal programs and services or the transfer of jurisdiction over health services to First Nations governments.



Prior to October 1, 2013, the First Nations and Inuit Health Branch (FNIHB) of Health Canada, through its regional office, delivered public health and community health programs on-reserve in BC. On October 1, 2013, the FNHA assumed full responsibility for the design, management, delivery and funding of health programs and services formerly administered by the FNIHB. This is the first and the only First Nations Health Authority in Canada to date. While the FNIHB — BC Region no longer holds service delivery responsibility in BC, Health Canada continues to play an important role in the implementation and functioning of legal and funding agreements and health plans in partnership with the FNHA. This arrangement ensures that the federal transfer to the FNHA is not a "dump and run" and recognizes that First Nations in BC are best positioned to make decisions about the health and wellness of their citizens, supported and funded by the government of Canada.

FNHA assumed responsibility in program areas including environmental health and communicable and non-communicable disease prevention and provision of primary health care services, including nursing stations and community health centres in remote and/or isolated communities. As they did when Health Canada was in control, these services supplement and support the general services that the Province and regional health authorities provide to all BC residents. The FNHA also supports targeted health promotion programs for Aboriginal people, regardless of residency (e.g., the Aboriginal diabetes initiative) as well as counselling, addictions and mental wellness services. Other services assumed as part of the transfer include non-insured health coverage (including drugs, dental care, vision care, medical supplies and equipment), short-term crisis-intervention mental health services, and medical transportation for those registered as Indians under the *Indian Act*, regardless of residency. In the years prior to the transfer to the FNHA, Health Canada reduced these services because of federal financial constraints and policy objectives. The FNHA will be responsible for undertaking province-wide initiatives such as information management, technology and working with partners to promote First Nations knowledge, values, medicines and models of health and healing across the provincial system.

The FNHA does not replace the role or services of the Ministry of Health or the BC health authorities. The FNHA works in partnership with Health Canada, the BC Ministry of Health, the BC health authorities and other health organizations for the stated purpose of improving the quality, accessibility, delivery, effectiveness, efficiency and cultural appropriateness of health programs and services accessed by First Nations people in BC. It is the intention of the FNHA to continue to provide the same services as Health Canada did in the initial years of the transfer and, over time, to develop programs and services under its own policy within the resources available to it from Canada and BC. It is not technically an exercise of jurisdiction. The transfer of responsibility for health programs and services for First Nations in BC is described in more detail below, under sectoral governance initiatives.

Addressing the Colonial Legacy

The health of First Nations populations has deteriorated in the past 150 years as a result of the colonial legacy and the impacts of industrial society. Consequently, First Nations have special health needs. These needs should be considered as a distinct category, beyond the broader health care needs of other BC citizens. As First Nations people have higher rates of chronic health conditions, such as diabetes, their health costs will continue to climb. Many First Nations people also tend to see a doctor at later stages of diseases like diabetes, when the disease has progressed. As a result, treatment costs are higher than in cases with early detection and management. These variances must be considered and remedied appropriately. Over time, the cost of addressing these issues should decline, as First Nations communities move beyond the colonial period and have greater access to wealth from traditional lands, more control over their affairs, enhanced capacity to manage those affairs, adequate financial and other support from other governments to meet obligations and to effect the colonial transition, and greater community awareness of health issues. For the near term, however, First Nations will have a greater need than other communities for programs and services to address social and economic conditions. In the future, if progress continues, First Nations peoples health care needs should be no different from those of other Canadians, except where First Nations choose to adopt traditional healing programs and so on. The role of governments and policy-makers, including those of First Nations, should be increasingly focused on promoting healthy living and wellness.

Nationally, the Assembly of First Nations (AFN) and the federal and provincial governments jointly developed the *Blueprint on Aboriginal Health: A 10-Year Transformative Plan*, aimed at closing the gap in quality of life between First Nations citizens and other Canadians. This plan helps decision-makers develop appropriate health policy and considers some of the questions regarding jurisdictional responsibility.

Jurisdiction versus Program Delivery

Jurisdiction for health care should not be confused with program and service delivery. To date, most of the work undertaken by First Nations in the area of health services has focused on program and service delivery, not on First Nations assuming jurisdiction over health care. The main thrust has been on entering into arrangements with Canada whereby First Nations assume management and responsibility of health services to “Indians” under federal jurisdiction. This is achieved under the health transfer programs policy, in accordance with which non-insured health service programs can be transferred to a Nation’s control. As discussed above and below, in BC this whole program has been transferred from Health Canada to the FNHA. Currently, 110 BC First Nations (not including self-governing Nations and modern treaty groups) are in transfer, flexible transfer and block agreements, with 65 Nations in transitional or integrated agreements and the remaining 26 “bands” in set agreements that have been assumed by the FNHA through novation agreements. Novation agreements will remain in place through March 31, 2015. As of October 2014, a committee was examining future options for those communities. In the coming years, it is the intention of the FNHA to work with communities and service providers to reform the health benefits program and redesign the planning, programming and funding model formerly used by the FNIHB of Health Canada.

The FNHC is not discussing assuming health jurisdiction at this time. The FNHA agreement transfers administrative responsibility for certain programs and services to a First Nations institution; although it is the largest and most ambitious transfer of its kind, it is not a transfer or recognition of First Nations jurisdiction or legislated responsibility for aspects of health care. In this regard, the FNHA is only administering federal programs and services (with First Nations working in federal space similar to "band" transfer agreements, but at a provincial level and with all of the administrative resources included) and building a health partnership with the province so as to gain access to the much larger provincial system. In the Tri-partite First Nations Health Plan that led to the creation of the FNHA, the provincial government's commitment is that provincial services are for BC First Nations citizens regardless of residence.

For self-governing First Nations, the arrangements are different depending on the terms of the self-government agreements. In some instances, groups of First Nations have been working with both the province and Canada to establish provincial health boards for their reserve lands and people. For instance, the Nisga'a Nation has established the Nisga'a Valley Health Board and continues with those and other arrangements post-treaty. There is also a Nuu chah nulth Health Board. Sechelt does not have or participate in a health board and its services are run through the authority of chief and council. As a self-governing Nation, its relationship with the FNHA would likely focus on co-operative efforts to bolster existing services or introduce new services to members.

The Growing Cost of Health Care

All governments with jurisdiction over health care are forced to make difficult decisions regarding priorities and health care service levels. In considering whether to assume jurisdiction, First Nations are and will be considering the most effective way to ensure the highest quality of health care within communities and the appropriate order of government for that jurisdiction or service. With the exception of policy innovation that a Nation's governing body or bodies might require as a jurisdiction with respect to specific aspects of health care, it is unlikely that First Nations with governance arrangements that include law-making power over health will draw down this jurisdiction anytime soon, if at all, given the magnitude, cost and complexity of the issues. These questions and others are being discussed through the FNHC, FNHA and the First Nations leadership in BC as well as at the regional and community level.

While jurisdiction or authority over health services is being achieved in both sectoral and comprehensive governance arrangements, responsibility for health care is still shared with Canada and BC. Some Nations may prefer to keep the door open to exercising law-making powers over health care but limit their exercise of this jurisdiction, or take responsibility only for the manner in which federal or provincial programs and services are delivered in accordance with transfer agreements with the Crown. First Nations must also consider the need for economies of scale with respect to health services; the high costs of health care, both current and future; and the professional support available from outside governments and agencies. These are relevant in determining whether it is better to administer and deliver programs and services under transfer arrangements with Canada and British Columbia or achieve key objectives through the exercise of First Nations jurisdiction. At this point in time, most self-governing Nations have chosen administrative control over exercising full jurisdiction with law-making powers in their self-government negotiations.

Some questions that your community may raise or that you may wish to pose with regard to health services:	
Q:	Who exercises jurisdiction over health services within our community?
Q:	What is the relationship between the provincial health care system and the First Nations health care system and the federal government?
Q:	What health services are being delivered in our community?
Q:	How are health services currently being delivered in our community?
Q:	What are the expectations and needs of the community?
Q:	To what extent should our Nation look to exercise jurisdiction over health services?
Q:	What health partnership should exist with the federal and provincial governments to ensure the best access to health services?
Q:	Who provides health services to citizens of our Nation who do not live in the community?
Q:	How can we ensure the seamlessness of health services for citizens who regularly move on- and off-reserve?
Q:	Which health services for our Nation's citizens are covered by federal funds and which by provincial funds?
Q:	What is the most appropriate order of First Nations government to assume jurisdiction over health care: "band," Nation, region?
Q:	Should jurisdiction for health care be recognized or transferred to a pan-National government level (i.e., a regional body)?
Q:	What is the role of regional bodies such as the First Nations Health Council in governing or administering health and the provision of health services within our community?
Q:	Who should be responsible for providing programs and services and delivery of health services within our community?
Q:	What jurisdiction does our community need with regard to health?
Q:	How will the cost of health services be paid for within our Nation and what standard of health care will be provided?

INDIAN ACT GOVERNANCE

Under the *Indian Act*, the federal government has the power to make regulations to control the spread of disease on-reserves, to provide medical treatment and health services, and to provide compulsory hospitalization and treatment for infectious diseases (s. 73). Presumably, this power was put in place to address the impact of disease after colonization. Canada has made no regulations under these powers with respect to health and health programs and services.

The *Indian Act* also provides a band council with bylaw-making power in relation to the health of residents on-reserve and to preventing the spread of contagious and infectious diseases:

> 81 (1) The council of a band may make bylaws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases

Some First Nations have made bylaws under this section, although none of these bylaws have displaced federal or provincial authority for the provision of health services on-reserve. For the most part, bylaws made by First Nations under the *Indian Act* relate to health matters of a local or municipal nature and not to the broader exercise of jurisdiction over health services.

SECTORAL GOVERNANCE INITIATIVES

There is currently a significant sectoral health change underway in BC, with the establishment of the FNHC and the FNHA and through a series of political and legal agreements and health plans between Canada, First Nations, First Nations institutions and the Province. These agreements are not intended to affect Aboriginal title and rights or treaty rights. Rather, the agreements relate to new administrative arrangements for the delivery of health services to First Nations in BC. Although this is not an exercise of full or legal jurisdiction over health, the policy control that BC First Nations have now assumed for the delivery of health care warrants its discussion as a sectoral governance initiative, given the governance framework that is taking shape provincially to oversee and deliver the health programs and services now under First Nations authority.

In November 2006, the First Nations Leadership Council and the province released the *Transformative Change Accord: First Nations Health Plan* based on the recommendations from the *Blueprint on Aboriginal Health: A 10-Year Transformative Plan* and the BC Provincial Health Officer's 2001 report, *The Health and Well-Being of Aboriginal People in British Columbia*. In February 2007, First Nations in BC established the FNHC to provide political leadership in the implementation of tripartite commitments related to health, including the development and implementation of the Tripartite First Nations Health Plan. The Tripartite First Nations Health Plan was signed in June 2007 by Canada, British Columbia and the First Nations Leadership Council. The purpose of the plan is to improve the health and well-being of First Nations and to close the health gap between First Nations citizens and other British Columbians. Both health plans recognize that First Nations should be involved in the design and delivery of health programs that address the health and wellness of First Nations people. Furthermore, one of the stated intentions is a comprehensive examination of how federal and provincial health care programs and services are delivered to First Nations people in BC, both on- and off-reserve. The Tripartite First Nations Health Plan established a commitment of the parties to develop and implement a new health governance structure by 2010. This structure would include a First Nations health governing body, a First Nations Health Council, a provincial advisory committee on First Nations Health, and a First Nations health directors association. The First Nations health governance structure is further explained below.

The transfer of First Nations health services to the FNHA occurred along a continuum that began with the Transformative Change Accord. The first step was the completion of the *BC Tripartite Framework Agreement on First Nations Health Governance* (signed in 2011). This legally binding agreement describes how the federal government would transfer federal responsibility for health programs and services to a new FNHA. In addition, the agreement further defined and described the roles and responsibilities of the respective parties, including the FNHC, FNHA, First Nations Health Directors Association (FNHDA) and Tripartite Committee on First Nations Health (TCFNH).

In December 2012, the parties signed the Health Partnership Accord that had been endorsed at an all-chiefs' assembly held the previous May. This was the second stage of agreements that committed the partners to the process. The accord outlines agreements on areas such as the purpose, vision and commitments to partnership, as well as reciprocal accountability and a review and renewal process. As a political document, the accord reaffirms the commitment to the work, the shared vision, the new health governance structure, and the broad-based approach to health, and sets out partnership principles.

Following the signing of the $4.7 billion Canada Funding Agreement in June 2013, the phased transfer of responsibilities from Health Canada to the FNHA was initiated on July 2, 2013, with the FNHA taking over a set of responsibilities from Health Canada headquarters, including funding administration, policy, planning and program development. It was competed on October 1, 2013, with the transfer of regional functions for First Nations health programs and services. After years of negotiations and planning, Health Canada programs and services were transferred from Health Canada to the FNHA through a series of service agreements set out in Schedule 5 to the Framework Agreement to provide for business continuity. The parties to

the health transfer recognized the enormous scale of the task of transferring assets (staff and property) and program responsibility from Health Canada to the FNHA, so the transfer will take place in stages through a transition period. Hence, under the Framework Agreement, the FNHA is required to prepare annual Interim Health Plans that set out the operational start-up plans, goals, priorities, program plans and services, evaluation process and use of funding provided by Canada and British Columbia. Following the early transition period, the Interim Health Plans will be replaced by five-year Multi-Year Health Plans.

As mentioned above, the Tripartite First Nations Health Plan, calls for the development of a new First Nations health governing structure. This new structure includes six components:

- *First Nations Health Council* (FNHC) — The FNHC is a provincial-level advocacy body representative of and accountable to BC First Nations. The FNHC is mandated to provide political leadership in the implementation of health plans and agreement, including responsibility to uphold the governance structures and standards established by First Nations in BC.
- *First Nations Health Authority* (FNHA) — The FNHA manages, designs, delivers and funds health and wellness programs, services and other initiatives in partnership with First Nations political leadership in the implementation of tripartite commitments. The FNHA works in partnership with the BC Ministry of Health and the BC Health Authorities to coordinate and integrate their respective health programs.
- *First Nations Health Directors Association* (FNHDA) — The FNHDA is a province-wide professional association composed of health directors and managers working in First Nations communities. The FNHDA provides technical advice to the FNHA.
- *Tripartite Committee on First Nations Health* (TCFNH) — The TCFNH provides the central forum where the tripartite partners coordinate and align planning, programming and service delivery to support BC First Nations health and wellness across the entire provincial system. Members include representatives from the FNHC, FNHA, FNHDA, Regional Tables, Regional and Provincial Health Authorities, the BC Ministry of Health, and Health Canada, as well as the Provincial Health Officer and Deputy Provincial Health Officer.
- *Regional caucuses* — The regional caucuses provide a forum in which community leadership and health professionals share information, develop common perspectives and priorities, set strategic direction on regional health matters, nominate and appoint representatives to the FNHC and the FNHA, and nominate FNHA Members for the FNHA Board of Directors.
- *Regional tables* — Regional tables are composed of representatives appointed by local and regional governance structures and mandated to carry out the work of the regional caucus by providing direction in the development of regional health and wellness plans and working alongside regional health authorities to implement region-specific priorities identified under regional partnership accords.

As previously noted, to meet the cost of these responsibilities the FNHA entered into a funding agreement with Health Canada in June 2013. Through the Canada Funding Agreement, the FNHA receives approximately $4.7 billion over 10 years. The details of the Canada Funding Agreement are set out in Schedule 1 to the Framework Agreement, including an annual escalator in funding. For years 2 to 5, the Annual Federal Amount is calculated by multiplying the previous year's Annual Federal Amount by an annual escalator of 5.5 percent. For years 6 to 10, the annual escalator will be a new amount to be determined by Canada and the FNHA. The majority of this funding flows directly to First Nations communities in BC through contribution agreements and the First Nations Health Benefits Program.

The FNHA will have flexibility to support communities as they deliver some health programming through local agreements and in partnership with municipal or other regional service providers. Work is also taking place, often at a community or regional level, across the broader health field — such as with hospitals, dentists, pharmacies and even funeral homes — to ensure that services are more culturally appropriate for First Nations people and respect and make room for First Nations traditions.

First Nations Health Council

First Nations Health Authority
Health through wellness

On May 26, 2011, at *Gathering Wisdom for a Shared Journey IV*, hosted by the First Nations Health Council, BC First Nations endorsed the signing of a *BC Tripartite Framework Agreement on First Nation Health Governance* with the governments of BC and Canada. This agreement will result in BC First Nations having increased administrative control and decision-making over health by taking over health service delivery from the federal government. In addition, a Consensus Paper was also adopted, containing directives that new health governance arrangement be Nation based.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All self-government agreements address aspects of health. While some self-government agreements include provisions for jurisdiction over health, no First Nation currently exercises broad jurisdictional powers over such services. All self-governing Nations, in varying degrees, continue to deliver programs and services under contract on behalf of Canada and/or British Columbia in their communities.

Sechelt's powers over health are perhaps the broadest of any self-governing Nation. Sechelt laws are made under its law-making powers, as set out in section 14(1)(i) of the *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27). However, the law-making power is to the extent authorized by the Sechelt Constitution. Currently the Constitution is silent on this matter and it will take a referendum vote of Sechelt members and approval of the governor in council to amend the Sechelt Constitution to address health jurisdiction. As a result, Sechelt has not exercised this jurisdiction to date.

Westbank's Self-Government Agreement is a bilateral agreement with Canada. Because British Columbia is not a party to the agreement, the Westbank agreement does not recognize new powers over health services for Westbank. Westbank retains its health bylaw-making powers under the *Indian Act*.

The treaty agreements provide broad recognition of First Nations jurisdiction over health services provided by the Nation's government or public institutions on the Nation's lands. Tsawwassen First Nation has exercised jurisdiction and passed the *Education, Health and Social Services Act (Tsawwassen)*. The law sets out that the Tsawwassen executive council must, by regulation, develop and adopt a community health plan designed to ensure equality of access to all those eligible for health programs and services; provide health services and programs in accordance with the community health plan; and deliver health services and programs in accordance with public health standards generally applicable in British Columbia. The law requires that services are only provided to non-citizens where there is a financing contract in place with Canada. The Maa-nulth, Yale and Tla'amin (formerly Sliammon) agreements all contain similar language, allowing the Nation to enact laws regarding health services on their lands. In the Yale and Tla'amin agreements, those laws prevail in a conflict with Canadian or British Columbia law when it comes to the structure of the service delivery, but Canadian and British Columbia laws prevail regarding the actual service.

The Nisga'a now have jurisdiction over health services under their treaty, although they have not exercised broad law-making authority. The Nisga'a continue to operate under the Authority, which is registered under the BC *Society Act*. This elected body includes representatives of the four Nisga'a villages and an elected representative from the non-Nisga'a community. The Nisga'a Valley Health Authority is responsible for creating and maintaining facilities and promoting medical and public healthcare programs in the Nass Valley. The Nisga'a treaty contemplates continuation of the arrangements whereby the Nisga'a Lisims government delivers and administers federal and provincial health services and programs for all individuals residing on Nisga'a lands.

Interestingly, while the BC health initiative through the FNHA and the agreements with respect to that initiative are expressly without prejudice to self-government, treaty-making and inherent rights, there does not appear to have been any contemplation by the framers as to how the arrangements under the FNHA would evolve under self-government, whether as part of modern treaty-making or not — that is, how a self-governing First Nation would participate in, use the services of or come under the authority of the FNHA. Currently, no self-governing First Nations in BC have a formal relationship with the FNHC or the FNHA. Consequently, the role that the FNHC/FNHA might play in this regard, as more First Nations that are currently subject to the FNHA administrative arrangements move to comprehensive self-government, remains to be seen. Even though there is no longer a Health Canada presence in BC with respect to Indian health programs and services under self-governing arrangements, the federal government may continue to have a role to play through Health Canada.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	Legislative powers of council to make laws in relation to health services on Sechelt Lands as authorized by the Sechelt Constitution. (s. 14(1)(i) Laws shall include and contain standards and rights at least equivalent to those prevailing in the province of BC. (Sechelt Constitution, Part III, Division (1), s. 19)	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act. (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)
Westbank	The bylaw-making power with respect to health under paragraph 81(1) (a) of the *Indian Act* continues to apply. (Part XXXI, s. 273) Westbank intends to enter into future negotiations over this jurisdiction. (Part XXIV, s. 222(a))	N/A
Nisga'a	Nisga'a has jurisdiction over health services on Nisga'a Lands. Nisga'a, Canada and BC will negotiate and attempt to reach agreements for the Nisga'a Lisims Government delivery and administration of federal and provincial health services and programs for all individuals residing within Nisga'a Lands. (Ch. 11, s. 82 and 85)	Federal or provincial laws prevail. (Ch. 11, s. 83) Nisga'a law prevails in the case of a Nisga'a law determining the organization and structure for the delivery of health services on Nisga'a Lands. (Ch. 11, s. 84)
Tsawwassen	Tsawwassen Government may make laws with respect to health services, including public health, provided by a Tsawwassen Institution on Tsawwassen Lands. (Ch. 16, s. 88)	Federal or provincial laws prevail. (Ch. 16, s. 91) Tsawwassen law prevails in the case of a Tsawwassen law with respect to the organization and structure of Tsawwassen Institutions used to deliver health services on Tsawwassen Lands. (Ch. 16, s. 92)
Maa-nulth	Maa-nulth Governments may make laws with respect to health services, provided by a Maa-nulth First Nation or Maa-nulth Institution on Maa-nulth Lands. (s. 13.22.1)	Federal or provincial laws prevail. (s. 13.22.3) Maa-nulth law prevails in the case of a Maa-nulth law with respect to the organization and structure of Maa-nulth institutions used to deliver health services on Maa-nulth Lands. (s. 13.22.4)
Yale	Yale First Nation Government may make laws with respect to health services, including public health services, provided by a Yale First Nation Institution on Yale First Nation Land. (s. 3.18.1)	Federal or provincial laws prevail (s. 3.18.4) Yale First Nation Law prevails in the case of a Yale First Nation law with respect to the organization and structure of Yale First Nation Institutions used to deliver health services on Yale First Nation Land. (s. 3.18.5)
Tla'amin	The Tla'amin Nation may make laws in relation to health services on Provided by a Tla'amin Institution for Tla'amin Citizens on Tla'amin Lands. (Ch. 15, s. 86)	Federal or provincial laws prevail. (Ch. 15, s. 91) Tla'amin Law prevails in the case of a Tla'amin law with respect to the organization and structure of Tla'amin Institutions used to deliver health services on Tla'amin Lands. (Ch. 15, s. 92)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(a) Health			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Gwa'sala-'Nakwaxda'xw	1994.09	HEALTH	Bylaw Respecting Mental Health Commission
Nadleh Whuten	1999-2	HEALTH	Bylaw Respecting Healthcare
Seabird Island	2008	HEALTH	Bylaw Respecting Community Wellness
Tzeachten	1-1990	HEALTH	Bylaw Respecting Health
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Nisga'a Lisims Government	2000/06	Nisga'a Programs and Services Delivery Act	
Tsawwassen First Nation	APR 3, 2009	TFN Education, Health And Social Development Act	
Tsawwassen First Nation	035-2009	Health And Social Housing Regulation	
Tsawwassen First Nation	038-2009	TFN Education, Health And Social Development Appeal Regulation	
Westbank	2011-01	WFN Health Services Facilities Law	

RESOURCES

First Nations

First Nations Health Council
Suite 1205, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-913-2080
Fax: 604-913-2081
Toll-free: 1-866-913-0033
Email: info@fnhc.ca
www.fnhc.ca

- *Health Partnership Workbook:* www.fnhc.ca/pdf/Your_Voice-_Health_Partnership_Workbook.pdf
- www.fnhc.ca/pdf/FNHC_Resolution_-_Adoption_of_Consensus_Paper_May_2011_-_GW_FINAL_(Formatted).pdf
- *Tripartite First Nations Health Plan with Canada* (June 2007): www.fnhc.ca/pdf/TripartiteFNHealthPlan.pdf
- *Implementing the Vision: Governance of First Nations Health Services in British Columbia — A working paper of the Tripartite Governance Committee:* www.fnhc.ca/pdf/implementingthevision.pdf
- *2012 Health Partnership Accord:* www.fnhc.ca/pdf/Tripartite_Health_Partnership_Accord-_December17.2012_.pdf

First Nations Health Authority
Suite 501 – 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-693-6500
Fax: 604-913-2081
Toll-free: 1-866-913-0033
Email: info@fnhc.ca
www.fnha.ca

- *British Columbia Tripartite Framework Agreement on First Nations Health Governance.* www.fnha.ca/Documents/framework-accord-cadre.pdf

First Nations Health Directors Association
Mailing address, telephone and fax: see First Nations Health Authority
Email: info@fnhda.ca
www.fnhda.ca

Assembly of First Nations
Suite 1600, 55 Metcalfe St.
Ottawa, ON K1R 5B4
Phone: 613-241-6789
Toll-free: 1-866-869-6789
Fax: 613-241-5808

- The Health and Social Secretariat (HSS) report is broken into sections: Strategic Policy, Community Programs, Public Health, and Social Development. Health strategies and decisions are developed in partnership with the National First Nations Health Technicians

Network (NFNHTN) and the Chiefs Committee on Health (CCOH).
www.afn.ca/index.php/en/policy-areas/health

Provincial

Fraser Region Health
Suite 400, Central City Tower
13450 – 102 Ave.
Surrey, BC V3T 0H1
Phone: 604-587-4600
Toll-free: 1-877-935-5669
Fax: 604-587-4666
Email: www.fraserhealth.ca/about_us/contact-us/
www.fraserhealth.ca/home/

Interior Health Corporate Office
Suite 220, 1815 Kirschner Road
Kelowna, BC V1Y 4N7
Phone: 250-862-4200
Fax: 250-862-4201
Email: www.interiorhealth.ca/AboutUs/ContactUs/Pages/default.aspx
www.interiorhealth.ca/Pages/default.aspx

Ministry of Health
BC Government
1515 Blanshard Street
Victoria, BC V8W 3C8
Phone: 604-660-2421
Email: hlth.health@gov.bc.ca
www.gov.bc.ca/health/

- *Transformative Change Accord: First Nations Health Plan* (November 2006).
  www.health.gov.bc.ca/library/publications/year/2006/first_nations_health_implementation_plan.pdf
- *BC First Nations Health Handbook*. A companion to the *BC Health Guide*:
  www.healthlinkbc.ca/pdf/first_nations_healthguide.pdf

Northern Health Authority
Aboriginal Health
Suite 600, 299 Victoria St.
Prince George, BC V2L 5B8
Phone: 250-649-7226
Fax: 250-565-2640
Email: aboriginal.health@northernhealth.ca

Vancouver Coastal Health
11th Floor, 601 West Broadway
Vancouver, BC V5Z 4C2
Phone: 604-736-2033
Toll-free: 1-866-884-0888
Email: feedback@vch.ca
www.vch.ca/home/

Vancouver Island Health Authority (VIHA)
c/o Royal Jubilee Hospital
1952 Bay Street
Victoria, BC V8R 1J8
Phone: 250-370-8914
Email: info@viha.ca
www.viha.ca

- *Vancouver Island Health Authority Aboriginal Health Plan:* www.viha.ca/NR/rdonlyres/2716EF1A-75E5-4289-AE9D-EEBFAEA5B56F/0/AboriginalHealthPlan.pdf

Federal

First Nations and Inuit Health Branch — Pacific Region
Health Canada — Federal Building
Suite 540, 757 West Hastings Street
Vancouver, BC V6C 3E6
Phone: 604-666-3235
Fax: 604-666-6024
Toll-free: 1-866-225-0709
www.hc-sc.gc.ca

- Health Canada Report on Plans and Priorities
  www.hc-sc.gc.ca/ahc-asc/performance/estim-previs/plans-prior/index-eng.php

SELECT LEGISLATION

Provincial

- BC *Society Act* (R.S.B.C. 1996, c. 433)
- *Medicare Protection Act* (R.S.B.C 1996, c. 286)
- *Health Professions Act* (R.S.B.C. 1996, c. 183)
- *Health Authorities Act* (R.S.B.C. 1996, c. 180).

Federal

- *Canada Health Act* (R.S.C., 1985, c. C-6)
- The *Department of Health Act* (S.C. 1996, c. 8)
- *Hospital Insurance Diagnostic Services Act* (1957, Bill 320)
- *Medical Care Act* (1966)

PART 1 /// SECTION 3.16

Heritage and Culture

3.16

HERITAGE AND CULTURE

3.16

HERITAGE AND CULTURE

BACKGROUND

The various cultures of the Aboriginal peoples of Canada are the basis and the expression of unique identities and relationships. The culture of a people informs all aspects of governance and is reflected in its legal traditions and institutions. Accordingly, when we consider "Heritage and Culture" as a subject matter, or an area of "jurisdiction," this should in no way diminish the appreciation of the place of culture as a foundation for self-government, which is in turn an expression of self-determination.

Clearly, Indigenous cultural expressions, including languages and arts, hold the philosophies and values that are informing First Nations citizens and their leadership and affecting the evolving models of contemporary First Nations governance. First Nations promote and support the authority and work of cultural leaders in the fields of language, arts and heritage as "traditional knowledge keepers" whose experience is considered central to the Nation rebuilding exercise that First Nations are undertaking.

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Article 11: UN Declaration

As a subject matter for jurisdiction, heritage and culture can be stated quite broadly and in many different ways, and includes language; customs; traditions; spiritual and religious practices, including the protection of beliefs and practices; heritage; cultural resources and artefacts; communication, preservation, promotion, transmission, and protection of culture, cultural beliefs and practices; traditional knowledge; intellectual property; archaeological sites; and protection of heritage and sacred sites and ancestral remains.

Some general yet important considerations with respect to this subject matter are addressed below. However, given its broad nature, First Nations will typically want to identify, clarify and articulate the aspects of this jurisdiction that are their priorities. The extent to which jurisdiction might apply on reserves or over a Nation's ancestral lands, including Aboriginal title lands, or the existence of common interests will influence the need for First Nations to collaborate or share work depending on their particular circumstances and affiliation with other groups sharing the same culture and language. Certainly, in light of the test for proving Aboriginal title, and where shared culture and language are critical to the group establishing itself as the "proper title holder," the outcome of these decisions potentially becomes even more important.

Division of Powers

There is no particular power over something akin to heritage and culture in the constitutional division of powers between the federal and provincial government. Consequently, heritage and culture as a jurisdiction is shared within the Constitution among federal, provincial and First Nation governments. The federal government could regulate in this area under section 91(24) of the *Constitution Act, 1867*.

The primary court case on this issue is not particularly helpful. In *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, the Gitxaala Nation challenged the provincial *Heritage Conservation Act* (R.S.B.C. 1996, c. 187) as being outside of British Columbia's constitutional jurisdiction. The court disagreed:

> Sections 12(2)(a) and 13(2)(c) and (d) of the Act are valid provincial legislation falling within provincial jurisdiction over property and civil rights in the province. While

> legislation that singles out aboriginal people for special treatment is *ultra vires* the province, the impugned provisions do not single out aboriginal peoples or impair their status or condition as Indians. The impugned provisions prohibit everyone, not just aboriginal peoples, from the named acts, and require everyone, not just aboriginal peoples, to seek the Minister's permission to commit the prohibited acts. The treatment afforded to aboriginal and non aboriginal heritage objects is the same and any disproportionate effects are due to the fact that aboriginal peoples have produced the largest number of heritage products. The Act is tailored, whether by design or by operation of constitutional law, to not affect the established rights of aboriginal peoples, a protection that is not extended to any other group. There is no intrusion on a federal head of power.

It is unlikely that the ruling in the *Kitkatla* case would stand up to a challenge against proven Aboriginal rights or title, but for now the common law indicates that provincial governments, the federal government and First Nations all may have some form of jurisdiction over heritage and culture.

While most First Nations legitimately view heritage and culture, including language, as being part of their constitutionally protected right of self-government, Canadian courts have not yet ruled on the specific exercise of such a jurisdiction. The courts have, however, considered the importance of culture and the "practices, customs and traditions" of an Aboriginal group in establishing an Aboriginal right and in particular with respect to the test for proving Aboriginal title. There is as well the constitutional rights of all Canadians to fundamental freedoms as set out in Part 1 of the *Constitution Act, 1982*, and more specifically the protections afforded to the collective rights of Aboriginal peoples in section 25 of the Charter of Rights and Freedoms. Presumably, when read together with section 35 these provisions create the space to legally infer a right that Aboriginal people have to preserve their cultural identity within Canada and all that this means with respect to governance.

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

Article 12: UN Declaration

Constitutional questions aside, there is potentially some ability under the *Indian Act* for First Nations to exercise authority over aspects of culture on reserve land, but it is limited. First Nations could pass zoning bylaws to protect heritage or culture sites under section 81 of the *Indian Act*. However, *Indian Act* bylaws are subject to Ministerial approval. Direct assertion or negotiations with Canada and/or British Columbia for recognition of First Nations jurisdiction may be a preferred option, as it provides the legal assurance that comes with recognition by outside governments, especially if the powers are to extend off-reserve and throughout a Nation's ancestral lands.

Provincial and Federal Legislation

The primary provincial legislation with respect to this subject matter is the *Heritage Conservation Act* (R.S.B.C. 1996, c. 187)(HCA). Generally speaking, First Nations are not satisfied that this act and the mechanism established under it sufficiently promote and protect First Nations heritage and culture. This is discussed further below. Under the HCA, archaeological sites are protected regardless of whether they are located on Crown lands or private lands. It is unclear if the HCA applies on reserve land, but arguably it does not. Protected archaeological sites may not be altered (e.g., changed in any manner, without a permit issued by the Minister or designate). The HCA affords considerable discretionary authority in determining whether, and under what conditions, such permits are to be granted.

The HCA provides for heritage inspections and investigations. Inspections are to assess the archaeological significance of land or other property. In this regard, the inspection determines the presence of archaeological sites that warrant protection, or are already protected, under the HCA. A heritage investigation is undertaken in order to recover information that might otherwise be lost as a result of site alteration or destruction. Site alteration permits can be issued authorizing the removal of residual archaeological deposits once the inspection and investigation are completed.

Section 4 of the HCA provides that the Province may enter into a formal agreement with a First Nation with respect to the conservation and protection of heritage sites and heritage objects that represent the cultural heritage of the people who are represented by that First Nation. There are currently no such agreements. Section 20 of the HCA also gives the Minister the power "to enter into agreements with a person, organization, local government, first nation, or the government of Canada or of a province." Such an agreement has been entered into with the Treaty 8 First Nations, as well as with a number of Hul'qumi'num Nations (Stz'uminus, Cowichan Tribes, Halalt, Lyackson, Penelakut Tribe) and the Hul'qumi'num treaty group. Other approaches are also available. Squamish First Nation has instituted a Sacred Land Use Plan, while Snuneymuxw has a protocol with the Islands Trust Council that includes the protection of heritage sites. On Haida Gwaii, land use planning agreements also cover heritage, including the cultural importance of old-growth cedar. Further, most of the seven Strategic Engagement Agreements (SEAs), though not specific to culture or heritage, refer to both land use discussions and land use planning. These types of options are discussed below under Sectoral Arrangements. Interestingly, for the purposes of this act and as the context requires, a "first nation" is defined as "an aboriginal people sharing a common traditional territory and having a common traditional language, culture and laws, or the duly mandated governing body of one or more such people". It appears that for this purpose the Province is recognizing that a First Nation is not just a "band" and the governing body a "chief and council" but can be, or is, something other and with implied authority beyond a "reserve."

In 2011, the First Nations Summit, Union of BC Indian Chiefs and the BC Assembly of First Nations adopted the *First Nations Heritage Conservation Action Plan*. The plan is critical of the HCA and states:

> The BC provincial *Heritage Conservation Act* and associated policies and management regime fail to adequately protect our culture and heritage resources. The HCA also fails to adequately provide for the protection of our sacred and spiritual sites, the sanctity of our artefacts and the remains of our ancestors and other archaeological resources in accordance with our laws and customs.

The provincial HCA does superficially protect archaeological sites, as described above. However, as many First Nations have pointed out, the province has not made the implementation of section 4 of the act a priority, and the provincial process is therefore more likely to result in permits to developers to dig up archaeological sites than to actually protect them. While the act does suggest that there is more First Nations participation in the process and provides for the return of artifacts, cultural resources and ancestral remains to First Nations, it does not adequately address the fundamental issues of First Nations' roles in governing heritage areas.

In addition to the HCA, the province has enacted the *First Peoples' Heritage, Language and Culture Act* (R.S.B.C. 1996, c. 147).

Federally, there is no specific enactment that deals with the promotion and protection of Aboriginal heritage and culture and that applies generally across Canada. However, section 92 of the *Indian Act* does prohibit any person acquiring title to any of the following, without the written consent of the Minister, from a reserve: an Indian grave house; a carved grave pole; a totem pole; a carved house post; or a rock embellished with paintings or carvings.

Of course, federal legislation ratifying modern treaties or self-government agreements recognizes the powers of the particular Aboriginal group making the agreement in this area. Many modern treaties recognize First Nations authority to pass laws in relation to protecting cultural sites, artifacts, burial sites and archaeological sites on Treaty Settlement Lands (for example, see section 21.2.0 of the *Maa-nulth First Nations Final Agreement*).

Heritage Areas, Cultural Property, and Language and Culture

Heritage Areas (including sacred sites, burial sites and archaeology)

Important aspects of a First Nation's jurisdiction over heritage and culture relate to specific areas and sites or types of sites. All of a Nation's ancestral lands may be considered sacred in one way or another. However, many First Nations wish to exercise jurisdiction over specific areas or types of sites, and many feel that this is not a matter of choice: they are required by their laws and directions from their elders and citizens to manage or protect sacred sites and their ancestors' resting places.

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

Article 13: UN Declaration

There has been an ongoing effort to make changes to the HCA, as well as implementing increased First Nation control of heritage areas within ancestral lands. In 2007, under the auspices of the Leadership Council, First Nations established a Joint Working Group on First Nations Heritage Conservation with the government of BC (the Joint Working Group). The Joint Working Group was an initiative aimed at moving toward greater First Nation jurisdiction and was mandated to "explore options and provide recommendations to improve the protection, management and conservation of First Nations' cultural and heritage sites, in the spirit of the New Relationship and the Transformative Change Accord." The First Nations representatives on the Joint Working Group were not mandated to negotiate on behalf of First Nations, but rather to work to revise provincial legislation and policy and to assist in implementing pilot projects and in activating section 4 agreements under the HCA.

Of particular concern to First Nations is how the current provincial law is discriminatory when it comes to the protection of Aboriginal burial grounds. While the law provides for the protection of designated cemeteries created by non-Aboriginal people and governments, it does not provide the same level of protection for Aboriginal burial sites, which are not designated as needing protection. In fact, the provincial Archaeology Branch can and does issue permits to developers or landowners allowing them to disturb and dig up Aboriginal burial sites, at times even over the objections of First Nations. Current provincial law also fails to automatically protect sacred sites, even when a First Nation has identified such sites as being sacred. The HCA and related policies are mainly focused on archaeological sites with physical evidence, rather than on sacred sites.

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 31: UN Declaration

First Nations and groups like the Joint Working Group are working toward greater First Nations jurisdiction over heritage sites, including implementation of section 4 of the HCA to confirm First Nations authority under provincial law (see "Sectoral Governance Initiatives," below). Unfortunately, after several years of First Nations representatives working to convince the provincial government to enter into a pilot agreement offering participating First Nations a more comprehensive role, the provincial government made it clear it was not interested in further discussion. As a result, First Nations withdrew from the Joint Working Group in 2012 and independently developed and released a toolkit intended to support First Nations in the development of heritage-related capacity, provide information for First Nations to use developing a heritage plan or policies, and assist First Nations in responding to development referrals associated with heritage. Discussions are underway about whether to re-engage with the provincial government on pilot projects.

First Nations may also wish to assert and exercise their inherent jurisdiction based on traditional laws, particularly in light of the 2014 declaration of Aboriginal title for the Tsilhqot'in. It is now reasonable to assume that because title is territorial, most, if not all, archaeological sites and areas of significant spiritual and cultural importance would most likely be found within Aboriginal title lands. In fact, it is the "evidence" that needs to be recorded and protected, and doing this is an exercise of jurisdiction that could be used to prove title, in addition to other ways that a Nation demonstrates that it occupied and still occupies the land today. This demonstration could include:

- passing laws to deal with protection of heritage, sacred and burial sites
- unilaterally designating a Nation's sacred sites and taking measures to protect them
- developing and implementing First Nations land-use plans that call for protection of heritage areas
- developing procedures, template agreements or permits for archaeologists working in a First Nation's territory
- educating land owners and governments about First Nations laws and respectful options for dealing with burial, heritage and sacred sites
- negotiating protocols or agreements with local governments to recognize sites or establish procedures for dealing with sites within local government boundaries
- pursuing litigation for recognition of Aboriginal rights and title in relation to heritage, sacred and burial sites.

The Tsilhqot'in Nation recently declared the Dasiqox Tribal Park to protect "cultural, heritage and ecological values." This area is outside of the Aboriginal title area confirmed by the Supreme Court of Canada and, at 3,120 square kilometres, is almost double the 1,750 square kilometres the Supreme Court identified to be Tsilhqot'in Aboriginal title lands. It also includes the site of the proposed New Prosperity Mine at Fish Lake, a proposed development that Tsilhqot'in opposes. However, *Tsilhqot'in*'s decision is not without precedent. Amidst bitter disputes over logging in the 1980s, the Haida issued similar declarations to protect Lyall Island/Gwaii Haanas as a Haida Heritage Site. The Haida declarations eventually led to a formal joint park agreement with the federal government that created the South Moresby National Park Reserve in 1988 and led to the 1993 *Gwaii Haanas Agreement*. This is a mutual agreement between the Haida and federal government to protect Haida Gwaii and its heritage sites. Today, the area is co-operatively managed through the Archipelago Management Board, which has an equal number of Haida Nation and government of Canada representatives. The southernmost part of Gwaii Haanas has been declared a United Nations Educational, Scientific and Cultural Organization (UNESCO) cultural site and contains the remains of a Haida village.

Although these steps may not initially be recognized by other governments (federal, provincial or local governments), it can lead to progress toward restoring First Nations jurisdiction in this important area and can certainly ensure that Nations continue to meet their responsibility to occupy the land though the enforcement of their laws.

It is also important to note that the courts have given some weight to land use plans and heritage areas that have been unilaterally designated by First Nations. In the case of *Squamish Nation et al. v. The Minister of Sustainable Resource Management et al.* (2004 BCSC 1320), the B.C. court overturned provincial approval of a ski resort because of lack of consultation. The court noted that the Squamish had "produced the Xay Temix Land Use Plan, which designates the Brohm Ridge/Mount Garibaldi area as a 'Sensitive Area' where special care must be taken to protect the sacred cultural values which exist there." This area is in the heart of the Squamish territory and is not subject to any significant overlap with other First Nations. Although the Squamish land use plan had not been adopted by British Columbia or implemented through legislation or treaty, the court took it into account in overturning the provincial government's decision.

The Nisga'a "Ancestors' Collection"

In 2010, the Ancestors' Collection, consisting of some 330 items, was repatriated to the Nisga'a Nation as part of the Nisga'a Final Agreement. Since leaving the Nass Valley in the late 19th and early 20th centuries, most of these items were in the possession of either the Canadian Museum of Civilization or the Royal BC Museum. Today Hli Goothl Wilp-Adokshl Nisga'a, the Nisga'a Museum, is the new, permanent home of Anhooya'ahl Ga'angigatgum', the Ancestors' Collection. Never before displayed together, the collection now forms the heart of one of the finest displays of Northwest Coast First Nations art in existence.

First Nations may also wish to push the federal and provincial governments to recognize First Nations authority over heritage areas in treaty negotiations, as discussed below. In treaty negotiations the provincial government has been reluctant to negotiate meaningful First Nations authority off treaty settlement lands, but if First Nations continue to press for better provincial negotiating mandates, there may be some progress in this area, particularly after the *Tsilhqot'in* decision by the Supreme Court of Canada.

In addition to treaty, and whether as part of the treaty process or not, a First Nation could look to sign a Strategic Engagement Agreement with the provincial government.

Cultural Property (including artifacts and intellectual property)

Cultural Products and Artifacts: Jurisdiction over cultural property includes ownership and management of cultural products and artifacts.

This aspect of jurisdiction includes the ability of a Nation to promote and disseminate cultural materials/products. This can include a local role for a Nation in the selection of materials for exhibitions based on local criteria. Authorities can be developed to promote the creation of cultural artifacts and the support of local arts and crafts. One area that has seen some progress is the return of cultural artifacts that were taken from First Nations during and after colonization. BC First Nations have had some success, both nationally and internationally, in repatriating these important pieces of their cultural history, but there is still much to be done in this area. Provisions in comprehensive governance arrangements typically address repatriation of cultural products and artifacts.

Cultural Intellectual Property: There are significant issues with respect to cultural intellectual property, including copyright of traditional knowledge. Intellectual property can include an incredible range of subjects, including traditional knowledge, medicines, ethnobotany (the relationship between

Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.

IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create.

World Intellectual Property Organisation (WIPO)

people and plants), stories, songs, dances, regalia, names and just about anything else that was developed within a people's cultural approach and traditions. While some governance arrangements have provisions for First Nations jurisdiction over the use of cultural symbols and practices on First Nations lands, this authority is limited, and Canada does not currently recognize broad First Nations jurisdiction over intellectual property. This much-debated area of the law is evolving. Although not specifically an initiative of BC or even Canadian First Nations, there has been considerable dialogue regarding Indigenous rights over cultural property at the United Nations and specifically through the World Intellectual Property Organisation (WIPO), an organization dedicated to helping to ensure that the rights of creators and owners of intellectual property are protected worldwide and that inventors and authors are recognized and rewarded for their ingenuity. As stated on WIPO's website regarding Indigenous peoples, the role of intellectual property systems in relation to traditional knowledge, and how to preserve, protect and equitably use traditional knowledge, is receiving growing attention in a range of international policy discussions. These discussions address matters as diverse as food and agriculture; the environment, notably the conservation of biological diversity; health, including traditional medicines; human rights and Indigenous issues; and aspects of trade and economic development. The protection, promotion and recognition of Indigenous people's intellectual property rights work is ongoing.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) also speaks to intellectual property in a number of articles. Article 11 states that Indigenous people have the right to practise and revitalize their cultural traditions and customs; Article 24 relates to the right to use traditional medicines and retain traditional health practices, including preserving vital medicinal plants, animals and minerals; and Article 31 confirms the Indigenous right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural perspectives, as well as the manifestations of their sciences, technologies and cultures. UNDRIP signatories, including Canada, "shall take effective measures to recognize and protect the exercise of these rights."

Unfortunately, Canada is lagging far behind. First Nations wanting to protect cultural intellectual property in Canada are typically faced with trying to fit this protection within narrow legislation that was really designed to protect individual and corporate rights. Some First Nations have acquired trademarks to protect petroglyph images and traditional names, and other First Nations have designated elders to hold copyright for the First Nation, but both of these solutions are far from ideal.

BC First Nations languages among the world's most threatened

BC is home to 34 distinct First Nation language groups and 61 dialects. Unfortunately, 13 of the 34 are spoken by 50 or fewer members, meeting the linguistic definition of being threatened for language extinction. For this reason, BC is included on the list of the five global hotspots for language extinction. Even more concerning: most speakers are aged 60 or over, meaning their languages may very well have no fluent speakers within a few decades.

In an effort to promote First Nations languages, the First Peoples Cultural Council and the Royal BC Museum began a three-year language exhibition, *Our Living Languages: First Peoples' Voices in BC*, in June 2014.

Language and Culture

Language: First Nations often want to ensure that their language is promoted and used in different aspects of community life, including public meetings, education and cultural activities. Language revitalization is crucial to a Nation's ability to deconstruct the current *Indian Act* reality, to decolonize and develop governance based on indigenous models. Some Nations may consider establishing the official language of the Nation as their own tongue, but for practical reasons (cost and access to fluent speakers) permit legal documents to be prepared in either English or the First Nation language or both. Language and language instruction is sometimes a matter that is covered by and governed under the jurisdiction of education (especially if it is for credits in high school or university), but it is also a part of the culture that is passed on from elders to youth. Language might also be an important consideration in other jurisdictions, such as traffic, transportation (with road signage), and land management and land and marine use planning with respect to place names, and so on. An important step in governing ancestral lands is recording traditional place names in the language and taking steps to have those traditional names recognized. This can help connect the language to the land from which it springs.

The two key areas of language jurisdiction are language revitalization and education. Language revitalization refers to the planning and programming of initiatives that address the immediate need to archive and transmit indigenous knowledge in Indigenous languages to future generations.

Language revitalization initiatives might include developing a Nation-wide strategic plan for language, developing a dictionary or curriculum, archiving a language, digitizing old tapes, and creating a library of all of the Nation's language resources. Language education includes the full spectrum of formal and traditional education, including early childhood, K–12, adult education, master-apprentice, cultural camps, teacher training and language revitalization certificates. Some of the education opportunities take place in formal settings and others can be less formal and community based. (For a detailed list of resources available on language revitalization and language education, see the resource section at this end of this chapter.)

Customs, Traditions, Spiritual and Religious Practices: It is important to protect a Nation's traditions and values, and accordingly First Nations may wish to make laws in this regard. While it may be legally acceptable for a First Nation to have powers to protect and promote its culture, this is also a form of regulatory power over matters that can be highly individual (e.g., religious practices and spiritual beliefs). This is one area where the collective rights of the Nation to protect its society may clash with the rights of it citizens under the Charter of Rights and Freedoms. Some legal flexibility is created for Aboriginal practices by section 25 of the charter (the charter does not diminish the Aboriginal, treaty, and other rights of Aboriginal peoples), but the issue is complex.

In addition, some First Nations use their constitution, laws and the Canadian legal system to try to protect and promote their culture. Others, however, take the position that their cultural laws and practices should be kept internal and that it is a mistake to place these in a constitution or in laws that will be interpreted by Canadian courts.

Arts and Cultural Expression: Artists make significant contributions to the well-being of First Nation communities. They make visible the dreams and visions of a people, while also asserting a people's unique identities and presence. With this in mind, First Nations may wish to develop laws and policies for the promotion and support of their artists and cultural workers, and to endorse their specialized expertise. Attention to this area of jurisdiction might include the creation of a "cultural authority" or "commission" that acts as a go-to advisory committee for a Nation or group of First Nations, and to inform and liaise with neighbours and other entities and partners. Some First Nations, to the extent that they have the resources, commission public art for common spaces both on their reserves and within their ancestral lands. This public art is a way to promote the cultural expression of the people, including its evolving forms. For example, a drive around any number of the Okanagan Nation reserves will reveal public art that clearly reflects contemporary expression of ancient and not so ancient art forms but which are nonetheless "Sylix." It is important for citizens and non-citizens alike to see and experience this, as it is a visual demonstration that Indigenous peoples and cultures are not bound to some stereotypical image of what an "Indian" is or must be to be legitimate.

An increasing number of First Nations are also building public art and cultural representation requirements into their development and building bylaws and laws. First Nations can thereby require developers building on reserves or treaty settlement lands to use the First Nations names and cultural designs in their developments and buildings in a manner approved by the First Nation, often under the guidance of elders or cultural leaders.

INDIAN ACT GOVERNANCE

While the *Indian Act* has prohibitions on trade or desecration of certain cultural properties on reserve land, such as grave houses, grave poles, and so on, these are rarely enforced. Further, there is no specific listing of culture as a bylaw power. Despite this, First Nations can and do often address aspects of heritage and cultural protection and promotion through the exercise of other bylaw-making powers in the *Indian Act* as ancillary to those powers. Again, exercise of *Indian Act* bylaw jurisdiction is limited to reserve lands and is subject to disallowance by the Minister.

SECTORAL GOVERNANCE INITIATIVES

There are no sectoral governance initiatives dedicated to heritage and culture as a subject matter and that involve the federal government. However, a Nation with a land code under the *Framework Agreement on First Nation Land Management* would have jurisdiction in relation to land use (zoning) and land use planning, including the issuance of development permits, and by virtue of that jurisdiction, control and management of heritage and cultural sites located on its reserves. Many land codes expressly provide for First Nations to pass laws on reserve land relating to "setting aside and regulation of heritage lands and sacred sites." Sectoral governance initiatives respecting heritage and cultural sites would be of greatest interest to a Nation where they apply to the Nation's broader ancestral lands. As such, unlike many other initiatives considered in this report, these initiatives would require the involvement of the province. The options for greater First Nation control over heritage and cultural sites within a Nation's ancestral lands is, as discussed above, contemplated though BC's *Heritage Conservation Act*.

The *Heritage Conservation Act*

Section 4 of the HCA provides for agreements with First Nations that could enable them to designate sacred sites for protection and to take over management of heritage sites or set permitting conditions for them. Section 4 states, "The Province may enter into a formal agreement with a first nation with respect to the conservation and protection of heritage sites and heritage objects that represent the cultural heritage of the aboriginal people who are represented by that first nation." Unfortunately, despite the clear wording of the legislation, the provincial government is of the opinion that section 4 does not allow for any First Nations jurisdiction. In any case, as of October 2014 there were no section 4 agreements.

Under section 4, an agreement must be in writing and must be approved by the lieutenant governor in council. However, this does not apply to an agreement that is entered into under section 20(1)(b). An agreement made under section 4 may include one or more of the following: a schedule of heritage sites and heritage objects that are of particular spiritual, ceremonial or other cultural value to the Aboriginal people for the purpose of protection; a schedule of heritage sites and heritage objects of cultural value to the Aboriginal people; circumstances under which the normal requirements of the act do not apply with respect to heritage sites and heritage objects, or to types of heritage sites and heritage objects, for which the First Nation administers its own heritage protection; policies or procedures that will apply to the issuance of or refusal to issue a permit; provisions with regard to the delegation of ministerial authority; and any other provisions the parties agree on. In addition to section 4 agreements, a Nation may seek to enter into an agreement under section 20 of the act. There are two section 20 agreements, as noted earlier in the chapter.

Notwithstanding the potential for more to be accomplished under the HCA than is currently the case, and the fact that there are no specific provincial sectoral governance initiatives dealing solely with First Nation jurisdiction in the area of heritage and culture, there is significant work being undertaken to promote and protect culture and language based on the other provincial legislation and initiatives identified below. In the case of the Reconciliation Agreements and Strategic Engagement Agreements, these provide First Nations signatories with increased participation in decision-making affecting their ancestral lands, including cultural heritage.

The *First Peoples' Heritage, Language and Culture Act*

The First Peoples' Cultural Council (FPCC) (formerly the First Peoples' Heritage, Language and Culture Council) is a First Nations–operated provincial Crown corporation formed by BC in 1990 to administer the First Peoples' Heritage, Language and Culture Program. The FPCC is supported by the *First Peoples' Heritage, Language and Culture Act* (R.S.B.C. 1996, c. 147).

The FPCC's mandate is to assist BC First Nations in their efforts to revitalize languages, arts and cultures. Since its inception in 1990, it has distributed more than $22 million to communities for language, arts and culture projects. The council's vision statement is as follows: "B.C. Aboriginal languages, cultures and arts are thriving. The cultural knowledge expressed through Aboriginal languages, cultures and arts is recognized and embraced."

Its mission statement is:

> The First Peoples' Cultural Council provides leadership for the revitalization of Aboriginal languages, culture and arts in British Columbia. The First Peoples' Cultural Council monitors the status of B.C. Aboriginal languages, cultures, and arts, and facilitates and develops strategies, which help Aboriginal communities recover and sustain their heritage. The First Peoples' Cultural Council is committed to establishing itself as the key source of current and accurate information on the state of Aboriginal languages in British Columbia and to continuing to provide program coordination and funding for Aboriginal language and cultural preservation and enhancement.

Governed by a board of directors with as many as 13 members, the FPCC works closely with an advisory committee made up of 34 First Nations people, including one representative from each of BC's 24 First Nations language groups, who are experts in the languages, arts and cultural knowledge of their language group and Nations. Both council members and advisory committee members are selected through an open-call process. The council had a 10-member board of directors as of May 2014, including an urban representative, a business representative, a non-voting member appointed by the provincial government, and a cultural advisor.

The FPCC has developed a Heritage Toolkit that provides resource documents related to historic place conservation in BC. The toolkit helps cultural workers understand that, while conservation is most closely associated with archaeological sites, there is much more to it. It can include buildings or just places traditionally used for cultural practices or even fishing holes or areas where foods and medicines were gathered. The toolkit contains a heritage glossary, information on formally designating and having heritage places recognized, a document on values-centred historic conservation management, and a section on identifying and understanding the importance of preserving non-tangible cultural heritage.

The *Haida Gwaii Reconciliation Act*

The Haida Nation, like most First Nations, has asserted jurisdiction over all of its heritage and cultural sites. However, the Haida have negotiated a unique agreement, the *Kunst'aa guu — Kunst'aayah Reconciliation Protocol*, which has been incorporated into provincial legislation. The *Haida Gwaii Reconciliation Act* (S.B.C. 2010, c. 17) provides, among other things, that the official name of the islands changes to "Haida Gwaii" and that there is shared decision-making on Haida Gwaii through a joint management board. Specifically with respect to the *Heritage Conservation Act*, section 7 of the *Haida Gwaii Reconciliation Act* states:

> 7 (1) In this section, "conservation" and "heritage site" have the same meanings as in section 1 of the *Heritage Conservation Act*.
>
> (2) Despite section 7 (1) of the *Heritage Conservation Act*, with the approval of the Lieutenant Governor in Council, the council may establish policies and standards for the identification and conservation of heritage sites within the management area.

The protocol and act are in many ways the current high-water mark with respect to the recognition and exercise of a Nation's jurisdiction within its ancestral lands. What is significant is that it has been negotiated outside of the BC treaty process on an assumption that Aboriginal title exists.

Taku Tlingit Agreements

The Taku Tlingit have a number of bilateral agreements with the provincial government. The *Wóoshtin Yan too.aat Land and Resource Management and Shared Decision-Making Agreement* has two specific purposes, including "implementing the culturally and ecologically sustainable management framework for the SDM Area, comprised of the Atlin Taku Land Use Plan and the Shared Decision Making structures, processes and initiatives set out in [the] Agreement."

The agreement includes a number of provisions relating to "implementing the culturally and ecologically sustainable management framework for the Shared Decision Making area" set out in the agreement. These are pointedly directed toward cultural preservation. For instance, section 2.2(d) states that outcomes will include management of land, water, and resources, including ecosystems, fish and wildlife habitats and populations, that secure the integrity of places of cultural importance to the Taku River Tlingit, and that ensure that this and all future generations of Taku River Tlingit have opportunities to continue their Khustiyixh. The agreement also creates newly protected areas and recommendations for further conservancy areas within the Taku River Tlingit territories.

Reconciliation Agreements and Strategic Engagement Agreements

In addition to the Haida Nation reconciliation agreement though the *Kunst'aa guu — Kunst'aayah Reconciliation Protocol* and the Taku Tlingit agreements, there are currently seven Strategic Engagement Agreements, one of which, the Sto:lo SEA, involves 15 bands. Most of these agreements include wording focused on "protecting cultural and heritage values" and protecting First Nation heritage sites. While these agreements do not confer or recognize a Nation's jurisdiction, they can address a number of matters, including matters dealing with heritage and culture. For example, the 2013 SEA between the Province of British Columbia and the Ktunaxa Nation establishes an agreed-to process for engagement and consultation respecting land use decisions made by the Province within the Nation's territory. For the Ktunaxa, depending on the significance of the impact of the decision, this means meeting their interests as set out in the agreement, including, "protecting, and managing past, present and future cultural resources, areas and landscapes that contain values significant to the Ktunaxa Nation, including: contemporary and historic ceremonial sites; archaeological sites; traditional use, spiritual, and medicinal plant harvesting areas, and oral history, artefacts, and archival resources."

There are also seven Reconciliation Agreements with First Nations or groups of First Nations. Unlike the Haida agreement, the Reconciliation Agreements do not have supporting provincial legislation, as they do not, from the province's perspective, alter the final decision-making authority of the province (i.e., they are not "shared decision-making"). However, they do provide a framework for more involvement by First Nations in identifying and trying to resolve issues, including issues relating to the protection of culture and heritage sites.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

With the exception of the *Sechelt Indian Band Self-Government Act*, all comprehensive governance arrangements recognize First Nations jurisdiction over heritage and culture, including language, although how the jurisdiction is stated varies between agreements. As well, all address to some extent the repatriation of cultural property in the possession of the Crown and in some cases the return of ancestral remains. The treaty arrangements also typically have provisions dealing with the naming of places within a Nation's ancestral lands.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	LANGUAGE	ARCHAEOLOGY	CONFLICT OF LAWS	INTELLECTUAL PROPERTY	PLACE NAMES
Sechelt	No provision.	No provision.	No provision.	N/A	No provision.	No provision.
Westbank	Westbank First Nation has jurisdiction in relation to the preservation, promotion and development of Okanagan culture on Westbank Lands. (Part XV, s. 175)	Westbank First Nation has jurisdiction in relation to the use, preservation, promotion of the Okanagan language. (Part XV, s. 175(d))	Westbank First Nation has jurisdiction in relation to the management, preservation and protection of archaeological sites on Westbank Lands, including the issuance of permits and licences for excavation of archaeological sites. (Part XV, s. 175(a))	Westbank laws prevail. (Part XV, s. 176)	Westbank First Nation does not have jurisdiction to make laws with respect to intellectual property. (Part V, s. 39(c))	No provision.
Nisga'a	Nisga'a Lisims government may make laws to preserve, promote, and develop Nisga'a culture and Nisga'a language, including laws to authorize or accredit the use, reproduction, and representation of Nisga'a cultural symbols and practices. (Ch. 11, s. 41)	The Nisga'a Lisims Government may make laws to preserve, promote, and develop the Nisga'a language (Ch. 11, s. 41) May make laws with respect to teaching Nisga'a language and culture. (Ch. 11, s. 100)	Nisga'a Government will develop processes to manage heritage sites on Nisga'a Lands in order to preserve the heritage values associated with those sites from proposed land and resource activities that may affect those sites. (Ch. 17, s. 36)	Nisga'a laws prevail. (Ch. 11, s. 43)	The Nisga'a Lisims Government does not have jurisdiction to make laws with respect to intellectual property. (Ch. 11, s. 42)	After the effective date, the Nisga'a Nation may propose that BC name or rename other geographic features with Nisga'a names, and BC will consider those proposals in accordance with applicable provincial laws. (Ch. 3, s. 96)
Tsawwassen	The Tsawwassen Government may make laws with respect to the preservation, promotion and development of Tsawwassen culture. (Ch. 14, s. 2(a))	The Tsawwassen Government may make laws with respect to the preservation, promotion and development of the Hun'qum'i'num language. (Ch. 14, s. 2(a)) May make laws with respect to teaching Hun'qum'i'num language and culture. (Ch. 16, s. 77)	The Tsawwassen Government may make laws with respect to archaeological sites, materials and human remains on Tsawwassen Lands. (Ch. 14, s. 2(c) and 2(e))	Tsawwassen laws prevail. (Ch. 14, s. 3)	The Tsawwassen Government does not have jurisdiction to make laws with respect to intellectual property. (Ch. 2, s. 22)	After the effective date, Tsawwassen First Nation may propose that BC name, rename or add a place name to a geographic feature in accordance with federal or provincial saw and policy. (Ch. 14, s. 30)
Maa-nulth	Each Maa-nulth First Nation government has authority to make laws with respect to the preservation, promotion and development of Nuu-chah-nulth culture. (s. 21.2.1(d) and 21.2.2)	Each Maa-nulth First Nation Government has authority to make laws with respect to the preservation, promotion and development of the Nuu-chah-nulth language (s. 21.2.1(d)) May make laws with respect to the development and teaching of the Nuu-chah-nulth language. (s. 13.19.1(b))	Each Maa-nulth First Nation Government may make laws with respect to conservation, protection and management of the heritage sites of the Maa-nulth First Nation, and the cremation or entombment of Maa-nulth archeological human remains found on Maa-nulth lands or returned to the Maa-nulth by Canada or BC. (s. 21.2.1(a) and (e))	Maa-nulth laws prevail. (s. 21.2.4)	The Maa-nulth First Nation Governments do not have jurisdiction to make laws with respect to intellectual property. (s. 21.2.3)	A Maa-nulth First Nation may propose that BC name or rename other geographic features with names in the Nuu-chah-nulth language, and British Columbia will consider those proposals in accordance with provincial waw, policy and procedures. (20.7.3) At the request of a Maa-nulth First Nation, BC will record names in the Nuu-chah-nulth language and historic background information about place names submitted by that Maa-nulth First Nation. (s. 20.7.4)

Table — Comprehensive Governance Arrangements... ***continued***

	GENERAL JURISDICTION	LANGUAGE	ARCHAEOLOGY	CONFLICT OF LAWS	INTELLECTUAL PROPERTY	PLACE NAMES
Yale	Yale First Nation Government may make laws applicable on Yale First Nation Land with respect to preservation, promotion and development of the Yale First Nation culture and the Puchil dialect of the Nlaka'pamux (Thompson) language. (s. 5.2.1(d))	Yale First Nation Government may make laws with respect to language and culture education on Yale First Nation Land for the certification of teachers of Yale First Nation culture and the Puchil dialect of the Nlaka'pamux (Thompson) language; and the development and teaching of curriculum with respect to Yale First Nation culture and the Puchil dialect of the Nlaka'pamux (Thompson) language. (s. 3.21.1–3.21.3)	Yale First Nation Government may make laws applicable on Yale First Nation Land with respect to the conservation, protection, designation and management of Heritage Sites; public access to Heritage Sites; and the conservation, protection, designation and management of Yale First Nation Artifacts owned by Yale First Nation. (s. 5.2.1(a)–s. 5.21.1(c))	Yale First Nation laws prevail. (s. 5.2.5)	Yale First Nation Government does not have the authority to make laws with respect to intellectual property. (s. 5.2.4)	Yale First Nation may propose that British Columbia name, rename or add a place name to a geographic feature in accordance with provincial law, and provincial policy and procedures. (s. 6.8.2)
Tla'amin	The Tla'amin Nation may make laws applicable on Tla'amin Lands in relation to the preservation, promotion and development of Tla'amin culture. (Ch. 14, s. 4(a))	The Tla'amin Nation may make laws applicable on Tla'amin Lands in relation to the preservation, promotion and development of Tla'amin language. (Ch. 14, s. 4(a))	The Tla'amin Nation may make laws applicable on Tla'amin Lands in relation to the establishment, conservation, protection and management of Heritage Sites and cremation or internment of Archaeological human remains found on Tla'amin Lands or returned to the Tla'amin Nation. (Ch. 14, s. 4(b) and (c))	Tla'amin laws prevail. (Ch. 14, s. 9)	Tla'amin Nation law-making authority under this agreement does not extend to intellectual property. (Ch. 2, s. 19)	Tla'amin may propose that BC name, rename or add place names for other geographic features with Tla'amin names and British Columbia will consider those proposals in accordance with provincial law. (Ch. 14, s. 29) At the request of the Tla'amin Nation, BC will record Tla'amin names and historical background information for geographic features. (Ch. 14, s. 30)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(c) Observance of Law and Order			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Tk'emlups te Secwepemc		OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Heritage Conservation
Bylaws — Others			
FIRST NATION	**DATE**	**DESCRIPTION**	
Tk'emlups te Secwepemc		Zoning — Bylaw Respecting Heritage Conservation	
Tk'emlups te Secwepemc		Construction — Bylaw Respecting Heritage Conservation	
Tla'amin	2009	Tla'amin-Simon Fraser University Archaeology And Heritage Stewardship Program	
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Nisga'a Nation	July 2009	Nisga'a Museum Construction Financing Act	
Tsawwassen First Nation	Apr 3, 2009	TFN Culture And Heritage Act	
Sechelt Indian Band	1996-03	Protect And Promote Cultural Heritage	
Sechelt Indian Band		Shishalh Nation Lands And Resources Decision-Making Policy	

Table — Language References

LANGUAGE REFERENCES
• The *Report on the Status of B.C. First Nations Languages:* www.fpcc.ca
• Online Map of BC First Nations languages: www.fpcc.ca (paper maps also available)
• Online Language archive — *FirstVoices is a group of web-based tools and services designed to support Aboriginal people engaged in language archiving, language teaching and culture revitalization:* www.FirstVoices.com and www.FirstVoiceskids.com (online language archive for pre-readers)
• Heritage Toolkit — *Goal is to provide resource documents to help First Nations cultural workers understand historic place conservation in BC:* www.fpcc.ca
• Chief Atahm School — *Seeks to continually improve its program with the development of an educational framework that privileges Secwepemc knowledge, language and culture:* www.chiefatahm.com
• Enowkin Centre — Nsyilxcen Language (affiliated and accredited with Nicola Valley Institute of Technology) — *As BC's Aboriginal public post-secondary institute, In 2008-09 NVIT's student body reflected 60% (122) of BC's First Nations communities, as well as First Nations communities in seven other provinces and territories:* www.enowkincentre.ca/programs_nsyilxcen.html
• Certificate in Language Revitalization (UVIC) — *The award-winning and accessible Certificate in Aboriginal Language Revitalization is offered by the University of Victoria's Department of Linguistics and the Division of Continuing Studies in partnership with the En'owkin Centre:* www.uvcs.uvic.ca/aboriginal/
• First Nations Language Program (UBC) — *The FNLG program was initiated in 1997 as part of UBC's commitment to community-based collaboration with First Nations peoples, in recognition of the profound importance of these languages and of the cultural traditions they represent:* http://fnlg.arts.ubc.ca
• First Nations Studies Program (SFU) — *Offers sequential, comprehensive courses rooted in traditional and contemporary aboriginal logic, methodology, practice and theory:* www.sfu.ca/fns
• UNBC — *Provides outstanding undergraduate and graduate learning opportunities that explore cultures, health, economies, and the environment:* www.UNBC.ca
• Four-week, three-course, 12-credit certificate program on Indigenous maps, films, rights and land claims (UFV): www.ufv.ca/geography/programs/landclaims/
• Indigenous Higher Learning Association (IAHLA) — Formed at the request of Indigenous–controlled post-secondary institutes and adult learning programs to address and further the mutual interests of all Indigenous–controlled learning centres in BC, and receives administrative support from the First Nations Education Steering Committee
• Language Teacher/Certification: www.ydli.org/misc/bccert.htm
• Developmental Standard Term Certificate in First Nations Language and Culture (DSTC): www.fnesc.ca/atec/listing_dstc.html
• BC Teacher Regulation Branch: www.bcteacherregulation.ca
Language Rights
• United Nations Declaration on the Rights of Indigenous Peoples (See Part 1: Sections 13, 14 and 16): www.un.org/esa/socdev/unpfii/en/drip.html
• United Nations Fact Sheet on Indigenous Languages: www.un.org/esa/socdev/unpfii/documents/Factsheet_languages_FINAL.pdf
• Canadian Linguistic Association (CLA) Statement on Aboriginal Language Rights: http://homes.chass.utoronto.ca/~cla-acl/CLA_rights.pdf

RESOURCES

First Nations

Aboriginal Tourism Association of BC
Suite 707 – 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-921-1070
Toll-free: 1-877-266-2822
Fax: 604-921-1072
Email: www.aboriginalbc.com/contact-us/
www.aboriginalbc.com

First Peoples' Cultural Council
1A Boat Ramp Road
Brentwood Bay, BC V8M 1N9
Phone: 250-652-5952
Fax: 250-652-5953
Email: info@fpcc.ca
www.fpcc.ca

First Peoples' Cultural Foundation
1A Boat Ramp Road
Brentwood Bay, BC V8M 1N9
Phone: 250-652-5952
Fax: 250-652-5953
Email: susan@fpcc.ca
www.fpcf.ca

Ksan Cultural Centre
Box 326
Hazelton, BC V0J 1Y0
Phone: 250-842-5544
Toll-free: 1-877-842-5518
Fax: 250-842-6533
Email: ksan@ksan.org

Ktunaxa Kinbasket Interpretive Centre
7731 Mission Road
Cranbrook, BC V1C 7E5
Phone: 250-417-4001

Nisga'a Museum
PO Box 300
810 Highway Drive
Greenville, BC V0J 1X0
Phone: 250-633-3050
Email: nisgaamuseum@nisgaa.net
www.nisgaamuseum.ca

Nk'Mip Desert Cultural Centre
1000 Rancher Creek Road
Osoyoos, BC V0H 1V6
Toll-free: 1-888-495-8555
Fax: 250-495-7912

Nuyumbalees Cultural Centre
34 Weway Road, Cape Mudge
PO Box 8
Quathiaski Cove, BC V0P 1N0
Phone: 250-285-3733
Fax: 250-285-3753

Squamish Lil'wat Cultural Centre
4584 Blackcomb Way
Whistler, BC V0N 1B4
Phone: 1-866-441-SLCC (7522)
Email: info@slcc.ca
www.slcc.ca

St'át'imc Heritage and Learning Centre
PO Box 1420
Lillooet, BC V0K 1V0
Phone: 250-256-7523
Fax: 250-256-7119
www.uslces.org

Stó:lō Resource Centre/ Research and Resource Management Centre
Bldg. 7 – 7201 Vedder Road
Chilliwack, BC V2R 4G5
Phone: 604-858-3366
Fax: 604-824-5129

U'mista Cultural Society
1 Front Street
PO Box 253
Alert Bay, BC V0N 1A0
Phone: 250-974-5403
Toll-free: 1-800-690-8222
Fax: 250-974-5499

Provincial

BC Archaeology Branch
Ministry of Natural Resource Operations
PO Box 9816, Stn Prov Govt
Victoria, BC V8W 9W3
Phone: 250-953-3334
Fax: 250-953-3340
www.for.gov.bc.ca/archaeology

BC Arts Council
1st Floor, 800 Johnson Street
PO Box 9819, Stn Prov Govt
Victoria, BC V8W 1N3
Phone: 250-356-1718
Fax: 250-387-4099
Email: BCArtsCouncil@gov.bc.ca

Ministry of Aboriginal Relations and Reconciliation
PO Box 9100 Stn Prov Govt
Victoria, BC V8W 9B1
Phone: 604-660-2421 (Vancouver), 250-387-6121 (Victoria)
Toll-free: 1-800-663-7867 (other locations)
Toll-free: 1-800-880-1022 (Information)
Email: ABRInfo@gov.bc.ca
www.gov.bc.ca/arr

University of British Columbia
Museum of Anthropology
6393 NW Marine Drive
Vancouver, BC V2T 1Z2
Phone: 604-827-5932
Fax: 604-822-2974
Email: http://moa.ubc.ca/about/contact.php
www.moa.ubc.ca

Federal

Canada Council for the Arts
50 Albert Street, PO Box 1047
Ottawa, ON K1P 5V8
Phone: 1-800-263-5588 or 613 566 4414
www.canadacouncil.ca

Canada Intellectual Property Office
Place du Portage I
50 Victoria Street, Room C-114
Gatineau, QC K1A 0C9
Phone: 1-866-997-1936
Email: cipo.contact@ic.gc.ca
www.cipo.ic.gc.ca

Heritage Canada
Canadian Heritage Museums Assistance Program
British Columbia, Alberta, Yukon
351 Abbott Street, Suite 205
Vancouver, BC V6B 0G6
Phone: 604-666-0176
Fax: 604-666-3508
Email: wr-ro@pch.gc.ca
www.pch.gc.ca/eng/1268597502197

International

World Intellectual Property Organization (WIPO)
34, chemin des Colombettes
CH-1211 Geneva 20, Switzerland
Phone: +41 22 338 9111
Fax: +41 22 733 5428
www.wipo.int

LINKS AND RESOURCES

First Nations

- First Nations Heritage Conservation Action Plan for BC First Nations: www.ubcic.bc.ca/files/PDF/HeritageConservationActionPlan_030311.pdf
- UBCIC First Nations heritage planning toolkit: www.ubcic.bc.ca/files/PDF/UBCIC_HeritageBook.pdf
- Joint Working Group on First Nations Heritage Toolkit: www.ubcic.bc.ca/files/PDF/UBCIC_HeritageBook.pdf

Provincial

- Provincial Archaeological Report Library: www.for.gov.bc.ca/archaeology/accessing_archaeological_data/Provincial_Archaeological_Report_Libary.htm
- British Columbia Cultural Centres Guide: www.travel.bc.ca/attractions/first-nations-cultural-ce/1/
- First Citizens Fund: www.gov.bc.ca/arr/cultural/fcf/default.html
- *BC First Peoples' Heritage, Language and Culture Act:* www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96147_01
- Wooshtin Yan Too.Aat Land and Resource Management and Shared Decision Making Agreement: www2.gov.bc.ca/gov/DownloadAsset?assetId=4FCB900A4F8942D7BC2F102E0FFEC0E9

SELECT LEGISLATION

Provincial

- *First Peoples' Heritage, Language and Culture Act* (R.S.B.C. 1996, c. 147)
- *Haida Gwaii Reconciliation Act* (S.B.C. 2010, c. 17)
- *Heritage Conservation Act* (R.S.B.C. 1996, c. 187)

PART 1 /// SECTION 3.17

Intoxicants

3.17

INTOXICANTS

3.17

INTOXICANTS

BACKGROUND

The subject of intoxicants (intoxicants in this context generally refers to alcohol) is an aspect of jurisdiction over health. There are also *Criminal Code* (R.S.C. 1985, c. C-46) considerations. Given the history of prohibition against Indians consuming alcohol, intoxicants are dealt with separately in the *Indian Act*. Given the complexity of First Nations' assuming health jurisdiction, it is also addressed as a stand-alone issue in comprehensive governance arrangements. Furthermore, there are issues relating to the regulation of the distribution and sale of intoxicants, since there are major revenue-raising aspects to such sales and control with respect to who is licensed to sell alcohol. As a result, the provinces protect their existing jurisdiction and control over the licensing, regulation and revenue-raising powers related to alcohol. Taxation of alcohol and the ability of First Nations to charge a point of sale tax on alcohol is also discussed in Section 3.29 — Taxation.

Provisions in both the *Indian Act* and modern comprehensive governance arrangements recognize First Nations jurisdiction in prohibiting alcohol sales or possession. However, there are no provisions in the *Indian Act* recognizing jurisdiction over licensing the sale of alcohol or to raise revenues from alcohol sales on reserves. For First Nations under the *Indian Act*, as elsewhere in BC, a person who wishes to sell liquor in a store, bar or a restaurant or at an event (e.g., a ball tournament) is required to obtain a licence from the provincial government. This is in addition to meeting any other requirements of the First Nation (e.g., obtaining a special events licence, business licence, building permit, etc.). In the case of modern treaties, while jurisdiction does extend to the "sale, exchange and manufacture of alcohol," including the exclusive right to sell liquor on First Nations' lands (or have an agent or designate sell on their behalf), this power does not displace provincial licensing requirements, which must be met as well.

With respect to other controlled substances that would be considered intoxicants, First Nations have been looking at ways to address substance abuse and problems associated with trafficking on, or through, their lands. Some First Nations in BC have established "drug-free zones" by resolution of council. These areas are typically around schools and other community facilities, and the intention is that judges will impose stiffer penalties on offenders caught in these areas, in accordance with the *Criminal Code* of Canada and sentencing guidelines under the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19). With respect to production of controlled substances, people can now grow medicinal marijuana in Canada, but to the best of our knowledge no person has yet established a licensed medical marijuana operation on a reserve or on settlement lands.

INDIAN ACT GOVERNANCE

Under section 85.1 of the *Indian Act*, the council of a First Nation can make bylaws prohibiting the sale or possession of intoxicants on-reserve, but a majority of the First Nation's electors at a special meeting must approve the bylaw. Unlike bylaws made under section 81 and 83 of the *Indian Act*, ministerial approval for an intoxicants bylaw is not required. Thirty First Nations in BC have made bylaws in accordance with 85.1 of the *Indian Act*, and of the 12 First Nations with similar law-making powers under comprehensive government arrangements (CGA) dealing with intoxicants, two (Westbank and Sechelt) have made laws. There is no jurisdiction for a First Nation to license or regulate the sale of alcohol or to raise revenues from such sales.

SECTORAL GOVERNANCE INITIATIVES

There are no sectoral initiatives dealing solely with recognition of First Nations jurisdiction over intoxicants at this time. The issue generally arises as part of comprehensive governance negotiations.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

Most comprehensive governance arrangements, whether in a treaty or otherwise, address the subject of intoxicants and recognize First Nations jurisdiction in relation to the prohibition of the sale, supply, manufacture or possession of intoxicants. The First Nation can establish exceptions regarding possession or use of intoxicants under certain conditions (e.g., age or place restrictions). The Sechelt and Westbank arrangements do not recognize the jurisdiction to regulate or license permitted sales. The Tsawwassen, Nisga'a, Tla'amin and Yale treaty arrangements, in addition to jurisdiction over the prohibition of alcohol (and conditions for possession of alcohol), recognize the First Nation's jurisdiction to make laws for the sale, exchange and manufacture of alcohol, including the exclusive right to sell liquor on their lands (or have an agent or designate sell on their behalf). For some First Nations, if they have a control within a local market, this could potentially be a significant source of revenue. The treaty arrangements also permit the Province to issue a sales licence to another party if the First Nation consents.

The *Maa-nulth First Nations Final Agreement* is silent on the subject of Maa-nulth jurisdiction over intoxicants.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	Sechelt has the power to make laws regarding the prohibition of the sale, barter, supply, manufacture or possession of intoxicants on Sechelt Lands and any exceptions to a prohibition of possession. (s. 14(1)(o))	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)
Westbank	Westbank First Nation has jurisdiction to prohibit the sale, barter, supply, manufacture, or possession of intoxicants on Westbank Lands and exemptions in relation to possession of intoxicants on Westbank Lands. (Part XXIII, s. 220) Westbank will enter into future negotiations for expanded jurisdiction over intoxicants. (Part XXIII, s. 222 (b))	Westbank law prevails. (Part XXIII, s. 221)
Nisga'a	Nisga'a Government may make laws with respect to the prohibition of, and the terms and conditions for, the sale, exchange, possession, or consumption of intoxicants on Nisga'a Lands. (Ch. 11, s. 110)	Federal or provincial law prevails. (Ch. 11, s. 111)
Tsawwassen	Tsawwassen Government may make laws with respect to the prohibition of, and the terms and conditions for, the sale, exchange, possession, manufacture and consumption of liquor on Tsawwassen Lands. (Ch. 16, s. 100)	Federal or provincial law prevails. (Ch. 16, s. 101)
Maa-nulth	No provision.	N/A
Yale	Yale First Nation Government may make laws with respect to the prohibition of, or the terms and conditions for the sale, exchange, possession, manufacture or consumption of, liquor on Yale First Nation Land. (s. 3.20.1)	Federal or provincial law prevails. (s. 3.20.2)
Tla'amin	The Tla'amin Nation may make laws in relation to the prohibition of, and the terms and conditions for, the sale, exchange, possession, manufacture or consumption of liquor on Tla'amin Lands. (Ch. 15, s. 115)	Federal or provincial law prevails. (Ch. 15, s. 116)

Table — BC First Nations' Laws/ByLaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(a) Health			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Gitsegukla	90-6	HEALTH	Bylaw Respecting Drug Abuse
Gitsegukla	90-7	INTOXICANTS	Bylaw Respecting Intoxicants
Bylaws — Section 85.1 Intoxicants			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Ahousaht	2011-01	INTOXICANTS	Bylaw Respecting Ahousaht First Nation Intoxicant Law
Blueberry River First Nations	1-85	INTOXICANTS	Bylaw Regarding Intoxicants
Cheslatta Carrier Nation	1-1986	INTOXICANTS	Bylaw Respecting Intoxicants
Ditidaht	2006-03	INTOXICANTS	Bylaw Respecting Prohibition Of Intoxicants
Doig River	UNNUMBERED	INTOXICANTS	Bylaw Respecting Intoxicants
Fort Nelson First Nation	7	INTOXICANTS	Bylaw Respecting Intoxicants
Nisga'a Village Of Gingolx	10	INTOXICANTS	Bylaw Respecting Intoxicants
Nisga'a Village Of Gingolx	13	INTOXICANTS	Bylaw Respecting Intoxicants To Minors
Gitga'at First Nation (Hartley Bay)	86-01	INTOXICANTS	Bylaw Respecting Intoxicants
Gitxaala Nation	1	INTOXICANTS	Bylaw Respecting Intoxicants
Halfway River First Nation	01-85	INTOXICANTS	Bylaw Respecting Intoxicants
Ka:'Yu:'K't'h'/Che:K:Tles7et'h' First Nations	2	INTOXICANTS	Bylaw Respecting Intoxicants
Kitasoo	1991-1	INTOXICANTS	Bylaw Respecting Intoxicants
Kwadacha	2008-01	INTOXICANTS	Bylaw Respecting Intoxicants
Prophet River First Nation	01-85	INTOXICANTS	Bylaw Respecting Intoxicants
Saulteau First Nations	1-85	INTOXICANTS	Bylaw Respecting Intoxicants
Seton Lake	UNNUMBERED	INTOXICANTS	Bylaw Respecting Intoxicants
Stellat'en First Nation	UNNUMBERED	INTOXICANTS	Intoxicants
Tl'azt'en Nation	99.04	INTOXICANTS	Bylaw Respecting Intoxicants
West Moberly First Nations	UNNUMBERED	INTOXICANTS	Bylaw Respecting Intoxicants
Bylaws — Section 81(1)(c) Observance of Law and Order			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Lower Kootenay	7	LAW AND ORDER	Bylaw Concerning The Banning Of Alcohol And Drugs On The Lower Kootenay Indian Reserve Lands
Ulkatcho	1-1981	LAW AND ORDER	Bylaw For The Control Of Drugs And Alcohol
Bylaws — Section 81(1)(p) Trespassing			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Adams Lake	2010-1	TRESPASSING	Bylaw Respecting Removal And Punishment Of Persons Trespassing And Engaging In Prohibited Activities
Lower Kootenay	5	TRESPASS	Bylaw Concerning The Banning Of Alcohol And Drugs On The Lower Kootenay Indian Reserve Lands.
Snuneymuxw First Nation	UNNUMBERED	TRESPASSING	Draft Bylaw Respecting The Removal And Punishment Of Persons Trespassing Or Frequenting The Reserve Of Prohibited Purposes
Yale	2002-1	TRESPASSING	A Bylaw Respecting The Removal And Punishment Of Persons Trespassing Or Frequenting The Reserve For Prohibited Purposes
Yekooche	2002-4	TRESPASSING	Bylaw Respecting The Removal And Punishment Of Persons Trespassing Or Frequenting The Reserve For Prohibited Purposes
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Tsawwassen First Nation	Apr 3, 2009	TFN Community Safety and Security (Land Use and Prohibited Substances) Act	
Westbank First Nation	2009-01	WFN Community Protection Law	

RESOURCES

Provincial

Ministry of Public Safety and Solicitor General
Government of British Columbia
Liquor Control and Licensing Branch
4th Floor, 3350 Douglas Street
Victoria, BC V8Z 3L1
Phone: 250-952-5787

- *Local Government and First Nations Roles and Responsibilities in the Provincial Liquor Licensing Process*
- Sample Resolution Template (LCLB024)

Federal

Department of Justice
Government of Canada
284 Wellington Street
Ottawa, ON K1A 0H8
Phone: 613-941-4193
Fax: 613-941-5446

SELECT LEGISLATION

Provincial

- *Controlled Drugs and Substances Act* (S.C. 1996, c. 19)

Federal

- *Criminal Code* (R.S.C. 1985, c. C-46)

PART 1 /// SECTION 3.18

Labour Relations

3.18

LABOUR RELATIONS

3.18

LABOUR RELATIONS

BACKGROUND

Labour relations refers to the relationship between an employer and employees. Labour relations can be a very divisive issue, depending on whether one is an employee or an employer. Workers have hard-won rights to be treated fairly in the workplace and to freely organize and form trade unions to represent their collective interests.

Workers' Rights

In Canada, the rights to collectively organize as employees are recognized through the Constitution and the application of the Charter of Rights and Freedoms, which protects the fundamental freedom of association. In addition, aspects of workers' rights are protected through human rights legislation. Federally, the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) provides for the protection of workers from discrimination, but only in federally regulated activities. Each province and territory has its own anti-discrimination laws that apply to activities that are not federally regulated.

The *Canadian Human Rights Act* did not originally apply to First Nations, but with the repeal of section 67 of the act in June 2011, the act now applies to First Nation government activities. The amendments to the *Canadian Human Rights Act* acknowledge the unique circumstances of First Nations and do not abrogate or derogate from the protection provided for existing Aboriginal or treaty rights. Further, and as it does for all levels of government, the provisions of the act that allow an employer to carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals apply to First Nation governments. This is how employers justifiably discriminate in order to meet social objectives, including preferential hiring. Significantly, the act recognizes the place of Indigenous legal traditions and customary law. Where a complaint is made under the *Canadian Human Rights Act* against a First Nation government, the act must be applied in a manner that "respects First Nations' legal traditions and customary laws." Notably, the act specifically speaks to the "balancing of individual rights and interests against collective rights and interests" so long as they are consistent with the principle of gender equality. The Canadian Human Rights Commission has published a handbook on how the act applies to First Nations. Since the act came into force and became applicable to First Nations, 344 human rights complaints, including employment matters, have been filed against First Nation governments and related entities, and 173 complaints have been filed against the federal government. Of those 344 complaints against First Nations governments, 61 percent were abandoned before they could be dealt with by the Canadian Human Rights Commission, and only three complaints have been referred to the Canadian Human Rights Tribunal. Of the 173 complaints filed against the federal government, 36 percent were abandoned and 26 complaints were referred to the Canadian Human Rights Tribunal.

The Regulation of Labour Relations in Canada

In addition to the protections in the Charter and under the human rights legislation, both the federal and provincial governments have enacted legislation dealing with labour relations and working conditions, including the manner in which employees can form trade unions and collectively bargain. Issues arise from time to time as to whether a matter between an employer and employee should be governed by federal or provincial labour law. The answer depends largely on the employer and the nature of the work.

In Canada, both the federal government and provincial governments have jurisdiction in labour relations and regulate them very heavily. The provinces have jurisdiction with respect to labour relations and working conditions generally and the federal government has jurisdiction in relation to federal works, which means any work, undertaking or business that is within the legislative authority of Parliament.

Provincially, labour relations, minimum wage and standards for working conditions in most workplaces are regulated by the Employment Standards Branch of the BC Ministry of Labour, which administers the provincial *Employment Standards Act* (R.S.B.C. 1996, c. 113) and regulations made under that act. In addition, labour management and collective bargaining in the province is governed by the *Labour Relations Code* (R.S.B.C. 1996, c. 244), which guarantees the right of every employee to join a trade union and participate in lawful activities of that union. The *Labour Relations Code* governs all aspects of collective bargaining among the provincially regulated employers and employees, which include the acquisition and termination of collective bargaining rights, the process of collective bargaining, and the settlement and regulation of disputes in both the public and private sectors. The *Labour Relations Code* establishes the Labour Relations Board, which is an independent, administrative tribunal with the mandate to mediate and adjudicate employment and labour relations matters related to unionized workplaces.

The government of Canada regulates labour relations and working conditions through the *Canada Labour Code* (R.S.C. 1985, c. L-2) and regulations made under the code. In addition to legislation that regulates general working conditions, governments also specially regulate their public sector employees. The paramount consideration in managing employee and employer relations within the public sector is to ensure protection of the public interest. Canadians rely heavily on programs and services delivered by government (more so than any single private corporation), with many of the services provided being essential.

Canada has therefore enacted the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) and the *Parliamentary Employment and Staff Relations Act* (R.S.C., 1985, c. 33 (2nd Supp.). These acts have special provisions for how collective bargaining takes place, rules for negotiations, and so on. The *Public Service Labour Relations Act* also establishes a Public Service Labour Relations Board (PSLRB), which is a quasi-judicial statutory tribunal responsible for administering the collective bargaining and grievance adjudication systems in the federal public service and in Parliament. There is similar legislation for provincial government employees. There is no comparable specific legislation for First Nation governments.

Collective Bargaining in Canada

The way labour organization typically works in Canada is that groups of employees, either on their own or as part of a larger union, can request to become “certified” as a “bargaining unit,” which gives the representatives of the bargaining unit the legal right to negotiate a collective agreement with the employer. Today, approximately 4.66 million workers in Canada belong to a trade union or to an employee association. This figure represents just under 30 percent of all workers in Canada. Almost without exception, employees in the federal and provincial public sector (i.e., employees of governments and other governmental bodies) are unionized and, for the most part, so too are local or municipal governments. There are also a number of trade unions that specialize in representing public-sector employees.

In BC, the British Columbia Government Employees Union (BCGEU) represents most, but not all, provincial government employees. Other unions in the provincial public sector include the Canadian Union of Public Employees (CUPE), the Hospital Employees Union (HEU), the Health Sciences Association (HSA), the BC Teachers Federation (BCTF), the Federation of Post-Secondary Educators

of BC (FPSE) and the Professional Institute of Public Servants (PIPS). In British Columbia's system of sectoral bargaining, certain employer organizations are established by law — for example, the Health Employers Association of BC (HEABC) and the British Columbia Public School Employers' Association (BCPSEA). All of these organizations may have dealings with First Nations. Federal employees are for the most part represented by the Public Service Alliance of Canada (PSAC), which has more than 170,000 members. The Canadian Union of Public Employees (CUPE), the largest union in Canada, with 600,000 members, represents workers in health care, education, municipalities, libraries, universities, social services, public utilities, transportation, emergency services and airlines.

Labour Relations and First Nations

By virtue of "Indians, and Lands reserved for Indians" coming under section 91(24) of the *Constitution Act, 1867*, one might assume that labour relations and working conditions on-reserve are governed by federal legislation, specifically the *Canada Labour Code*. However, the situation is not quite so straightforward, for under some circumstances an undertaking by a First Nation is not considered as coming under the *Canada Labour Code* but under provincial law. Several court cases have considered whether federal or provincial labour relations laws apply on First Nation lands (as of October 2014, just in consideration of reserve lands and not Aboriginal title lands) or to businesses and other entities controlled by First Nation governments. The Supreme Court of Canada decision in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* [2010] 2 S.C.R. 696, suggests that under the *Constitution Act, 1867*, jurisdiction over labour relations is presumed to be a provincial matter, the exception being federal power over labour relations.

The analysis to determine which jurisdiction applies focuses on a two-step functional test under which the court looks at the nature, operations and activities of the enterprise to see whether the activity is federal or provincial in nature. If the first test is not conclusive, the court will look at whether the application of provincial jurisdiction would impair the "core of federal power." If it does not, provincial labour law applies. This is a significant decision for First Nations, as it demonstrates that many activities on reserve lands or undertaken by a First Nation assumed to fall under federal labour jurisdiction might now be seen to fall under provincial labour laws.

As the law continues to evolve in this area, federal law will apply in some situations and provincial law in others. Most First Nation government ("band") offices operate on the assumption that, given the nature of their activities, federal law and the *Canada Labour Code* will apply to labour relations and the working conditions of employees. Under the *Canada Labour Code*, there are standards of employment to be met, including the establishment of a safety and health committee. While required to have such a committee, First Nations may not know this or even know that this law applies (see *The Self-Assessment*, Module 2, Administration — Guide, in Part 2 of the Toolkit). In the absence of a First Nation having recognized jurisdiction or a court decision that provincial labour laws apply to First Nation governments, it is anticipated the *Canada Labour Code* will continue to be relied upon by First Nation governments and their employees. One First Nation sought to argue that they had a section 35 right of self-government to enact a labour code (*Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (2008), 1 CNLR 71), but the court rejected this, saying the First Nation had not met the test to establish the right — namely, whether the activity was integral to the culture of the people at the time of contact (the Van der Peet test (*R. v. Van der Peet*, [1996] 2 S.C.R. 507)). To date, no First Nation in Canada is exercising recognized jurisdiction over labour relations on its lands.

However, Canada's inherent right policy does conceivably provide for the recognition of First Nations' jurisdiction over labour relations and working conditions. These are not excluded from negotiations on the grounds of being related to Canadian sovereignty, defence and external relations, and other national interest powers. Indeed, "labour and training" is actually identified as a matter for negotiations,

even though Canada sees the subject as going beyond matters integral to Aboriginal culture or strictly internal to an Aboriginal group. Accordingly, if Canada were to recognize First Nations jurisdiction, it would require that federal or provincial law be paramount in the event of a conflict between First Nations law and federal or provincial law.

Whether a First Nation would want to regulate labour relations and, if so, how broadly raises policy questions that the Nation would need to carefully consider. A First Nation, for example, may seek to regulate only its public service — that is, those employees who work for the First Nation government or its related entities. But it may not wish to have jurisdiction over labour relations and working conditions for employees of other businesses located and operated by third parties (including private businesses run by citizens) on its land.

To date, no sectoral initiative or comprehensive governance arrangement recognizes First Nations' jurisdiction over labour relations, although the subject matter is addressed in comprehensive governance arrangements (see below). It is Canada's negotiating position that First Nations should not regulate these matters, notwithstanding the inherent right policy. Interestingly, the *Westbank First Nation Self-Government Agreement*-in-Principle (AIP) did include a chapter on labour relations, but was removed from the final agreement at Canada's insistence. This power would have recognized Westbank's jurisdiction over the operation and management of Westbank government and all employees of Westbank government or any corporation or body established by Westbank government to carry out any function or duty on its behalf within Westbank's jurisdiction. Any laws made by Westbank would have had to be designed to be equivalent in effect to federal law, which would have continued to apply and would have prevailed in the event of a conflict. While these provisions were removed from the AIP, section 222 of the *Westbank First Nation Self-Government Agreement* does contemplate that labour relations will be the subject of future negotiations. Even though First Nations may not currently exercise jurisdiction over labour relations, their governments will, as they continue to rebuild, face issues regarding the organization of their workforce and will need to be aware of how these matters have been addressed by other governments in Canada.

Currently, there are only a handful of First Nation governments ("band" offices) that have actually been certified by a labour board, but there are no collective agreements in place. Some First Nations–related entities have been certified and do have collective agreements. First Nation government is, therefore, the only area of government in Canada that has not been systematically unionized and/or that has no specific legislation regarding government employees.

Canada has not included specific provisions in federal legislation regulating employee relations and working conditions in the Aboriginal public sector. As Nations rebuild and as their public sector grows to provide programs and services through First Nation governments, labour relations issues will understandably become more evident and there may be a need for increased regulation in this area. Indeed, it is most probable.

INDIAN ACT GOVERNANCE

The *Indian Act* makes no specific reference to labour relations with respect to either the powers of the Minister or the federal government or the powers that may be exercisable by a First Nation.

SECTORAL GOVERNANCE INITIATIVES

There are no sectoral initiatives addressing labour relations and working conditions in relation to First Nations governments on First Nations lands.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

As noted above, none of the comprehensive governance arrangements provides jurisdiction over labour relations and working conditions. In the *Westbank First Nation Self-Government Agreement*, labour relations are included as a subject matter for future negotiations. There is also reference to the *Canadian Human Rights Act*, which applies to Westbank with the proviso that the act must be interpreted to take into account Westbank's ability to give preference to its members when hiring employees and contractors. The Nisga'a Final Agreement provides provisions that ensure that the Nisga'a Lisims government will have standing to participate in any industrial relations matter, with the exception of a matter arising out of a collective agreement. The Tsawwassen, Maa-nulth, Yale and Tla'amin final agreements all make explicit reference to the Nation not having jurisdiction over labour relations, so that laws of general application apply.

Given the complexity of labour relations law and the evolving nature of First Nations governance, it is unclear whether federal or provincial jurisdiction would apply to labour relations under modern treaty arrangements. Ultimately, this matter may be determined by a court. The Sechelt arrangements are silent and would primarily remain under federal jurisdiction and the *Canada Labour Code*.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	*CHARTER OF RIGHTS AND FREEDOMS* AND *CANADIAN HUMAN RIGHTS ACT*
Sechelt	No provisions.	No provisions.
Westbank	No jurisdiction. Westbank First Nation may seek further negotiations with BC and Canada to set out jurisdictional arrangements with respect to labour relations on Westbank Lands. (Part XXIV, s. 222(c))	Westbank First Nation is bound by the provisions of the *Canadian Charter of Rights and Freedoms* and the rights and freedoms guaranteed by the Charter are enforceable with respect to the government of Westbank First Nation and the council. (Part V, s. 32) Nothing in this Agreement limits the operation of the *Canadian Human Rights Act* (CHRA) with respect to the Westbank First Nation and Westbank lands and members. The interpretation and application of the CHRA shall take into account the entitlement of Westbank First Nation to give preference to its members in hiring employees and contractors for Westbank First Nation operations, where justifiable. (Part XXXIII, s. 291)
Nisga'a	No provisions.	The *Canadian Charter of Rights and Freedoms* applies to Nisga'a Government with respect to all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government as set out in the Agreement. (Ch. 2, s. 9)
Tsawwassen	The powers of Tsawwassen Government to make laws do not include the power to make laws with respect to labour relations and working conditions. (Ch. 2. s. 22)	The *Canadian Charter of Rights and Freedoms* applies to Tsawwassen government with respect to all matters within its authority. (Ch. 2, s. 9)
Maa-nulth	The law-making authority of a Maa-nulth First Nation Government does not include labour relations and working conditions. (s. 1.8.11)	The *Canadian Charter of Rights and Freedoms* applies to each Maa-nulth First Nation Government with respect to all matters within its authority. (s. 1.3.2)
Yale	The law-making authority of Yale First Nation Government does not include labour relations and working conditions. (s. 2.6.3)	The *Canadian Charter of Rights and Freedoms* applies to Yale First Nation Government with respect to all matters within its authority. (s. 2.3.2)
Tla'amin	The Tla'amin Nation law-making authority does not extend to labour relations and working conditions. (Ch. 2, s. 19))	The *Canadian Charter of Rights and Freedoms*, applies to Tla'amin Nation with respect to all matters within its authority. (Ch. 2, s. 8)

Table — BC First Nations' Laws/Bylaws in Force

COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Huu-ay-aht First Nations		Human Resources Policy Regulation
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations	5/2011	Government Personnel Act
Nisga'a Nation	2006/05	Nisga'a Personnel Administration Act
Sechelt Indian Band	1996-05	Wage Set-Offs
Toquaht Nation	5/2011	Government Personnel Act
Tsawwassen First Nation	Apr 2009	Government Employees Act
Uchucklesaht Tribe	5/2011	Government Personnel Act
Ucluelet First Nations	5/2011	Government Personnel Act

RESOURCES

First Nations

Assembly of First Nations
Suite 1600, 55 Metcalfe St.
Ottawa, ON K1R 5B4
Phone: 613-241-6789
Toll-free: 1-866-869-6789
Fax: 613-241-5808

- Report of the Assembly of First Nations: *Assessing First Nations Needs under the Canada Human Rights Act*

AFOA Canada

Suite 1010, 100 Park Royal Suites
West Vancouver, BC V7T 1A2
Phone: 604-925-6370
Fax: 604-925-6390
www.afoabc.org

301, 1066 Somerset Street West
Ottawa, ON K1Y 4T3
Phone: 613-722-5543
Fax: 613-722-3467
www.afoa.ca

- New Certified Aboriginal Public Administrators (CAPA) Program

First Nations Public Service
Suite 1200, 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: 604-926-9903
Fax: 604-926-9923
www.motionvisual.com/testsite_firstnationspublicservice/index.htm

Provincial

British Columbia Government Employees Union (BCGEU)
4911 Canada Way
Burnaby, BC V5G 3W3
Phone: 604-291-9611
Toll-free: 1-800-663-1674
Fax: 604-291-6030
Toll-free fax: 1-800-946-0244
www.bcgeu.ca

Hospital Employees Union (HEU)
5000 North Fraser Way
Burnaby, BC V5J 5M3
Phone: 604-438-5000
Toll-free: 1-800-663-5813
Fax: 604-739-1510
Email: info@heu.org
www.heu.org

Health Sciences Association of British Columbia (HSA)
300 – 5118 Joyce Street
Vancouver, BC V5R 4H1
Phone: 604-439-0994
Toll-free: 1-800-663-2017 (within BC)
Fax: 604-439-0976
Toll-free fax: 1-800-663-6119 (within BC)
www.hsabc.org

British Columbia Teachers' Federation (BCTF)
100 – 550 West 6th Avenue
Vancouver, BC V5Z 4P2
Phone: 604-871-2283
Toll-free: 1-800-663-9163
www.bctf.ca

Federation of Post-Secondary Educators of BC (FPSE)
400 – 550 West 6th Avenue
Vancouver, BC V5Z 1A1
Phone: 604-873-8988
Fax: 604-873-8865
Email: info@fpse.ca
www.fpse.ca

Federal

Canadian Human Rights Commission
8th Floor, 344 Slater Street
Ottawa, ON K1A 1E1
Phone: 613-995-1151
Toll-free: 1-888-214-1090
TTY: 1-888-643-3304
Fax: 613-996-9661
www.chrc-ccdp.gc.ca

- *Your Guide to Understanding the Canadian Human Rights Act*
- *Human Rights Handbook for First Nations*
- *Special Report to Parliament on the Impacts of Bill C-21 (An Act to Amend the Canadian Human Rights Act)*

Canadian Union of Public Employees (CUPE)
1375 St. Laurent
Ottawa, ON K1G 0Z7
Phone: 613-237-1590
Fax: 613-237-5508
www.cupe.ca

Department of Justice
284 Wellington Street
Ottawa, ON K1A 0H8
Phone: 613-957-4222
Fax: 613-954-0811
Email: webadmin@justice.gc.ca
www.justice.gc.ca

- *Canada Labour Code*

Professional Institute of Public Service of Canada (PIPSC)
250 Tremblay Road
Ottawa, ON K1G 3J8
Phone: 613-228-6310
Toll-free: 1-800-267-0446
Fax: 613-228-9048
Toll-free fax: 1-800-465-7477
www.pipsc.ca

Public Service Alliance of Canada (PSAC)
233 Gilmour Street
Ottawa, ON K2P 0P1
Phone: 1-888-604-PSAC (7722)
Fax: 613-560-4200
www.psac-afpc.org

Public Service Labour Relations Board (PSLRB)
PO Box 1525, Station B
Ottawa, ON K1P 5V2
Phone: 613-990-1800
Toll-free: 1-866-931-3454
Fax: 613-990-1849
Email: mail.courrier@pslrb-crtfp.gc.ca
www.pslrb-crtfp.gc.ca

SELECT LEGISLATION

Provincial

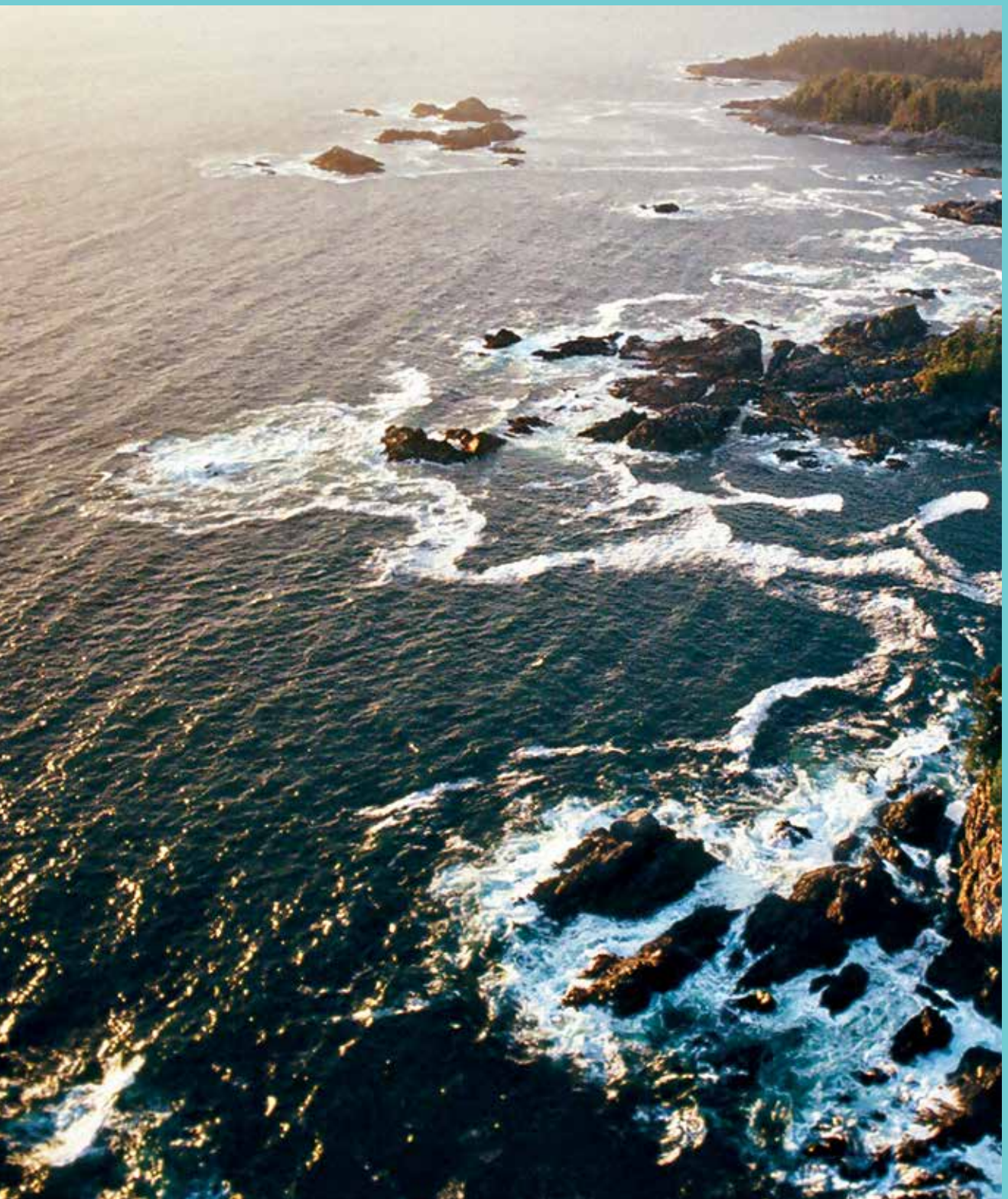
- *Employment Standards Act* (R.S.B.C. 1996, c. 113)
- *Labour Relations Code* (R.S.B.C. 1996, c. 244)

Federal

- *Canadian Human Rights Act* (R.S.C. 1985, c. H-6)
- *Canada Labour Code* (R.S.C. 1985, c. L-2)

PART 1 /// SECTION 3.19

Land and Marine Use Planning



3.19

LAND AND MARINE USE PLANNING

3.19

LAND AND MARINE USE PLANNING

BACKGROUND

Having effective land and marine use planning is important to ensuring sustainable and successful communities and is closely associated with economic development. Without solid land and marine use planning it becomes difficult to govern over lands and waters in any meaningful and consistent way and over time. In short, good planning is essential to good governance. Planning can be undertaken as a matter of policy; however, to ensure certainty of governmental decision-making, plans are often brought into effect by and have the strength of law. This is important for compliance and enforcement purposes.

In considering land and marine use planning, it is helpful to look at the planning exercise from a number of levels or perspectives. At the highest level is strategic land use and marine planning activities over large geographical areas, where regulation of lands, waters and renewable and non-renewable resources requires broad-based planning and coordinated decision-making between jurisdictions. At the lower level is municipal and local land use planning and "zoning." In Canada, provincial governments are involved in regional and strategic and sometimes province-wide planning activities, in addition to participating in land and marine resource-use forums that extend beyond provincial borders. Given the division of powers under the Constitution Act, 1867, the federal government also plays a role in land and marine use planning and has taken on a greater role in the latter. Local governments play a role in local community planning and zoning within municipal boundaries, including the foreshore. First Nations in BC are involved in all levels of land and marine use planning, given the unique nature of their governments and the evolving law of Aboriginal title with respect to the lands and waters that make up their reserves as well as those within their broader ancestral lands.

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.

Article 26: UN Declaration

Land and marine use planning is very closely linked to lands and land management (Section 3.20 — Lands and Land Management). Given that planning activities affect so many aspects of governance, this subject is also linked to environment; water; fish, fisheries and fish habitat; wildlife; forestry; oil and gas; minerals and precious metals; agriculture; emergency preparedness; and heritage and culture.

First Nation Perspectives on Land and Marine Use Planning

Indigenous Stewardship Practices

Historically, in accordance with Indigenous legal traditions, First Nations were the stewards of their lands and waters. Prior to contact, it was the Indigenous peoples who decided how lands and marine resources were used and for what purposes. Stewardship over land and waters could be through many different institutions, depending on the respective cultures and traditions of the Aboriginal peoples. For instance, on the west coast of BC, the clans as represented by hereditary chiefs had responsibility for specific areas within the Nation's territory. The basic premise of land and marine use planning for First Nations people was similar and really quite simple: take only what you need from the environment, in a manner that is sustainable, so that the resource will be there for subsequent users. With an increased settler population and increased pressure on land and waters, competition grew for decreasing resources.

Geographical Scope of Planning Activities

Both historically and moving forward, land and marine use planning for First Nations has and will continue to take place at different levels and for different purposes. In a First Nations context, it

is always important to keep in mind the geographic scope and what drives the planning activities. Local community planning activities can take place with respect to reserve lands or treaty settlement lands and often where *Indian Act*–governed First Nations are in accordance with various programs established by Canada ("municipal"-type planning). At the other end of the spectrum, land and marine use planning can take place for ancestral lands and where the plans are more strategic (i.e., "provincial" in nature). In addition, there is now a developing category of planning and related activities for Aboriginal title lands, as a subset of ancestral lands. In the case of reserve and treaty settlement lands, it is the First Nation that has primary jurisdiction for making laws with respect to land and marine use plans and decision-making with respect to those plans. For ancestral lands, while an objective of First Nations is to resume decision-making control over its lands, perhaps through shared decision-making agreements with the province, it is still the province, for the most part, that exercises final decision-making. However, this is changing, and certainly will need to change with respect to Aboriginal title lands.

The Impact of Aboriginal Title and Rights

As the politics of planning and the law on Aboriginal title and rights has evolved, so too have the opportunities for First Nations to become more meaningfully involved in broad-based planning activities, re-establishing their jurisdiction over their respective ancestral lands. Today, Tribal Councils, individual communities and other governing bodies often undertake planning within a Nation's ancestral lands.

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 18: UN Declaration

Reconciliation with First Nations is changing the way governments in Canada plan and make strategic decisions about how to use lands and natural resources. First Nations government is a unique form of government, with its own range of powers currently being defined. Not only is the law-making power unique, so too is the geographical distribution of that power. Historically, political power in Canada has rested in the south, where most people live and therefore vote. In this political model, rural Canada has been likened by some to a "colony" of urban Canada, where urban centres are exploiting the vast resource wealth of rural Canada and local communities, with their limited governance, typically have little or no real influence over significant public policy decisions that affect them, including high-level planning and the making of strategic decisions with respect to land use.

However, this is changing with re-emerging First Nations governance and First Nations governments having real political power and control within their ancestral lands. Typically, people who are attached to and survive off the land they live on have a different perspective of land management and resource exploitation than those who do not or are just passing through. This emerging political reality is already changing the way land and marine use planning and decision-making is being conducted in BC, even where full recognition of Aboriginal title and rights is still not forthcoming from the Crown. Consequently, there may be less, but more sustainable, natural resource development and when there is development, more of the wealth is staying in local communities, much of it controlled by First Nation governments and their business offshoots.

Provincial Land and Marine Use Planning

In BC, Crown land (land not granted to third parties in fee simple and for the most part still subject to Aboriginal title, or Indian reserves (as lands owned by the Crown) makes up approximately 94 percent of the provincial land base, or 88.7 million hectares. The rest, with the exception of reserves, typically falls within municipal boundaries and is mainly subject to local government land use plans and zoning bylaws. Crown land is governed primarily under the BC *Land Act* (R.S.B.C. 1996, c. 245) and the *Ministry of Lands, Parks and Housing Act* (R.S.B.C. 1996, c. 307), but also under the *Forest Act* (R.S.B.C. 1996, c. 157), the *Forest and Range Practices Act* (S.B.C. 2002, c. 69), the *Oil and Gas Activities Act* (S.B.C. 2008, c. 36) and the *Wildlife Act* (R.S.B.C. 1996, c. 488). There is also a series of Crown land agreements that regulate land use decision-making.

FrontCounter BC is the province's "window" into natural resource permitting, licensing and tenures, and all applications to use the natural resources found on Crown land are now submitted through it. From FrontCounter BC, a number of provincial ministries and agencies can become involved in administering, allocating, adjudicating and managing Crown land tenures for land programs. The Ministry of Forests, Lands and Natural Resource Operations (FLNRO) normally provides the lead role in developing and implementing land and marine use plans and agreements for BC's Crown land and coastal marine resources. This includes establishing legal orders to implement approved plans. FLNRO also provides policy direction and guidelines to support planning, and works with the Ministry of Energy and Mines, the Ministry of Environment and other government ministries and agencies, as required, to achieve this objective. FLNRO is responsible for working with First Nations on issues relating to Crown Lands and planning and typically does so in co-operation with the provincial Ministry of Aboriginal Relations and Reconciliation (MARR), particularly where intergovernmental negotiations with a First Nation are involved.

BC has established a number of useful online tools for the public to use in researching land and marine uses. GeoBC is the BC government agency responsible for creating and managing geospatial information and products, and it manages two of the Provincial Crown land registries: the Integrated Land and Resource Registry (ILRR) and the Government Access Tool for Online Retrieval (GATOR). The ILRR is a spatially enabled, comprehensive register of legal interests, rights, designations and administrative boundaries on Crown land. It also has information on land and resource restrictions and reservations (e.g., parks) and locations of private land. Public users can access the map viewer portion of the ILRR and a limited set of tools; however, access to full application functionality is available by registering for a Business BCeID Account with the province, which can be done online. GATOR, otherwise referred to as Tantalis or Tantalis GATOR, is a tool that allows registered users to interactively view, extract and print information from the Crown Land Registry. GATOR is now a free and publicly available tool.

Evolution of Provincial Land and Marine Use Planning in BC

Historically, successive governments in BC have not done well in land and marine use planning and sustainable development. In the past, many planning activities occurred around core industries that were central to the economy. For example, when the forest industry was the main economic driver, planning was focused on forestry interests. In BC, broad-based and strategic land use planning programs really only began in the early 1990s. At that time, planning programs were developed to ease land-use conflict among resource agencies, the public and First Nations people. The planning program was also to deliver the province's Protected Areas Strategy to safeguard large areas of land with high use-values beyond natural resource extraction. Before this province-wide coordination, land and marine use plans were done on a site-by-site basis, if completed at all, with less opportunity to assess broad social, economic and environmental trends and without the ability to plan and map accordingly.

Since the 1990s, a number of high-profile provincial planning exercises have resulted in regional Land and Resource Management Plans (LRMP). (For a list of strategic land and resource plans and agreements, go to www.for.gov.bc.ca/tasb/SLRP/). First Nations have participated in these processes to varying degrees. For the most part, First Nations initially expressed concern that their interests and Aboriginal title and rights were not being properly taken into account by the Province. Indeed, most LRMPs were developed before the courts had defined the Crown's responsibilities to consult with and accommodate First Nations' interests where there is a presumption of Aboriginal title. BC First Nations have consistently argued they are not simply stakeholders or interest groups, but have a profound and compelling legal right to the land and waters. The evolution of provincial planning has gone hand-in-hand with the advancement of Aboriginal title and rights. Over the years, as these rights have crystallized in the courts, from the early injunctions (*MacMillan Bloedel Ltd. v. Mullin* (BCCA), [1985] 2 CNLR 28) to stop logging in the Clayoquot Sound area (*Meares Island*) to more recently the first

declaration of Aboriginal title in *Tsilhqot'in*, so too has the opportunity for First Nations to be involved in land use planning, to the point where there are now examples of and opportunities for shared jurisdiction over traditional territories instead of just simple consultation. The province sometimes describes the evolution of land and marine use planning in BC as occurring in six distinct phases, taking into account, in part, the legal and political influences of First Nations:

PHASE I	The Clayoquot Sound conflict era of the early 1990s and the subsequent Commission on Resources and Environment (CORE) land use plans for most public land on Vancouver Island and then the Cariboo-Chilcotin and Kootenay-Boundary regions. At the same time, the government developed the *Forest Practices Code of British Columbia Act*, part of which enabled a legal framework around plan implementation.
PHASE II	The development and implementation of the first suite of Land and Resource Management Plans (LRMP) (beginning with Kispiox, Kamloops and Vanderhoof and ending with Fort St. John and Fort Nelson) and the establishment of the Northern Rocky Mountains Muskwa-Kechika Management Area (MKMA) in 1997–98. During this phase, the work required for "completion" of the Vancouver Island, Cariboo-Chilcotin and Kootenay-Boundary regions LRMPs took place.
PHASE III	Completion of most of the interior LRMPs in BC: Robson Valley, Prince George, Lakes, Bulkley Valley, Fort St. James, Cassiar-Iskut Stikine, Dawson Creek, Mackenzie, Okanagan, Kalum and Lillooet, by 2001. The Forest Practices Code was repealed and two new pieces of legislation and accompanying regulations were identified to take its place: the *Forest and Range Practices Act* (FRPA) and the *Land Amendment Act*. A decision was made not to initiate new LRMPs. However, work on plans that were currently under development was to continue. Also during this phase, the province expanded on the vision of landscape unit plans and created a system of local-level plans known as Sustainable Resource Management Plans (SRMP). SRMPs typically focused on watershed-sized areas. Planning activities largely included identifying biodiversity conservation zones and objectives (e.g., old-growth management areas, riparian areas, wildlife management areas) to aid in FRPA implementation. In other cases, SRMPs were undertaken to address economic development issues for resources such as tourism and recreation or agriculture. Similar to landscape unit plans, SRMPs bridge the gap between regional-level strategic land and resource planning processes (SLRPs) and operational plans.
PHASE IV	Continued development of the Central Coast, North Coast, Morice, Sea-to-Sky and Lillooet LRMPs and the Haida Gwaii/Queen Charlotte Islands (HG/QCI) Land Use Plan (LUP), with increased levels of engagement of First Nations. Planning table recommendations from the Central Coast and North Coast were sent into government-to-government discussions with affected First Nations, and resulted in a "Coast Land Use Decision" involving both areas, and supported by specific First Nations and government land use planning agreements.
PHASE V	Conclusion of government-to-government negotiations with First Nations on the planning table recommendations for Morice, Sea-to-Sky and Lillooet LRMPs, and the HG/QCI LUP. Negotiations continue in different stages for each of these "legacy" plans, and the work is intended to develop mutually supported recommendations for Cabinet and First Nation leaders. There was a two-to-three-year completion phase required for the government decisions on these "legacy" plans.
PHASE VI	(Current phase.) Involves implementation of the New Direction for all new planning processes, with an increased emphasis on First Nations collaboration and sound business case development prior to initiating a planning project. Government is shifting its efforts toward coordinated First Nations engagements, which will foster a more coordinated consultation and engagement framework to achieve reconciliation of First Nations interests and concerns. Land use plans and agreements are expected to be one of the tools to support government-to-government engagements with First Nations.

First Nations Land and Marine Use Planning Initiatives within Ancestral Lands

Regardless of whether a First Nation has a sectoral or comprehensive governance arrangement or is negotiating a modern treaty, it can now play an increasingly important role in land and marine use planning throughout its ancestral lands, with the degree of the involvement being commensurate with its title and rights and going beyond mere consultation on proposed provincial planning initiatives, as may have previously been the case.

First Nations–developed land and/or marine use plans, whether part of a provincial initiative or not, or tied to treaty-making, inform and help shape the relationship with the Crown, including the willingness of the province to engage in truly shared decision-making processes and dispute

resolution mechanisms. Governments and third parties are increasingly relying on land and marine use plans developed by First Nations, knowing they have to respect them, particularly as First Nations legal rights become better defined by the courts. While these plans may be developed and brought into force using different mechanisms, the key is to ensure that there is a plan in place and that the Nation's citizens support it.

Most Nations, in one way or another, have already developed or are developing comprehensive land and marine use plans for their ancestral lands, and many are working directly with the Province. If they are not already doing so, all Nations will at some point need to develop their plans, as this is one of the most important exercises a Nation can undertake in the era of title and rights recognition.

There is no single template for First Nations land and marine use plans for ancestral lands; all are quite distinct. (For a list of selected plans that are in place, see the chart below, and see Resources for links to the plans.) However, all contain the same essential elements. They typically describe how the Nation sees land use throughout its ancestral lands and set out or provide for how the Nation conceptualizes land use in terms of Indigenous teachings and laws; a geographical inventory of key resources to the Nation that need to be managed for certain activities (social and natural); and areas protected for traditional practices, as well as areas for economic development. Most importantly, they are an assertion of governance rights to determine what happens on the lands.

First Nations Land & Marine Use Plans

The Sechelt Nation has developed, a land and marine use plan for their ancestral lands, "A Strategic Land Use Plan for the Shíshálh Nation" (June 2007). This land and marine use plan represents the Nation's best efforts to date to summarize the values found across their territory, and to describe how they would like to see terrestrial and inter-tidal (beach) resources as well as the land protected, managed and utilized now and into the future.

Squamish Nation is another noteworthy example of a Nation engaging in land use planning. In 2007, based in part on the strength of their internally developed land use plan, Squamish and BC signed a Land-Use Agreement creating a framework for collaborative land management. They also signed a complementary Collaborative Agreement for the Management of Protected Areas in Squamish's traditional territory, which set up a process for managing protected areas, including new conservancies established through the Squamish Nation's land use plan, as well as existing provincial parks

Some plans are being developed jointly with British Columbia in accordance with agreements, and some have been developed independently. Where these plans are developed independently of the province, they typically can inform negotiations, including those leading to reconciliation and other agreements. Notable examples of land use planning initiatives led by First Nations include the Coastal First Nations land use plans, the *Sechelt Strategic Land Use Plan*, the *Gitanyow Lax'yip Land Use Plan* contained within the *Gitanyow Huwilp Recognition and Reconciliation Agreement*, the *Squamish Nation Land Use Plan* and the Lil'wat Nation's *Cultural Heritage Land and Resource Protection Plan*.

Developing land use plans is also proving to be important in the context of entering into agreements with the Crown on shared decision-making or management of lands, waters and natural resources. A number of joint planning and decision-making initiatives are being undertaken through Reconciliation Agreements and Strategic Engagement Agreements. Examples of sectoral governance initiatives discussed below include the Coastal First Nations Reconciliation Agreement (December 10, 2009), the *Haida (Kunst'aa guu — Kunst'aayah) Reconciliation Agreement* (December 11, 2009), and the Atlin Taku Land Use Plan (July 19, 2011). (For a list of all Strategic Engagement Agreements and Reconciliation Agreements between First Nations and BC see Section 1.3 — Sectoral Governance Initiatives.)

Land Use Planning Initiatives On-Reserve/Treaty Settlement Lands

Moving down the planning hierarchy from strategic-level plans over vast territories, First Nations are also undertaking land use planning at the community level and on-reserve or for all or part of their treaty settlement lands. "Municipal" land use planning and zoning are an aspect of land management addressed in the various land-related on-reserve-based sectoral governance initiatives and in all comprehensive governance arrangements. There are also provisions in the *Indian Act* to regulate local land use planning and zoning. Interestingly, First Nations efforts at local planning may not be as successful in achieving desired outcomes as planning activities with respect to ancestral lands, reflecting in part how the *Indian Act* system is still operating for most First Nations.

There are important challenges in terms of planning for on-reserve lands. Over the years, the federal government has from time to time supported land use planning initiatives on-reserve, often for specific purposes, such as the requirement that bands prepare Community Physical Development Plans, recording existing capital infrastructure and for planning future capital needs. Another example

is Community Development Plans, a higher-level planning tool for community visioning purposes, which is not necessarily "land" focused. Comprehensive Community Strategic Plans, Comprehensive Community Plans, Community Physical Development Plans, and Land Use Plans are often confused. This confusion does not help in planning. If bands have old land use plans, developed for whatever purpose, band staff may not even be aware of their existence, let alone be following them. They could be outdated by as much as 10 to 15 years.

Unfortunately, much of the "planning" activity undertaken by First Nations has had little legal weight, and the resulting plans provide the illusion of planning taking place but no real opportunity to execute the plan on the ground and for the benefit of a Nation. In some instances, it may not be clear what plans are for and their relative importance to decision-makers. For example, a First Nation may simply develop a plan because there was some money available from AANDC to do so, or because it is required under the terms of a funding agreement, but with no clear legal or policy reason for the plan and no tie to the community's governance structure. Federal officials responsible for funding agreements typically view planning as "year-to-year" program-style planning, not long-term planning to meet future needs for growth, and so on, as local government planning in the municipal context is generally understood. Further, at this time there is no formal assessment by AANDC or First Nations of whether the AANDC-supported plans that were developed are of any use — that is, whether a $50K plan is really a $50K plan or a $10K plan.

As a result of this history, Canada has been reviewing the various land use planning programs it requires or supports financially, to assess their effectiveness and relevance to the needs of First Nations. It is important to recognize that improved land use planning on-reserve can help First Nations unlock economic development opportunities and improve infrastructure, environmental and emergency management. Consequently, AANDC is pursuing pilot projects with a number of First Nations, and land use planning is eligible for funding under the Lands and Economic Development Services Program. AANDC is particularly interested in working with First Nations that have identified economic development opportunities that could benefit from a strong plan.

Some First Nations have also chosen to participate in a pilot project with the Federation of Canadian Municipalities that assists those First Nations and their neighbours who want to address planning for issues of mutual interest.

Land use planning can "stand alone" or First Nations may prefer to connect land use planning to comprehensive community planning. Whether stand-alone or part of a broader planning process, AANDC prefers a practical, map-based approach to land use planning that identifies the areas of land expected to be used for various purposes in the future, such as areas for economic development, residential use, and major infrastructure as well as culturally sensitive areas and areas in which development should be restricted for environmental conservation.

It is very important that planning is First Nations–led, to ensure that First Nations citizens support the land use plan that is ultimately adopted. Consultants are sometimes needed — for example, with technical information on major infrastructure — but the objective should be to develop First Nation–led plans rather than consultant-driven plans. In some cases, the citizens may be required to approve the plan through a community vote or referendum. Where funding is to be provided by Canada, AANDC prefers plans to be developed in partnership with the Department, in order to factor in the programming and funding that AANDC is authorized to make available for community infrastructure and housing.

Unfortunately, despite these good intentions, in the current *Indian Act* environment there is an industry of poor planning on-reserve, and where plans are developed they are typically developed almost exclusively by consultants with limited community input. The result is often a sub-standard plan, and even if they are of a higher quality, they are often rarely looked at, have little utility and are simply not

followed. The same cannot be said in the case of First Nations that are self-governing or where land use plans are tied to a community's governance structures, often as a requirement of First Nation law, and consequently must be developed and then followed. This improves the quality of land use plans, with greater effort put into producing them and with all involved knowing that real decisions will be based on them and that those decisions will affect peoples' lives.

To conclude, experience shows that economic development is far more successful on-reserve when proper land use plans are in place, are actually followed, and can be relied upon by all parties (citizens, residents, government officials, developers, investors, etc.). Given the links between land use planning, economic development and healthy communities, and in order to overcome the current challenge of on-reserve governance and to dismantle the *Indian Act* systems, it is important to get it right. There are options.

Considering the Options

A First Nation that is not under a comprehensive governance arrangement as part of a modern treaty will need to consider its land use planning focus — whether on jurisdiction on-reserve, where the law-making authority will normally be paramount, or on broader-based land and marine use planning within its ancestral lands, where First Nations jurisdiction continues to evolve based on the strength of title and rights. There is currently a continuum of First Nations participation in land use planning both on-reserve, ranging from *Indian Act* bylaws to full self-government, and for ancestral lands off-reserve, ranging from simple consultation to co-management and co-jurisdiction.

Finally, a Nation may need to address the role it wishes to play with respect to land use planning in adjacent municipalities, which have delegated authority over certain aspects of land use planning and zoning within municipal boundaries. While municipal zoning and land use planning does not apply on reserve lands, local government land use decisions and zoning can affect reserve lands, particularly where adjacent land uses on- and off-reserve are incompatible. Developing mechanisms for First Nations governments and adjacent local governments to discuss planning issues can be mutually beneficial. These arrangements can be set out in memorandums of understanding or other agreements.

INDIAN ACT GOVERNANCE

Section 81(1) of the *Indian Act* provides that a Nation has the power to make bylaws for "the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone." This power has been used by some Nations to enact "municipal-type" zoning and land use bylaws on-reserve. There are no specific land and marine use planning powers in the *Indian Act*.

SECTORAL GOVERNANCE INITIATIVES

Sectoral Governance Initiatives On-Reserve

The *Framework Agreement on First Nation Land Management* (Framework Agreement) signed by the Minister of Indian Affairs and Northern Development and 13 First Nations on February 12, 1996, enables First Nations to develop land codes and to exercise law-making powers over several aspects of land management on-reserve, including land use planning. These arrangements apply only to First Nations reserve lands and do not extend to broader planning activities off-reserve. However, approaches to planning developed on-reserve may apply off-reserve in so far as they inform the way First Nations interact with other jurisdictions within their ancestral lands — for example, with respect to adjacent local governments where mutual interests might be compatible zoning, infrastructure coordination, parks planning and so on.

The Resource Centre established by the Lands Advisory Board has been considering issues of land use planning and provides support and tools to assist developmental and operational First Nations with their local land use planning activities. While the Resource Centre does not develop land use plans for First Nations (planning is done by the communities), it provides assistance related to land use planning readiness; land use planning interfacing with traditional use plans and economic development; and implementation, maintenance and updating of plans.

Many developmental First Nations did not have appropriate land use plans in place before becoming signatories to the Framework Agreement, so either they developed one while developing their land code or they may still be developing one. The Resource Centre cautions First Nations to ensure that if they are developing a land use plan at the same time as they are developing a land code, both tasks should be undertaken together to ensure comparability (e.g., using the same definitions, timeframes for decisions, processes). The Resource Centre also stresses the importance of not rushing to have a land use plan in place and to be careful when hiring consultants, since consultants may not have an in-depth understanding of the Framework Agreement and land codes and the First Nation risks ending up with a plan similar to those typically undertaken to satisfy federal programming under the *Indian Act*.

The Resource Centre stresses that land use planning challenges can not be resolved through activities such as "Land Use Plan 101" workshops or by adapting basic generic models and templates. The experience of First Nations with land codes has shown that each First Nation has its own unique aspirations, different locational advantages, different levels of access to resources, different levels of internal capacity and different "opportunities."

Of the First Nations that have ratified their land codes, most have undertaken or are undertaking significant on-reserve land use planning exercises, recognizing that through detailed planning, communities can become healthier and more successful. Each has developed land use planning processes that are specific to their communities and, for the most part, are avoiding generic planning approaches. Approximately one-third of the communities that have ratified their land codes have a land use plan in place; another third are currently developing a land use plan, and more are in the preliminary stages of developing community-specific planning processes. Depending on the community, the land use plans may involve detailed traditional use elements; several communities are in the process of developing "traditional land use plans" that encompass all of the elements of a municipal-like land use plan in addition to including traditional values, knowledge and decision-making processes.

The *Framework Agreement on First Nation Land Management* is discussed in greater detail in Section 3.20 — Lands and Land Management.

Sectoral Governance Initiatives within Ancestral Lands

While there are no specific provincial sectoral governance initiatives regarding land and marine use planning, there are many examples of First Nations now being consulted or involved in the exercise of provincial decision-making over their ancestral lands. In this way, First Nations' perspectives on land use planning can inform provincial decision-making.

Often, the degree to which Nations are successful in negotiating and concluding agreements that meet their needs, thereby becoming recognized and formally involved in land use planning activities outside of their reserve lands, appears to be a function of how important their region is to the Province. Importance to the Province depends on proximity to projects that are important to its resource development agenda (e.g., proposed mining sites, liquid natural gas facilities, dam construction); the threat of ongoing or potential litigation and the relative chances of First Nations being successful in such litigation; whether working with a particular First Nation is strategic and

may have other outcomes (e.g., leading to the conclusion of a modern treaty); and the relative negotiating capacity and political connection of the First Nation. First Nations involvement in land use planning activities in the various types of agreements ranges from limited consultation to truly shared decision-making. The agreements are called many things (e.g., Reconciliation Agreements, Strategic Engagement Agreements, Incremental Treaty Agreements), and it can be hard to differentiate them. Examples of agreements reached with particular Nations are discussed below.

Reconciliation and Other Agreements with British Columbia

Coastal First Nations: In the 1990s, the Province initiated LRMPs (as discussed above) on the Central and North Coast in order to resolve disputes over land and resource use and to designate protected areas. The North Coast and Central Coast LRMPs are sub-regional land use plans that make recommendations to the Province regarding the management of public lands and resources. The recommendations represent consensus agreements reached by participants of the planning tables, who included multiple stakeholders (forest industry, environmental groups, local communities, small business, recreation, etc.), local and provincial government representatives, and in some cases representatives from local First Nations. First Nation representatives participated at the table, but abstained from decision-making in consideration of government-to-government discussions on these recommendations.

Ecosystem-based management (EBM) is a land management approach that recognizes that people, communities and the land are inseparable. Our choices must consider the health of both the people and the land that sustains them. EBM has two goals: maintain ecosystem health and improve human well-being.

Coastal First Nations

During the LRMP process, the First Nations of the region were also developing their own land use plans for their ancestral lands. Recommendations coming from both the First Nations and provincial processes formed the basis for a Land and Resource Protocol Agreement between the Coastal First Nations (Gitga'at, Haisla, Heiltsuk, Kitasoo/Xai'xais, Metlakatla, Wuikinuxv,) and British Columbia, which was signed on March 23, 2006. Although the Council of the Haida Nation are a part of the Coastal First Nations, the Haida did not sign the 2006 reconciliation protocol, having engaged in a separate government-to-government process. The protocol calls for the development of a decision-making matrix that identifies the different decision types required to administer activities on the land base, and places them in differing levels of engagement, based on location and complexity of the decision. This process is intended to ensure that each of the Coastal First Nations have a meaningful role in decisions that are important to them.

The 2006 protocol sets out a process for each of the individual First Nations to work collaboratively with the Province to address land use interests for their individual territories in Strategic Land Use Planning Agreements. The Strategic Land Use Planning Agreements established a number of protected areas (called conservancies and biodiversity areas) that, from the perspective of the Coastal First Nations, recognize their Aboriginal title and rights. These agreements require that all lands outside of protected areas are to use ecosystem-based management (see textbox). The agreements established baseline understandings for provincial land management that were later identified by the province as "land use objectives," specifying, for example, rules for how timber will be cut in areas identified to have significant cultural resources, fish streams and wildlife habitat.

The Coastal First Nations have also worked with the province to prepare Detailed Strategic Plans that refine the initial land use objectives further to reflect local interests and needs that may not have been captured adequately in the initial planning activities. The Detailed Strategic Plan, in particular, is considered a living document that is intended to evolve as knowledge, priorities and operating and legal parameters respecting Aboriginal title and rights evolve. A strategic planning process has been completed for each First Nation. There are some differences in planning processes across communities.

The Haida, as noted above and discussed below, have a different process, in accordance with their 2009 reconciliation agreement, *Kunst'aa guu — Kunst'aayah Reconciliation Protocol*. The Council of the Haida Nation also signed the Haida Gwaii Strategic Land Use Agreement (SLUA) with the provincial government in 2009.

For the Coastal First Nations, the local process of detailed strategic planning was an opportunity for the citizens in each community to determine the values most important to them in managing their territory. Many questions were considered, such as: Where are the most important streams and watersheds for fish? How much old growth forest remains, and which areas do we want to manage for cultural uses of cedar? Are there any culturally significant places that haven't been protected as conservancies? Where is it important to leave trees standing in a cut block for wildlife values? What will our timber supply needs be over the next few decades?

In December 2009, the Coastal First Nations continued to develop their relationship with the Province through the signing of a new reconciliation protocol. The protocol, which included the Gitga'at First Nation, Haisla Nation, Heiltsuk Nation, Kitasoo Indian Band, Metlakatla First Nation and Wuikinuxw Nation, was aimed at increasing economic and legal certainty for resource and land use and set up some parameters for shared decision-making. Amendments were made in 2010 and 2011, one of which clarified that Kitasoo Indian Band, Metlakatla First Nation and Wuikinuxw Nation, Gitga'at First Nation, Nuxalt Nation, and Heiltsuk Nation signed as part of the "Coastal First Nations" collective, and that Haisla Nation Council signed as the "Haisla Nation." Haisla Nation had withdrawn from the 2009 protocol, but was willing to re-enter the protocol on the terms and conditions set out in the 2011 amending agreement.

Coastal First Nations have also taken steps to develop marine use plans that integrate land and marine planning processes, and are still actively involved in the current federal government management planning process for the Pacific North Coast Integrated Management Area (PNCIMA). In 2008, the Coastal First Nations and the Skeena First Nations Stewardship Society (SFNSS) signed a Memorandum of Understanding on PNCIMA with the Department of Fisheries and Oceans. Among other things, the MoU commits the parties to work toward the development of annual work plans to establish collaborative initiatives for advancing integrated marine use planning in PNCIMA and to develop processes through which First Nations located within PNCIMA that are not represented through the Coastal First Nations or SFNSS will be engaged and consulted with respect to the work of the MoU. British Columbia and Nanwakolas Council of First Nations become parties to the MoU in the fall of 2010. PNCIMA is one of five Large Ocean Management Areas in Canada and includes an area of approximately 88,000 km. It is hoped that community marine use plans such as those taken on by Coastal First Nations will help establish best practices to sustain First Nations culture and communities in generations to come.

Nanwakolas: Another example of land and marine use planning is through Nanwakolas, a group of First Nations from the east coast of Vancouver Island (Mamalilikulla Qwe'Qwa'Sot'Em First Nation, Tlowitsis Nation, Da'naxda'xw Awaetlatla First Nation, Gwa'sala-'Nakwaxda'xw First Nations, We Wai Kum First Nation, Kwiakah First Nation and K'ómoks First Nation). The Nanwakolas First Nations have had a government-to-government relationship with British Columbia regarding strategic land use planning since 1996, when the member First Nations, through a prior association of tribal councils, entered into an agreement to participate in the Central Coast LRMP. This participation ultimately led to the signing of a Land Use Planning Agreement-in-Principle in 2006, which confirmed a number of understandings between the parties and included a commitment for further government-to-government work respecting strategic land use planning within the southern central coast area. The Nanwakolas Council, the governing body of the group, has coordinated and led the implementation of this work, in partnership with the member First Nations. As with the Coastal First Nations, one of the commitments of the agreement-in-principle was the implementation of ecosystem-based management within the south central coast area, and the designation and co-management of conservancies. Over time, the scope of activities has broadened beyond the agreement-in-principle, to include the establishment of the Nanwakolas Council Referrals Office and the pursuit of regional economic development initiatives.

The Tsilhqot'in Nation: At the same time as the Tsilhqot'in Nation was pursuing its seminal title and rights case through the courts, the Tsilhqot'in National government has also been seeking to work with the Province and has entered into a number of land-related agreements, including the renewal in 2014 of a Strategic Engagement Agreement for Shared Decision-Making Respecting Land and Resource Management. As well, Ts'il?os Provincial Park is co-managed through a Memorandum of Understanding between BC Parks and the Xeni Gwet'in First Nations Government. The Tsilhqot'in, like the Haida and the Nuu-chah-nulth, have also declared certain land within their ancestral lands to be "park" or "protected" lands (see textbox).

The Establishment of Tribal Parks

There are now a number of examples of First Nations declaring certain lands within their ancestral territories as "parks" or "protected areas," The most recent being when the Tsilhqot'in Nation announcing its intentions to create Dasiqox Tribal Park in 2014. Dasiqox covers approximately 300,000 hectares and is a vast mountain enclave for grizzlies and other wildlife. First Nations in BC seek to designate protected areas under their jurisdiction, where truly sustainable resource extraction can take place. This is unlike federally or provincially designated parks, where resource extraction is typically not allowed. In their parks, First Nations are looking to control logging, mining and other resource development activities that might otherwise be open to access by industry on the basis of provincial tenures and permits. Other examples of First Nations declaring parks in BC are Duu Guusd Tribal Park, established by the Council of Haida Nation in 1981, and Meares Island, which was set aside by the hereditary chiefs of the Tla-o-qui-aht First Nation in 1984.

In some cases, federal or provincial governments will work with First Nations to sort out mutual designations once the Nation has declared a park. This was the case with Duu Guusd Tribal Park, which was subsequently recognized by the provincial government as a heritage site and conservancy. However, it was not the case with Meares Island; tribal park designation has stopped logging on Meares Island for some 30 years.

The Haida Nation: Through the *Haida (Kunst'aa guu — Kunst'aayah) Reconciliation Agreement*, British Columbia has agreed to share jurisdiction through joint decision-making over Haida Gwaii. Because this agreement included recognition of Haida jurisdiction, the BC government needed to enact the *Haida Gwaii Reconciliation Act* to amend various provincial statutes to change the statutory decision-making powers of certain provincial officials (e.g. the chief forester). For its part, the Haida Nation passed a stewardship law in its House of Assembly, also a requirement of the agreement. The Haida Nation's House of Assembly is established pursuant to the Nation's inherent right to govern and operates under its own constitution. This is therefore not only an example of shared decision-making but also an example of a Nation exercising jurisdiction through a governing institution not constituted or recognized under a sectoral or comprehensive governance arrangement. This is noteworthy. By entering into this arrangement, the province has essentially legitimized the Nation's inherent right to govern and to determine its own institutions of government without needing any further formal agreement between the Crown and the Nation.

In order to carry out shared decision-making, the Haida and British Columbia have established a five-member Haida Gwaii Management Council. The council has the authority to make high-level decisions in key strategic areas for resource management on Haida Gwaii, such as implementing the *Haida Gwaii Strategic Land-Use Agreement*, development of land-use objectives for forest practices, determination of allowable annual cut, conservation of heritage sites, and approval of management plans for protected areas. The council consists of two provincial government representatives, two representatives assigned by the Haida Nation, and a mutually agreed-upon neutral chair. Council decisions are made by consensus, or, where this cannot be reached, by the vote of the chair.

The Taku River Tlingit: The Taku River Tlingit First Nation were involved in the development of the 2013 Atlin Taku Land Use Plan (a provincial LRMP). The management plan covers the entire Canadian side of the trans-boundary Taku River watershed, establishes a system of decision-making for land use management, and sets aside a large part of the region for conservation. The plan creates 13 new protected areas, including Atlin River, Monarch Mountain, and significant portions of the Taku watershed.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All comprehensive governance arrangements provide jurisdiction over land management on First Nation lands, which includes land use planning, whether high-level planning or municipal-type planning, and zoning. Modern treaty arrangements also address land use planning activities off settlement lands but within Nations' ancestral lands. The two governance arrangements outside treaty (Westbank and Sechelt) are restricted to reserves and do not address land use planning over ancestral lands. However, they do not limit the First Nation's ability to pursue these issues and their right to be involved in off-reserve land and marine planning processes. Indeed, Sechelt has a well-established land use plan for its ancestral lands and, relatedly, has developed the *shíshálh Nation Lands and Resources Decision-Making Policy*, which applies to lands and resources throughout shíshálh Territory. The Nation has made it clear that the 2013 policy was created in order to clearly define and communicate shíshálh´s expectations regarding development and engagement in their territory. Westbank has similar rules respecting consultation within its "caretaker area," that being its portion of the Okanagan Nation territory for which it is responsible under the Sylix Protocol. The Sylix Protocol sets out how each of the member communities of the Okanagan Nation work together on title and rights matters and the division of responsibility among the communities.

The treaty arrangements under the BC treaty process include provisions enabling the Tsawwassen and Maa-nulth First Nations to participate in and be a party to provincial and local government planning processes. The *Maa-nulth First Nations Final Agreement* requires each Maa-nulth government to develop community plans along the same lines as are required of other local governments by the province. The Maa-nulth Agreement also addresses the question of foreshore planning directly, dealing with it in a manner similar to land use planning and requiring the development of a foreshore plan.

While modern treaty arrangements vary with respect to the role of the Nation off settlement lands, all arrangements, including the more recent final agreements with Yale and Tla'amin, provide that the Nation will be involved in the management of protected areas and parks and any new or proposed parks in the future. In all of these arrangements, there are provisions that address the Nation's citizens' rights to carry out traditional practices in parks and protected areas, and all Nations are involved in some capacity in park and protected area management. In the Nisga'a and Maa-nulth Agreements, new parks and protected areas are established along with commitments to address each Nation's issues in particular parks and protected areas. In Nisga'a, and to a degree Tsawwassen, there is guaranteed participation in any planning processes developed off settlement land or when these processes are changed. It is impossible to know what types of high-level strategic planning processes may be developed in the future by British Columbia and Canada.

In addition to broad-based strategic planning initiatives, the treaty arrangements make reference to other sectoral plans (e.g., wildlife plans, forestry plans, fish management plans, emergency plans), which are discussed in the relevant chapters of the Final Agreements. Ultimately, all of these plans are in some way linked to higher-level strategic land and marine use planning initiatives.

Table — Comprehensive Governance Arrangements

	GENERAL AND LAND USE PLANNING WITHIN TRADITIONAL TERRITORY	LAW MAKING POWERS
Sechelt	No provisions.	The Council has the power to make laws in relation to zoning and land use planning with respect to Sechelt Lands. (s. 14(1)(b))
Westbank	No provisions.	Westbank First Nation has jurisdiction in relation to the management, administration, government, control, regulation, use and protection of Westbank Lands. This jurisdiction includes jurisdiction over foreshore and waterbeds where these areas form part of Westbank Lands and includes zoning and land. (Part X, s. 103(b))
Nisga'a	No provisions.	Nisga'a Lisims Government has jurisdiction to make laws with respect to Nisga'a Lands including use, management, planning, zoning and development. Each Nisga'a Village Government may make these laws as they apply on their village lands. (Ch. 11, s. 47–48)
Tsawwassen	Tsawwassen will be consulted and may participate in any provincial land use planning process affecting Tsawwassen Territory in the same capacity as a local government, a First Nation or as a member of the public, as the case may be. (Ch. 6, s. 16) BC and Tsawwassen may enter into an agreement with respect to the development of a cooperative working relationship in the Fraser River estuary, including the South Arm Marshes Wildlife Management Area, and Roberts Bank south to the US border. (Ch. 13, s. 30)	Tsawwassen has jurisdiction to make laws with respect to land management including zoning, development on Tsawwassen Lands. (Ch. 6, s. 1(d)) Tsawwassen will consult any Local Government that may be affected by the proposed law. This requirement does not limit the scope of the authority of Tsawwassen First Nation under this Agreement. (Ch. 17, s. 21)
Maa-nulth	No provisions.	Each Maa-nulth First Nation Government may make laws with respect to: the use of the Maa-nulth First Nation Lands including management, planning, zoning and development. (s. 13.14.1) BC and each Maa-nulth First Nation have entered into an agreement to provide the applicable Maa-nulth First Nation Government with law-making authority with respect to the applicable Foreshore Area comparable to the law-making authority of a municipality with respect to the regulation of nuisances; the regulation of buildings and structures; the regulation of business; and, land use, planning, zoning and development. If the Foreshore Area of that Maa-nulth First Nation is located within the boundaries of a municipality, that municipality will not exercise law-making authority with respect to the aforementioned matters. (s. 14.5.1 and 14.5.2)
Yale	No provisions.	Yale First Nation Government may make laws with respect to the use of Yale First Nation Land including management, planning, zoning and development. (s. 12.12.1)
Tla'amin	No provisions.	The Tla'amin Nation may make laws with respect to the use of Tla'amin Lands, including management, planning, zoning and development. (Ch. 3, s. 116(a)) British Columbia and the Tla'amin Nation will enter into an agreement that will provide Tla'amin with the law-making authority in relation to the foreshore area identified in the agreement. (Ch. 3, s. 48–49)

Table — Comprehensive Governance Arrangements... *continued*

	CONFLICT OF LAWS	PARKS AND PROTECTED AREAS
Sechelt	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)	No provisions.
Westbank	Westbank laws prevail. (Part X, s. 110)	No provisions.
Nisga'a	Nisga'a law prevails. (Ch. 11, s. 49)	The Nisga'a Nation has the right to participate in the planning, management, and development of the Park and the Ecological Reserve. (Ch. 3, s. 102) BC and the Nisga'a Nation will continue the Joint Park Management Committee, which makes recommendations to the Minister and Nisga'a Lisims Government with respect to the planning and management of activities in the Park and Ecological Reserve. (Ch. 3, s. 106) BC has designated a number of sites of cultural and historic significance outside Nisga'a Lands as provincial heritage sites. (Ch. 3, s. 95) BC will consult with the Nisga'a Nation with respect to planning and management of other provincial parks in the Nass Area. (Ch. 3, s. 119) At the request of any of the Parties, the Parties will negotiate and attempt to reach agreement on the establishment of a marine park in the Nass Area. (Ch. 3, s. 121)
Tsawwassen	Tsawwassen law prevails. (Ch. 6, s. 5)	With respect to a National Park or National Marine Conservation Area that is wholly or partly within Tsawwassen Territory, Canada will consult with Tsawwassen First Nation on the role of Tsawwassen First Nation in interim planning and management planning; the research and protection of cultural heritage sites of significance to Tsawwassen First Nation; and the identification, protection, interpretation and presentation of Tsawwassen Artifacts and heritage where applicable, including the use of the Hun'qum'i'num language in signage. Canada will also consult on the traditional ecological knowledge of Tsawwassen First Nation being considered in the natural history and management of any National Park or National Marine Conservation Area. (Ch. 12, s. 34) At the request of Tsawwassen First Nation, Canada and Tsawwassen First Nation will negotiate and attempt to reach agreement on arrangements for Tsawwassen First Nation to provide advice on matters affecting Tsawwassen First Nation in any National Park or National Marine Conservation Area that is wholly or partly within Tsawwassen Territory. (Ch. 13, s. 31) Where a public management planning process is established for a Provincial Park, Protected Area or Wildlife Management Area that is wholly or partially within Tsawwassen Territory, Tsawwassen First Nation may participate in the planning process on the same basis as other participants. (Ch. 13, s. 31) BC will consult with Tsawwassen First Nation with respect to the establishment, disposition, boundary modification, or changes in the designation of Provincial Parks, Protected Areas or Wildlife Management Areas that may affect the Tsawwassen right to gather plants, the Tsawwassen right to harvest wildlife or the Tsawwassen right to harvest migratory birds. (Ch. 13, s. 34) BC will not designate Tsawwassen Lands or lands within the Tsawwassen Water Lots as a Wildlife Management Area, Protected Area, Provincial Park, conservancy or ecological reserve. (Ch. 4, s. 29)

Table — Comprehensive Governance Arrangements... *continued*

	CONFLICT OF LAWS	PARKS AND PROTECTED AREAS
Maa-nulth	Maa-nulth law prevails. (s. 13.14.2) Federal and provincial law prevails in the case of a conflict with a Maa-nulth law made in accordance with the Foreshore Agreement. (s. 14.5.2(d))	Each Maa-nulth First Nation has the opportunity to participate in any public management planning process with respect to any Provincial Protected Area in its Maa-nulth First Nation Area. (s. 6.3.12) Individual Maa-nulth First Nations have the opportunity to negotiate agreements regarding protected areas and that individual Maa-nulth First Nation's opportunity to participate in the management planning of that area. (s. 6.4.15–6.4.19) Where a National Park or National Marine Conservation Area is within a Maa-nulth First Nation Area, Canada will consult with the applicable Maa-nulth First Nation regarding its role in the interim planning and management planning of that National Park or National Marine Conservation Area; the research, protection, identification, interpretation and presentation of any area in that National Park or National Marine Conservation Area which has heritage or archeological value; the traditional ecological knowledge being considered in the natural history and management of that National Park or National Marine Conservation Area; the role in research, protection, use and management of special marine areas within that National Park or National Marine Conservation Area; and, the interests in economic, employment and training opportunities associated with that National Park or National Marine Conservation Area. (s. 23.10.1) At the request of the Maa-nulth First Nation, Canada and that Maa-nulth First Nation will make reasonable efforts to enter into an agreement regarding arrangements for cooperation in the planning and management of the applicable National Park or National Marine Conservation Area in order to provide advice to the Minister regarding the aforementioned matters. (s. 23.10.2) BC will consult with a Maa-nulth First Nation regarding the creation of new Provincial Protected Areas in its Maa-nulth First Nation Area and will negotiate with the Maa-nulth First Nation to attempt to reach an agreement regarding participation in the management planning of that new Provincial Protected Area. (s. 24.1.3 and 24.1.6) A Maa-nulth First Nation may participate in any public management planning process established with respect to any Provincial Protected Area that is wholly or partially within its Maa-nulth First Nation Area. (s. 24.5.1) British Columbia will consult with a Maa-nulth First Nation in the preparation or modification of any management plan for a Provincial Protected Area wholly or partially within the Maa-nulth First Nation Area of that Maa-nulth First Nation in relation to the depiction, if appropriate, of Nuu-chah-nulth culture or heritage in the Provincial Protected Area; and the importance of Nuu-chah-nulth culture and heritage to the purpose of the Provincial Protected Area. (s. 24.5.6)
Yale	Yale First Nation law prevails. (s. 12.12.2)	British Columbia will Consult with Yale First Nation regarding the establishment, amendment or cancellation of any Provincial Protected Area wholly or partially within the Yale First Nation Area. (s. 7.9.3) British Columbia and Yale First Nation may enter into agreements regarding Yale First Nation participation in the planning and management of Provincial Protected Areas wholly or partially within the Yale First Nation Area. (s. 7.9.4) Canada will Consult with Yale First Nation with respect to the establishment of any National Park wholly or partially within the Yale First Nation Area.(s. 7.10.1)
Tla'amin	Tla'amin law prevails. (Ch. 3, s. 118) Federal law or provincial law prevails with respect to laws relating to the foreshore. (Ch. 3, s. 49(c))	The Tla'amin Nation may make proposals to British Columbia to establish new Protected Areas in the area set out in Appendix S in the Tla'amin Final Agreement. (Ch. 12, s. 40) Any Protected Area, National Park, National Historic Site, Migratory Bird Sanctuary, National Wildlife Area or National Marine Conservation Area established after the Effective Date will not include Tla'amin Lands without the consent of the Tla'amin Nation. (Ch. 12, s. 42) British Columbia and the Tla'amin Nation may enter into an agreement that addresses Protected Area planning, management and operations, economic opportunities, and other matters agreed to by British Columbia and the Tla'amin Nation. (Ch. 12, s. 43) Canada will consult with the Tla'amin Nation before the establishment of any National Park, National Historic Site, Migratory Bird Sanctuary, National Wildlife Area or National Marine Conservation Area within the area set out in Part 2 of Appendix N-1 in the Tla'amin Final Agreement. (Ch. 12, s. 45)

Table — BC First Nations' Laws/ByLaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(g) Zoning			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Gitga'at (f. Hartley Bay)	7	ZONING	To Provide For The Licensing Of Businesses, Callings, And Trades
K'omoks	6	ZONING	Bylaw Respecting Construction And Maintenance Of Buildings And Zoning
Kwikwetlem First Nation	1	ZONING	Bylaw Respecting Zoning
Lower Nicola	2009,1	ZONING	Bylaw Respecting Zoning
Moricetown	2003-001	ZONING	Bylaw Respecting Use Of Land (Real Estate Rental)
Moricetown	2003-003	ZONING	Bylaw Respecting Use Of Land (Buildings)
Mowachaht/Muchalaht	94-01	ZONING	Bylaw Respecting Zoning
Musqueam	1	ZONING	Bylaw Respecting Multiple Suites
Musqueam	2	ZONING	To Regulate The Development And Use Of Lands-Zoning
Musqueam	UNNUM-BERED	ZONING	Bylaw Respecting Building
Namgis First Nation	8	ZONING	Provide For The Dividing Of The Reserves Into Zones, The Prohibition Or Maintenance Of Any Class Of Buildings Or The Carrying On Of Any Class Of Business Trades Or Calling In Any Such Zone
Qualicum First Nation	1985-1	ZONING	Bylaw Concerning Zoning
Skwah	2	ZONING	Bylaw Respecting Zoning
Songhees First Nation	2001-07	ZONING	Bylaw Respecting The Regulating Of Mobile Home Park
Songhees First Nation	2001-11	ZONING	Bylaw Respecting Dividing The Reserve Into Zones And Regulating The Use Of Land
Squamish	11-1979	ZONING	Zoning Bylaw Amending Bylaw No. 6, Sor/72-352 Dated September 11, 1972
Squamish	12	ZONING	An Amendment To Zoning Bylaw No. 6-1972. (Marina Bylaw — 1979)
Tk'emlups te Secwepemc	—	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Heritage Conservation
Tlowitsis Tribe	2004-003	ZONING	Bylaw Respecting Zoning
Tsartlip	1	ZONING	Bylaw Respecting Zoning
Tsawwassen	UNNUM-BERED	ZONING	Bylaw Respecting Zoning
Tsleil-Waututh Nation	2001	ZONING	Bylaw Respecting Land Use
Tsleil-Waututh Nation	2-1993	ZONING	Bylaw Respecting Zoning
Tzeachten	01-1992	ZONING	Bylaw Respecting Zoning
Tzeachten	1	ZONING	Bylaw Respecting Zoning
Tzeachten	3	ZONING	Bylaw Respecting Zoning
We Wai Kai (f. Cape Mudge)	6	ZONING	To Provide For The Dividing Of The Reserve Or A Portion Thereof Into Zones And The Prohibition Of The Construction Or Maintenance Of Any Class Of Buildings Or The Carrying On Of Any Class Of Business, Trade Or Calling In Any Such Zone
Wei Wai Kum (f. Campbell River)	0	ZONING	Foreshore Zoning Bylaw
Wei Wai Kum (f. Campbell River)	1985-2	ZONING	Bylaw For Zoning
Wei Wai Kum (f. Campbell River)	6	ZONING	Bylaw Respecting Construction Or Maintenance Of Buildings And Zoning

Table — BC First Nations' Laws/ByLaws in Force... ***continued***

Bylaws — Section 81(1)(h) Construction			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Musqueam	IR#2	CONSTRUCTION	Bylaw Respecting Land Use And Development
Penelakut	NO.2	WATER SUPPLIES	Bylaw Respecting The Zoning And Land Use Regulation.
Songhees First Nation	1	BUILDING	To Provide For Provisions Of Mobile Home Parks Or Mobile Home Subdivisions On The Songhees Indian Res.
Tk'emlups Te Secwepemc	N/A	CONSTRUCTION	Bylaw Respecting Band Development Approval Process — Development, Prevention Of Nuisances, Construction And Regulation Of Land Use And Ancillary Matters On The Reserve.
Tk'emlups Te Secwepemc	UNNUM-BERED	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Heritage Conservation
Bylaws — Section 81(1)(i) Survey and allotment of reserve lands			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Skeetchestn	1986-1	LAND SURVEY	Bylaw Respecting Land Use.
Westbank	1979-12	LAND SURVEY	Bylaw To Regulate The Subdivision Of Land
SECTORAL GOVERNANCE INITIATIVES			
FNLMA - FRAMEWORK AGREEMENT - OPERATIONAL	**DATE**	**FIRST NATION LAW**	
Kitselas		Kitselas Reserve Lands Management Act	
Kitselas		Kitselas Land Interests Law	
Kitselas		Kitselas Resources And Land Stewardship Policy	
Leq'a:mel	Jan. 2010	Land Code	
Lheidli-T'enneh Band	2005	Lheidli T'enneh Land Use Plan	
Squiala First Nation	Nov 2006	Squiala First Nations Statement Of Principles, Purpose And Objectives For Development	
Squiala First Nation	May 2007	Squiala First Nation Development Approval Process	
Squiala First Nation	May 2007	Squiala First Nation Ir#7 Development Plan	
Squiala First Nation	July 2007	Squiala First Nation Ir#8 Development Plan	
Sumas First Nation	Dec. 2012	Land Code	
Sumas First Nation	Nov. 2013	Sema:Th Land Use Plan	
Tla'amin First Nation	Aug 2005	Land And Water Use Plan For Tla'amin Traditional Territory	
Tla'amin First Nation	Mar 2007	Tla'amin First Nation Comprehensive Community Plan	
Tsawout First Nation	01-2010	Tsawout First Nations Lands Department Policy No. 01-2010 — A Policy To Establish The Community Impact Assessment Requirements And Procedures	
Tsawout First Nation		Tsawout First Nation — Land And Water Referral Checklist	
Tsawout First Nation		Tsawout First Nation — Development Permit Tfn-Dp-10-	
Tsawout First Nation	Jul 2009	Tsawout Land Development Procedures Law No. 01-2009	
Tsawout First Nation	01-2010	Tsawout First Nation Land Development Procedures Law No. 01-2010	
Tsekani (f. Mcleod Lake)		Mcleod Lake Indian Band Land Use Planning Act	
Ts'kw'aylaxw First Nation	Dec. 2003	Land Code	
T'souke Nation	Jan. 2006	Land Code	
Tsleil-Waututh First Nation	Jan. 2009	Tsleil-Waututh Nation Stewardship Policy	
Tzeachten First Nation	10-01	Tzeachten First Nation Zoning And Land Use Law 2010	
Tzeachten First Nation	10-02	Tzeachten First Nation Subdivision, Development And Servicing Law 2010	
We Wai Kai (f. Cape Mudge)	2012	We Wai Kai Nation Draft Land Use Plan	

Table — BC First Nations' Laws/ByLaws in Force... *continued*

COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Huu-Ay-Aht First Nations	2011	Community Planning And Development Act
Huu-Ay-Aht First Nations	2013	Economic Development Act
Huu-Ay-Aht First Nations	4/2011	Zoning Regulation
Huu-Ay-Aht First Nations	2011	Land Act
Huu-Ay-Aht First Nations	3/2011	Land Use Plan Regulation
Ka:'Yu:'K't'h'/Chek'tles7et'h' First Nations	13/2011	Planning And Land Use Management Act
Ka:'Yu:'K't'h'/Chek'tles7et'h' First Nations	12/2011	Land Act
Nisga'a Lisims Government	2010/06	Nisga'a Land Title Act
Nisga'a Lisims Government	2000/14	Nisga's Lands Designation Act
Nisga'a Lisims Government	2009/02	Nisga'a Landholding Transition Act
Nisga'a Lisims Government	2010/01	Nisga'a Community Planning and Zoning Enabling Act
Nisga'a Lisims Government	2010	Nisga'a Owner Application Procedures Regulation 2010
Sechelt (Shíshálh) First Nation		Strategic Land Use Plan
Toquaht First Nation	12/2011	Land Act
Toquaht Nation	13/2011	Planning & Land Use Management Act
Tsawwassen First Nation	Apr 2009	Land Act
Tsawwassen First Nation	Apr 2009	Land Use Planning And Development Act
Tsawwassen First Nation	028/2009	Zoning Regulation
Tsawwassen First Nation	053/2009	Offsite Levies Regulation
Tsawwassen First Nation	127/2013	Development Permit Area Regulation
Tsawwassen First Nation	027/2009	Subdivision And Development Regulation
Tsawwassen First Nation	037/2009	Building Regulation
Uchucklesaht Tribe	13/2011	Planning And Land Use Management Act
Uchucklesaht Tribe	12/2011	Land Act
Ucluelet First Nations	13/2011	Planning And Land Use Management Act
Ucluelet First Nations	12/2011	Land Act
Westbank First Nation	2007-01	WFN Land Use Law, Land Use Plan - Schedule "A", Zoning Regulations - Schedule "B", Servicing Maps — Schedule "C"

Table — Reconciliation and Other Agreements with the Province

PROVINCIAL — STRATEGIC ENGAGEMENT AGREEMENTS
• ***Ktunaxa Strategic Engagement Agreement*** — $1.65 million strategic agreement between the Province and Ktunaxa Nation respecting co-operative decision-making.
• ***Tsilhqot'in Strategic Engagement Agreement*** — $1.26 million strategic agreement between the Province and Tsilhqot'in National Government respecting consultation on natural resource decisions.
• ***Nanwakolas Strategic Engagement Agreement*** — $2.25-million agreement respecting consultation on natural resource decisions.
PROVINCIAL — OTHER AGREEMENTS
• ***Doig River, Prophet River and West Moberly First Nations Agreements*** — are a series of 10 agreements with the Province to provide for collaborative planning, management and operation of Treaty 8 lands: 1. Final Agreement (not a treaty, nor a land claim agreement) 2. Amended Economic Benefits Agreement 3. Strategic Land and Resource Planning Agreement 4. Government-to-Government Protocol Agreement 5. Wildlife Collaborative Management Agreement 6. Parks Collaborative Management Agreement 7. Heritage Conservation Memorandum of Understanding 8. Crown Land Management Agreement 9. Forest and Range Resource Management Agreement 10. Long Term Oil and Gas Agreement
• ***Tsay Keh Dene Final Agreement*** — addresses the longstanding grievances from the creation and operation of the W.A.C. Bennett Dam and Williston Reservoir in the Peace River Valley region.
PROVINCIAL — INCREMENTAL TREATY AGREEMENTS
• ***Tla-o-qui-aht Incremental Treaty Agreement*** — November 13, 2008
• ***Klahoose First Nation Incremental Treaty Agreement*** — March 5, 2009
PROVINCIAL — RECONCILIATION AGREEMENTS
• ***Musqueam Reconciliation, Settlement and Benefits Agreement*** — settled three court cases with the Musqueam Indian Band through a negotiated agreement that transfers ownership of a parcel of land and provides cash for future economic activities.
• ***Coastal First Nations Amended Reconciliation Protocol — December 2010*** — building a new ferry terminal at Klemtu, as well as sharing a portion of resource revenue and carbon offsets. The Coastal First Nations will also be part of a new shared decision making process and the creation of an Alternative Energy Action Plan for their traditional territories.
• ***Haida Reconciliation Protocol — Kunst'aa guu — Kunst'aayah*** — establishes a unique shared decision making process at the strategic level for resource use, provides a share of resource revenues including carbon offsets and a community forest tenure and the opportunity to purchase additional forest tenures.
• ***Gitanyow Huwilp Recognition and Reconciliation Agreement*** — establishes a joint resources governance forum to create an approach to consultations and decision-making over an area of 6,285 square kilometres in northwest BC which includes the Northwest Transmission Line.
• ***Nanwakolas First Nations Reconciliation Protocol*** — creates a new partnership on Vancouver Island and the mid-coast intended to facilitate economic opportunities and strengthen the relationship between the province and First Nations.
• ***Secwepemc Reconciliation Framework Agreement*** — supports the BC jobs plan in the Thompson-Okanagan and gives Secwepemc a stronger voice in managing natural resources.
• ***Snuneymuxw First Nation Reconciliation Agreement*** — creates economic opportunities for Snuneymuxw through the transfer of three land parcels in the Mount Benson area. It also transfers a culturally significant property in Departure Bay and further includes an engagement protocol.
• ***Tseycum First Nation West Saanich Road Reconciliation Agreement*** — provides $150,000 for the Journey Home Cemetery and the re-internment of Tseycum ancestors and $50,000 for capacity funding for further reconciliation efforts.

RESOURCES

First Nations

Westbank First Nation
201 515 Highway 97 South
Kelowna, BC V1Z 3J2
Phone: 250-769-4999
Fax: 250-769-4377
Email: mail@wfn.ca

- Land Use Law No.2007-01: www.wfn.ca/docs/land_use_law_no_2007-01_schedule_a_final.pdf

Coastal First Nations
United Kingdom Building
Suite 1660, 409 Granville Street
Vancouver, BC V6C 1T2
Phone: 604-696-9889
Fax: 604-696-9887
www.coastalfirstnations.ca

- *Kunst'aa guu — Kunst'aayah Reconciliation Protocol*

Gitanyow First Nation
PO Box 340
Kitwanga, BC V0J 2A0
Phone: 250-849-5222
Fax: 250-849-5787
www.gitanyow.com

- *Gitanyow Huwilp Recognition and Reconciliation Agreement (2012)*: www.gitanyowchiefs.com/images/uploads/land-use-plans/Gitanyow-R-R-Agreement-2012.pdf

Gitga'at First Nation
445 Hayimiisaxaa Way
Hartley Bay BC V0V 1A0
Phone: 250-841-2500
Fax: 250-841-2541
www.gitgaat.net

- Land use plan: www.gitgaat.net/land/landuse.html

Haida Nation
504 Naanii Street Old Massett
PO Box 589, Masset
Haida Gwaii V0T 1M0
Phone: 250-626-5252
Toll-free: 1-888-638-7778
Fax: 250-626-340
Email: chn_hts@haidanation.com

- Haida Gwaii Strategic Land Use Agreement: www.haidanation.ca/Pages/Agreements/pdfs/Haida%20Gwaii%20Strategic%20Land%20Use%20Agreement.pdf

Heiltsuk First Nation
PO Box 880
Bella Bella, BC V0T 1Z0
Phone: 250-957-2381
Fax: 250-957-2544
www.heiltsuknation.ca

- Land use plan: www.firstnations.de/media/04-1-land-use-plan.pdf

Hupacasth First Nation
PO Box 211
Port Alberni, BC V9Y 7M7
Phone: 250-724-4041
Fax: 250-724-1232
www.hupacasath.ca

- Land use plan: www.hupacasath.ca/sites/default/files/LUP-Phase2-2006.pdf

Kitasoo/Xai'xais First Nation
General Delivery
Klemtu, BC V0T 1L0
Phone: 250-839-1255
Fax: 250-839-1256

- Integrated Marine Use Plan (2011)

Lil'wat First Nation
PO Box 602
Mount Currie, BC V0N 2K0
Phone: 604-894-6115
Fax: 604-894-6841
Email: info@lilwat.ca

- Land use plan: www.lilwat.ca/lilwat7ul/our-land/lilwat-land-use-plan.cfm

Nisga'a Lisims Government
PO Box 231, 2000 Lisims Drive
Gitlaxt'aamiks (formerly New Aiyansh), BC V0J 1A0
Phone: 250-633-3000
Toll-free: 1-866-633-0888
Fax: 250-633-2367
Email: comm@nisgaa.net

- Land use plan: www.nisgaalisims.ca/?q=system/files/Land+Use+Plan+Dec+2002.pdf

Sechelt First Nation
PO Box 740
5555 Sunshine Coast Highway
Sechelt, BC V0N 3A0
Phone: 604-885-2273
www.secheltnation.ca

- Land use plan: www.secheltnation.ca/departments/lands/LUP_040408.pdf
- *shíshálh Nation Lands and Resources Decision-Making Policy*: www.secheltnation.ca/departments/rights/Booklet_Decision_Making_Policy_Final_10May13.pdf

Taku River Tlingit First Nation
PO Box 132
Atlin, BC V0W 1A0
Phone: 250-651-7900
Fax 250-651-7909
Email: trtfn@gov.trtfn.com

- Land use plan: www.takhuatlen.org/publications/TRTFNVMD.pdf

Tla'amin First Nation
6686 Sliammon Rd
Powell River, BC V8A 0B8
Phone: 604 483 9646
Fax: 604 483 9769
www.sliammonfirstnation.com

- Land use plan: www.sliammonfirstnation.com/index.php/all-departments/category/6-tax-and-lands?download=17:tlaamin-land-use-plan-march-2010

First Nations Land Advisory Board
First Nations Land Management Resource Centre
Suite 106, 350 Terry Fox Drive
Kanata, ON K2K 2W5
Phone: 613-591-6649
Fax: 613-591-8373
Email: webadmin@labrc.com
www.labrc.com

- *Framework Agreement on First Nation Land Management*, 1996, online: http://labrc.com/wp-content/uploads/2014/03/Framework-Agreement-Amendment-5-edited.pdf

Provincial

GeoBC
PO Box 9375 Stn Prov Govt
Victoria, BC V8W 9M2
Phone: 250-952-6801
Toll-free: 1-866-952-6801
Email: geobcinfo@gov.bc.ca

- Government Access Tool for Online Retrieval (GATOR): http://a100.gov.bc.ca/pub/pls/gator/gator$queryforms.menu
- Integrated Land and Resource Registry (ILRR): http://apps.gov.bc.ca/apps/ilrr/html/ILRRWelcome.html

Ministry of Forests, Lands and Natural Resource Operations
PO Box 9049 Stn Prov Govt
Victoria, BC V8W 9E2
Phone: 250-387-6240

Fax: 250-387-1040
www.gov.bc.ca/for/

- *Crown Land: Indicators & Statistics Report, 2010.* www.for.gov.bc.ca/land_tenures/documents/publications/Crown_Land_Indicators_&_Statistics_Report.pdf
- *Agreement on Land Use Planning Between the Squamish First Nation and the Province of British Columbia (as Represented by the Minister of Agriculture and Lands)*, (14 June 2007). Online at Integrated Land Management Bureau Archives: www.for.gov.bc.ca/haa/Docs/squamish_FRO.pdf

Federal

Aboriginal Affairs and Northern Development Canada
10 Wellington, North Tower
Gatineau, Quebec
Postal Address:
Ottawa, ON K1A 0H4
Phone: 1-800-567-9604
Fax: 1-866-817-3977
www.aandc.gc.ca

- Lands and Economic Development Services Program: www.aadnc-aandc.gc.ca/eng/1100100033423/1100100033424

Federal of Canadian Municipalities
First Nations — Municipal Community Economic Development Initiative
24 Clarence Street
Ottawa, ON K1N 5P3
Phone: 613-241-5221
Fax: 613-241-7440
Email: info@fcm.ca
www.fcm.ca

- www.fcm.ca/home/programs/community-economic-development-initiative.htm

SELECT LEGISLATION

Provincial

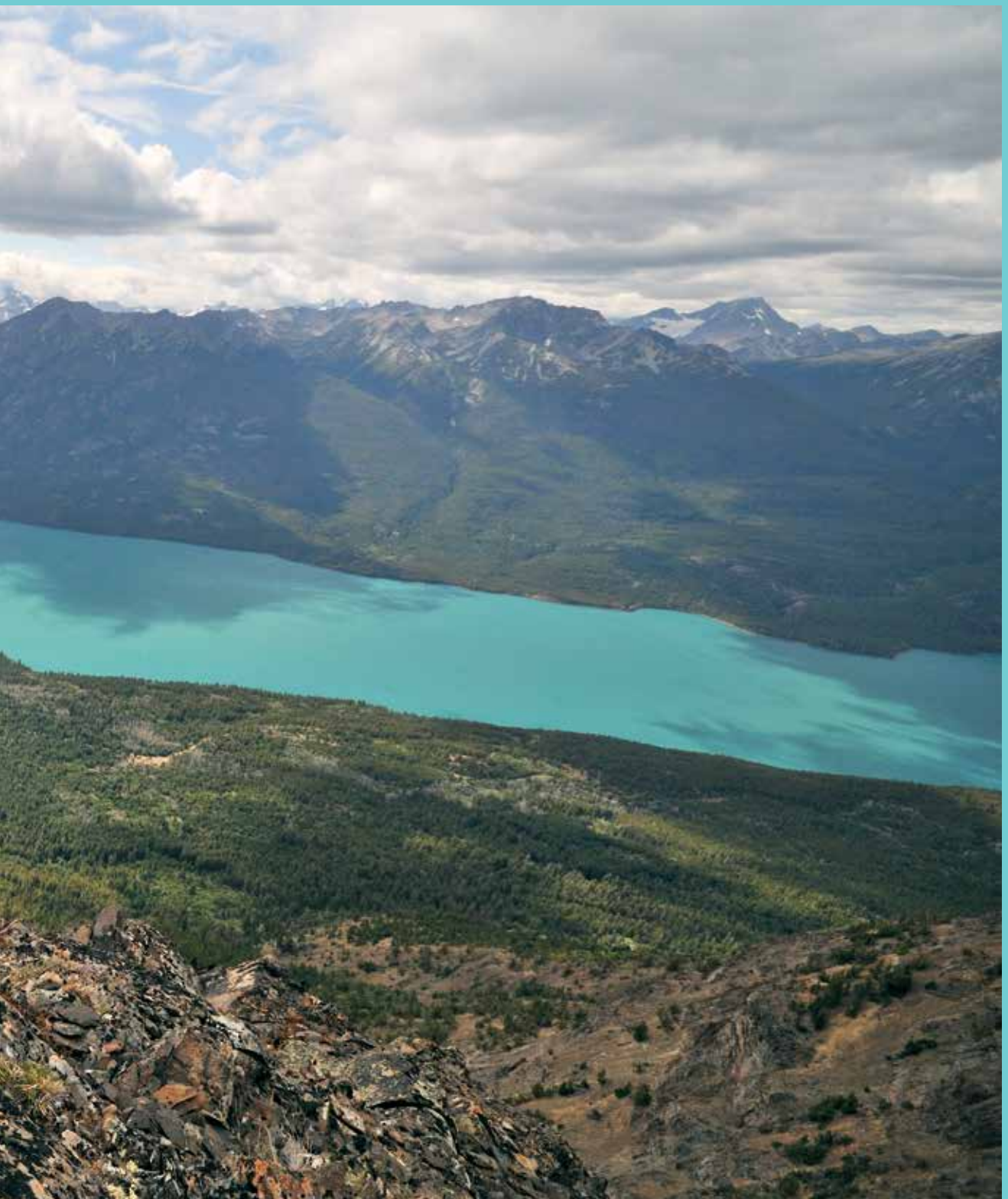
- *Land Act* (R.S.B.C. 1996, c. 245)
- *Ministry of Lands, Parks and Housing Act* (R.S.B.C. 1996, c. 307)
- *Forest Act* (R.S.B.C. 1996, c. 157)
- *Forest and Range Practices Act* (S.B.C. 2002, c. 69)
- *Oil and Gas Activities Act* (S.B.C. 2008, c.36)
- *Wildlife Act* (R.S.B.C. 1996, c.488)

COURT DECISIONS

- *MacMillan Bloedel Ltd. v. Mullin* (BCCA), [1985] 2 CNLR 28

PART 1 /// SECTION 3.20

Lands and Land Management



3.20

LANDS AND LAND MANAGEMENT

3.20

LANDS AND LAND MANAGEMENT

BACKGROUND

Indigenous Perspectives on Lands and Land Management

Lands and land management is a very important subject area to First Nations and integral, given the fundamental relationship between the "land" and the "people." Throughout Canada, Indigenous peoples have their own conceptions about land and how land is held and governed, which are revealed in ancient Indigenous legal traditions that vary from society to society, reflecting each culture's own particular beliefs, customs and practices. In many of these systems, a fundamental tenet is that land is held collectively and cannot be "owned," as is typically the case in many non-Indigenous legal traditions, in accordance with those societies' beliefs, customs and practices. Establishing contemporary land management and land governance systems, including land tenure systems, that reflect commonly held beliefs in the importance of holding lands collectively while at the same time creating private land interests, within limits determined by the community, can be challenging and at times controversial for many First Nations.

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.

Article 32: UN Declaration

Geographical Scope of Lands and Land Management

The categories of land that First Nations hold, the quantum of those lands, and the governance rules that apply to the land vary both within and among First Nations. Consequently, it can be very confusing to sort out which laws apply and where (e.g., lands reserved for Indians, treaty settlement land, Aboriginal title land, ancestral lands).

From a First Nations title and rights perspective, as matter of principle and right, the lands over which they govern are the ancestral lands that the people occupy. At the time when the Crown declared sovereignty in BC (deemed to be 1846 by the courts), each Nation occupied a generally defined geographical territory to the exclusion of others, although tribes often agreed to share certain lands and resources in common. The Nation's laws applied throughout this geographical area, including Indigenous land law. Following the assertion of Crown sovereignty in BC, with the establishment of the category of "Lands reserved for Indians" in section 91(24) of the *Constitution Act, 1867*, and the passage of the *Indian Act*, First Nations people in BC were moved onto reserves, which created a whole new dimension of the geographical scope of First Nations lands and had profound implications for First Nations governance over lands and land management. In BC, this was undertaken for the most part without treaties. Today, reserve lands continue to be governed under the *Indian Act*, except where a First Nation has brought about change through comprehensive self-government arrangements or a sectoral land management initiative.

Despite the many legal and political challenges, First Nations continue to assert and to varying degrees exercise land governance over their ancestral lands. This includes Aboriginal title lands (whether declared or otherwise), as that term has been defined by the courts as a subset of ancestral lands, those lands set aside as Indian reserves and lands that have been agreed to as treaty settlement lands. This is challenge where the federal government has assumed jurisdiction over lands and land management on-reserve under the *Indian Act* and the province assumes jurisdiction throughout the rest of the ancestral lands. Non-reserve lands in Canada are governed by the provinces under section 92(5) and (12) and section 109 of the *Constitution Act, 1867*, but may remain subject to Aboriginal title.

Under self-government arrangements, whether sectoral or comprehensive, it is the Nation that has primary jurisdiction over lands and land management for the lands that are set out and defined in the arrangements. In modern treaty arrangements, the category of "Aboriginal title lands" and "reserve lands" are conflated and termed "treaty settlement lands," with the Nation typically having limited governance rights, including the right to be consulted over significant land use and land governance decisions made by the province, within a defined or undefined geographical area approximating its ancestral lands.

Self-government options for lands and land management must therefore be considered based on:

- whether the lands are reserve lands or non-reserve lands
- if they are non-reserve lands, whether they are declared Aboriginal title lands or not.
- if Aboriginal title has not yet been declared, whether the lands in question may reasonably be expected to meet the test of proof for Aboriginal title lands
- whether they are unlikely to be declared Aboriginal title lands but fall within the Nation's broadest geographical scope, namely its ancestral lands (often called its traditional territory).

For all of these categories, there are options for advancing lands and land management governance as Nations rebuild.

Re-establishing First Nations Land Management

Control of First Nations land by First Nations governments has been a priority of First Nations leaders for decades, whether over their ancestral lands or the more limited scope of reserves. Some of the greatest advances in recent years have been made in sectoral self-government initiatives in the area of lands and land management. Land and land management is a core area of jurisdiction, with many considering it an essential element of any self-government arrangement. Indeed, if a Nation were to govern only one area, having determined its core institutions of governance, it would probably be over lands and land management.

Not surprisingly, given the history, complexity and geographical scope of lands, there are a number of ways in which First Nations lands are held and governed today along the governance continuum. As systems of lands and land management, including questions of how title to lands is held (i.e., the constitutional status of lands), is fundamental to how many other aspects of governance operate and jurisdiction is exercised, First Nations are considering their lands and land management options very carefully. Sometimes the complexity of the issues and the numerous options can be confusing, especially as these options are continually evolving.

Depending on the legal regime utilized, land management may be exercised through the *Indian Act*, sectoral self-government arrangements, self-government arrangements, historical treaties or modern treaties, or through other developing reconciliation mechanisms (e.g., strategic engagement agreements, reconciliation protocols/agreements). As different options for lands and land management with varying geographical scope are explored, developed and implemented, the question of what type of land management system to use moving forward can be controversial. For example, with respect to reserve lands, the type of land holdings and land registry system can be contentious, in part because of issues of cost, liability and the integrity of the existing limited commonly held reserve lands. Before deciding on the best option for a land management or governance system and over what geographical area, it is beneficial to clearly understand how lands are governed and managed (or mismanaged) under the *Indian Act* and how governance is evolving with respect to Aboriginal title and ancestral lands.

Land Management, the *Indian Act* and Reserves

Lands reserved for Indians are governed federally under section 91(24) of the *Constitution Act, 1867*. Unless and until the relevant provisions or the whole of the *Indian Act* are replaced, this legislation remains the principle instrument governing the use and management of Indian reserve lands. Other applicable legislation includes the *Canadian Environmental Protection Act* (S.C. 1999, c. 33), the Canadian Environmental Assessment Agency's *Species at Risk Act* (S.C. 2002, c. 29), *Canada Lands Surveys Act* (R.S.C. 1985, c. L-6), *Canada Lands Surveyors Act* (S.C. 1998, c. 14), and other federal "laws of general application" that address aspects of land management and that are not inconsistent with the *Indian Act*.

Through the *Indian Act*, reserve lands are held by the Crown for the use and benefit of the band members for whom these lands were set aside. First Nations do not "own" reserve lands. Rather, reserve lands are an example of a bare legal title, where title is in the Crown but where the use, occupation and beneficial interest in the land is set apart for a "band." It is important to note that these lands are not legally held "in trust," although we often characterize the relationship as being trust-like. Underlying bare title to reserve lands is usually held by Canada but, interestingly, and not always appreciated, title is sometimes held by a province. In BC, title to most reserves is federally held. While the declaration of Aboriginal title in *Tsilhqot'in* did not include reserves lands, based on the pleadings in that case reserve lands are still subject to Aboriginal title.

Independent of any consideration of Aboriginal title, whether underlying bare title to reserve lands is held by Canada or the provinces does not determine governance of the lands. Regardless of which government has bare title, the federal government has jurisdiction to legislate on the management and administration of "Lands reserved for Indians", because of section 91(24) of the *Constitution Act, 1867*. Reserve lands are governed by the federal *Indian Act*, which sets out specific responsibilities for land management. These responsibilities can be transferred to First Nations through appropriate legislation.

Aspects of Federal Land Management of Reserves

It is important to understand that the federal government's legal and administrative responsibility for reserve lands is multi-faceted and operates on various levels. It governs, it manages and it acts as a "trustee" for the band and band members. In deconstructing how reserve lands are managed prior to self-government, whether sectoral or comprehensive, it is therefore helpful to consider the federal administration of land from these different perspectives, depending on the aspect of land management you are discussing. Four aspects to look at are:

- ***management of land tenure systems*** — land management from the perspective of what is typically in Canada provincial jurisdiction over the creation, transfer and registration of legal interests in land
- ***management of property and assets*** — the management and control of interests in land and public works that are typically held by a government or a related governing entity for public purposes (e.g., vacant, recreation or park lands; government purpose lands such as for offices, hospitals, schools, cemeteries, fire halls, police stations, water and wastewater systems, etc.);
- ***management for local planning*** — zoning and land use requirements, which outside of reserves are typically jurisdictions delegated through provincial legislation to municipal and local governments
- ***management of private interests*** — acting in a decision-making capacity similar to that of a "trustee" respecting citizens' private interests in land, which anywhere else in Canada is typically undertaken by government only in exceptional circumstances (i.e., guardianship due to incompetency).

When deconstructing the current reality of the *Indian Act* land management system, this simple analytical framework can be very helpful in sorting through the issues and deciding how a community will move away from the *Indian Act*, as these four aspects can often be confused when making policy, drafting laws or establishing administrative systems.

In Canada, "reserve" lands are currently managed under the Land Management Manual created by Indian and Northern Affairs Canada (now Aboriginal Affairs and Northern Development Canada [AANDC]). The manual provides information on land planning issues, federal policy and policy development, land transactions, individual and communal interest, permits, leases, administration, land transactions, adding land to reserves, environmental obligations and other issues concerning reserve lands. Reserve lands remain defined under section 91(24) of the *Indian Act* as "Lands reserved for Indians" and the legal framework continues to maintain that legal title to reserves belongs to the federal or provincial Crown. All transactions involving such lands must be approved by the Minister or the governor in council, and the lands cannot be seized or mortgaged, pledged or charged to a non-Indian.

Management of land tenure systems: At a fundamental level, land governance is about making rules regarding the actual creation of legal interests in land. This includes both the ability to set the rules establishing a particular type of interest in land (e.g., a lease, licence, certificate of possession, mortgage) and the granting to a person of a recognized interest from the collective land base. The *Indian Act* establishes what type of interests are allowed on-reserve and then gives the Minister the authority to grant those interests, unless a Nation has taken over this jurisdiction under a comprehensive or sectoral self-government agreement. Off-reserve, the types of land interests allowed are established by provincial or territorial governments pursuant to the rules set out in provincial or territorial land acts. It is worth noting that approximately one-half of the First Nations in Canada do not follow the *Indian Act* land provisions and do not have recognized jurisdiction that displaces the act. This creates great uncertainty during the transition from colonial systems of land management to those ultimately based on recognition of First Nations jurisdiction. This is the "provincial" dimension to First Nations land management.

Management of property and assets: The second aspect of land governance concerns how public lands are managed by a governing body. Assuming that there are rules setting out what types of interests in land there can be and how new grants of these recognized interests are made, there are particular lands that are held by the government and managed by the governing body for the collective benefit of the citizens (public lands). The rules for how a province or Canada manages public lands off-reserve (Crown lands and lands held in fee simple by the government or a related entity) are set out in many different pieces of legislation, depending on the purpose for using the land (e.g., for hospitals, police stations, fire protection, parks). On-reserve, as with the private interests of citizens discussed below, Canada has assumed responsibility under the *Indian Act* to manage these land interests. While the band council is consulted on decisions, final authority rests with Her Majesty (as represented by the Minister of AANDC). This is the "property" dimension of First Nations land management.

Management for local planning: The third aspect of land governance typically deals with local planning, land use, services, zoning and so forth, regardless of the type of interest that may be established in the land. Off-reserve, provincial governments establish the parameters for local jurisdiction in these areas, but the municipal or local government are delegated the authority to make the decisions. This is the "municipal" dimension of First Nations land management.

Management of private interests: The fourth aspect of land governance, which is unique in Canada (with the exception of the property of minors and incompetents) is on-reserve land management where Canada has assumed responsibility under the *Indian Act* for administering lands on behalf

of the "band" not only with respect to public lands, but also with respect to individual band members' interests in "privately" held lands, assuming such interests have been created under the *Indian Act* (e.g., Certificates of Possession, leases). While Canada recognizes that this is not appropriate, moving away from this system has been difficult because of the fiduciary responsibilities that have been created.

Canada's land management role on-reserve (with respect to both "band lands" and "member lands") is a fiduciary requirement and reflects the legal status of First Nations and First Nations people as essentially wards of the state under the *Indian Act*. By enacting the *Indian Act* and assuming land management of reserve lands, the Crown takes on legal responsibilities and can be held liable for business decisions with respect to land use (see *R. v. Guerin*, [1984] 2 SCR 335).

While this old law is evolving, with the courts increasingly viewing First Nations and their citizens even under the *Indian Act* as "autonomous actors," this practice underpins the basis of First Nations' relationship with Canada under the *Indian Act*. In some cases, with respect to both "band" lands and "private lands," this responsibility has been delegated to the band. Nevertheless, the Minister has ultimate responsibility for administering private interests created on-reserve. Consequently, the Crown is formally a party to all such transactions, and these transactions are invalid without the Crown's consent. Under the *Indian Act*, interests created without Ministerial consent have no legal force and effect (e.g., leases to non-members commonly called "buckshee leases" or other interests in land established by a First Nation with respect to citizens' homes located on-reserve).

The federal officials carrying out the management of private interests and the Department of Justice lawyers advising them are, of course, not personally affected by the outcome of the decisions they make respecting the lands they are administering. Consequently, they are usually not as motivated to act, and are typically more risk adverse and conservative, given the fiduciary relationship. This fiduciary dimension of land management is seen as a serious impediment for what essentially should be private business decisions and transactions but in the case of reserves governed under the *Indian Act* must involve the Crown. This additional layer of legality and bureaucracy and the business uncertainty that this can create is often difficult for individuals and bands to navigate and overcome. In many ways, the buckshee leases and other "non-legal" interests in reserve lands are a reflection of "bands" and people finding other ways to do business and doing what they can to operate within what is fundamentally an inappropriate system of decision-making. Not only is it wrong in principle, it also creates significant and costly administrative burdens for the government, as well as liability. This is the "paternalistic dimension" of First Nations land management, and moving forward, First Nations will need to decide if they are going to do away with or replicate this system vis-à-vis their citizens when moving into self-government. Certainly the federal government is concerned about this aspect of land management, perhaps more so than any other aspect, given the liability associated with its fiduciary role, and this was a large part of the reason for the federal support for sectoral self-government initiatives in land management, as discussed below.

Land Management and Aboriginal Title Lands

In addition to First Nations' interest in reserve lands in BC and other parts of Canada, there remains, of course, the question of unextinguished Aboriginal title and a Nation's broader interest in its ancestral lands, or what may be referred to more commonly as traditional territories (including reserves). The courts have recognized that provincial Crown title is encumbered by the Aboriginal title of the Nation that holds that Aboriginal title — sometimes referred to as the "proper" Aboriginal title-holder. Where Aboriginal title is established, these lands are not Crown lands. Where Aboriginal title has not been proven or declared, it remains a burden on Crown title, and this is where the Crown and First Nations look to reconcile Crown title and Aboriginal title though agreements (e.g., modern treaties). Because the Crown in the meantime is still governing over lands that may be Aboriginal title lands, this gives

rise to numerous legal obligations on the Crown to consult with and accommodate First Nations when land and resource-use decisions are made by the Crown with respect to the lands subject to Aboriginal title. In situations where Aboriginal title remains unproven but there is a reasonable presumption that it exists, there is a duty to consult and accommodate First Nations' interests.

Aboriginal title, when found to exist, gives rise to rights of land use and possession on the part of the Nation. In situations where Aboriginal title has been declared, governments must get the consent of the Nation if they wish to take any action or make any decision that could infringe or in any way impair the Aboriginal title and associated rights of the Nation. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group. As of October 2014, the only instance where Aboriginal title has been established conclusively in the courts for any Nation is for part of the Tsilhqot'in peoples' ancestral lands. The granting of the declaration raises questions about how Aboriginal title lands, beyond the court decision, are legally described and held, registered, governed and managed.

Based on the common law as it exists today, Aboriginal title lands are best described as an interest in land that is recognized and affirmed by section 35 of the *Constitution Act, 1982*. This is distinct from describing them as property interests pursuant to section 91 or 92 of the *Constitution Act, 1867* or in terms of categories such as "fee simple land" or "public land." Aboriginal title lands are not Crown lands. They are also not "Lands reserved for Indians," yet all reserve lands are Aboriginal title lands. In her decision in the *Tsilhqot'in* case, Chief Justice McLachlin in some ways foreshadows the ongoing debate as to how Aboriginal title lands may ultimately be described and demarcated more broadly throughout BC, by simply leaving the door open to reconciliation when she confirms that Aboriginal title is "unique" (paragraph 14) and that for her, "Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question" (paragraph 72).

Section 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title, and this has significant implications for jurisdiction over lands and land management. Neither Canada nor British Columbia can legislate in a way that would take away from the inalienable connection of the Aboriginal group and future generations to their lands, unless such an infringement was justified in the broader public interest and was consistent with the Crown's fiduciary duty owed to the Aboriginal group. In *Delgamuukw*, the majority of the court stated that Aboriginal title and rights may be infringed by the federal and provincial governments only if the infringement a) furthers a compelling and substantial legislative objective and b) is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples. As a result, the powers of governments to legislate or make strategic decisions with respect to lands and land management subject to Aboriginal title is removed or significantly diminished.

Notwithstanding how Aboriginal title may be described and recorded, or how issues of multi-level governance over Aboriginal title lands will be resolved and Indigenous concepts of "ownership" addressed, Aboriginal title-holders will still need to consider how they manage their title lands as a collective "owner" (i.e., to make decisions over its use). No one else other than the collective group, however organized, can make these decisions. As the "owner," at a minimum the collective will decide, for example, how citizens, either collectively or individually, have access to the title lands, and for what purposes and what benefit (e.g., hunting, fishing, the cutting of timber, new settlements, ranching). Further, if third parties want to access to or use Aboriginal title lands, this will also be determined by the collective (e.g., logging, mineral exploration and mining, ranching, recreational pursuits). As discussed in Section 2.0 — Core Institutions of Governance, how the collective is organized to ensure legitimacy for the purposes of decision-making, whether in the exercise of law-making or in this case, when acting as an "owner" of land, is of critical importance to ensuring that decisions made are binding and enforceable.

According to some opinions, the Crown's underlying title consists only of the jurisdiction to try to justify infringements of Aboriginal title, and relatedly the responsibility to act consistently with the Crown's fiduciary duty to the Aboriginal title-holder. Further, Aboriginal consent to use title lands is the standard that everyone must meet — the federal government, the provincial government, and third parties. Absent Aboriginal consent or a justified infringement, neither the federal nor provincial Crown can take action with respect to Aboriginal title land. This, of course, has significant governance implications for all parties.

When considering patterns of land use and designation, the finding of Aboriginal title also raises questions about how interests in Aboriginal title lands that existed immediately before a declaration and that were not created under Indigenous laws may continue to exist, or how new interests will be created. This is not limited to private interests (grants, licences and other tenures), but extends to provincial interests, such as previously dedicated and registered roads or delineated parks. In the case of the transition from federal jurisdiction on-reserve to First Nations jurisdiction under self-government arrangements (whether sectoral or comprehensive), the arrangements address issues of existing interests and the transfer of jurisdiction.

Distinction between Property Rights and Jurisdiction

Property rights are rights that individuals, corporations, Aboriginal peoples, and the Crown have in relation to things, which can be either tangible (e.g. land) or intangible (e.g., intellectual property rights, such as copyright). Jurisdiction is governmental authority, which exists and can be exercised over a large variety of matters, including property. Governments exercise jurisdiction when they make and enforce laws in relation to particular matters.

Kent McNeil, 2008

Aboriginal title considerations should always be kept in mind when considering the range of options for governing lands and exercising jurisdiction, whether on- or off-reserve.

Other Matters When Considering Land Management

Fiduciary Relationship/Duty of the Crown

With regard to both reserve land and Aboriginal title lands, the Crown has a fiduciary relationship to Aboriginal peoples. In terms of reserve lands, as described above, these duties arise in part out of the federal Crown assuming responsibility for managing reserve lands under the *Indian Act*. In addition, there is a fiduciary relationship between the Crown and Aboriginal peoples over Aboriginal title lands. With respect to Aboriginal title lands, the court in *Tsilhqot'in* explicitly identified the Crown's underlying title as only consisting of the jurisdiction to try to justify infringements of Aboriginal title and relatedly the responsibility to act consistently with the Crown's fiduciary duty to the Aboriginal title holder. Further, Aboriginal consent is the standard the Crown must meet to use Aboriginal title land. Absent Aboriginal consent or a justified infringement, neither the federal nor provincial Crown can take action with respect to Aboriginal title land.

The federal duty on-reserve and the joint provincial/federal duty over Aboriginal title lands and the respective relationships will evolve through the process of reconciliation and as Nations rebuild. The issue of fiduciary responsibility with respect to lands and land management can be addressed in sectoral and comprehensive governance arrangements. Essentially, as Nations resume decision-making power away from the Crown, the fiduciary responsibilities are diminished.

Constitutional Status of Lands

Constitutionally, First Nations lands can be held in three ways: under section section 35 as Aboriginal title lands; under section 92 as provincial lands, along with the constitutional protection afforded by a modern treaty; and under section 91(24) as "Lands reserved for Indians." Each option has its pros and cons, and the legal ramifications of for each are complex. Whatever option is chosen, the objective is legal certainty over the constitutional status of lands and the governance arrangements emanating from them.

Notwithstanding how Aboriginal title lands will ultimately be governed as section 35 lands, essentially two paths for self-government with respect to lands and land management have been evolving,

reflecting different approaches to the constitutional status of the lands. The first path, favoured in comprehensive governance arrangements under modern treaties, is for underlying title to be provincial (i.e., lands previously held as "Lands reserved for Indians" are converted to fee simple under section 92 and are added to other lands to be recognized as treaty settlement land). In this approach, the First Nation is the owner of the land in fee simple. For governance purposes, the practical result of this approach is that a treaty First Nation is tied to the province's system for land management, including land registration. The second path, which is favoured in sectoral governance initiatives and in one bilateral self-government agreement in BC (but in others across Canada), is for the lands to be held as federal lands under section 91(24) (i.e., they are "Lands reserved for Indians"). Subject to Aboriginal title, in this case the underlying title rests with Her Majesty, and while the Nation does not "own" the land in the strict legal sense because the underlying title still rests with the Crown, the Nation is the de facto owner, having all the rights, powers, responsibilities and privileges of an owner. The practical result of this is that the First Nation is tied to a federal system of land management supported by national institutions (e.g., the First Nations Lands Advisory Board and AANDC for land registry support). Both options have their pros and cons. Some legal scholars have remarked that they are not sure if all of the options that are being developed would stand up to close legal scrutiny, but the parties that have entered into the governance arrangements based on the constitutional status of lands chosen are confident that they would.

Options are also being presented for consideration to First Nations outside the treaty process and the existing sectoral and other comprehensive initiatives described below, to create the legal authority to grant fee simple in their reserve lands independent of existing provincial land tenure options for fee simple land off-reserve or as modified, as in the BC treaty examples.

Each First Nation must determine the best model for holding land. However, it is important to realize that First Nations do not have to change the manner in which title to their reserve lands is held in order to govern their lands. Such governance includes the provincial-type power to create interests in land (with the exception of granting the underlying interests or fee simple interests) or to make local municipal-type bylaws or laws. There are other examples of the ability to regulate land use independently of legal ownership and the ability to create interests in land. Moving forward, existing and new options and models for how lands are held and consequently governed will inevitably be influenced by how Aboriginal title and Crown title are reconciled.

Today, and before reconciliation negotiations with the Crown, First Nations often hold lands with different constitutional status (e.g., Indian reserves, some with underlying federal title and some with underlying provincial title; provincial fee simple lands; and now, Aboriginal title lands so declared. The governance division of powers respecting these lands varies. One of the objectives of reconciliation negotiations is to regularize how the lands are held, and to determine appropriate governance arrangements with respect to those lands. Practically speaking, and assuming that a First Nation's land quantum has been determined (i.e., the geographical extent of the Nation's jurisdiction), it should not matter how the Nation actually holds its land, so long as it has the full benefit of those lands as an "owner" and can govern them appropriately and to its satisfaction. It is important that First Nations have full governance and management power to administer their lands, regardless of who has the underlying title, in order to address the aspects of land and land management considered above.

The Importance of Proprietary Rights to Governance

The evolving recognition of Aboriginal proprietary rights and interests in land and associated ownership rights to govern those lands can provide First Nations with significant legal and economic power. Contrary to what some may argue, whether lands are "owned" or "held" under Aboriginal title, or are "Lands reserved for Indians," under section 91(24), or are treaty settlement lands, the uses to which they can be put are not restricted to those grounded in some atavistic notion of ancient practices,

customs and traditions that are considered integral to distinctive Aboriginal cultures (e.g., hunting, finishing, trapping, gathering). While these uses are, of course, integral to First Nations cultures and are very important, ownership and associated governance rights can allow a First Nation to collectively decide how to use its lands in many different ways and as it sees fit, integrating cultural uses with current land use needs.

For a governing body, having the proprietary interest in land (ownership) is very significant and cannot be over-emphasized. Whether through Aboriginal title or other title, where proprietary interests in land are established and where the owner of that land is a government (i.e., not an individual citizen), ownership of the land typically includes the right to make laws over that land. So while the land management discussion in this chapter focuses on the governance of land and law-making with respect to land, from a broader perspective having ownership and control of land gives rise to a much more far-reaching jurisdiction than simple land management. This is an important consideration when thinking about governance reform for reserve lands but also now with respect to Aboriginal title lands where the Nation is the "owner" of the land.

Role of the Governing Body in Managing Lands

The question of what role First Nations governing bodies will play in managing lands will arise regardless of how title to lands is held. This will be the case for land held communally, but also for lands that may be held by individual citizens. With regard to reserve lands, in every community that considers how to replace AANDC, this question will arise whether as an outcome of participating in a lands sectoral governance initiative or through a negotiated comprehensive governance arrangement (as part of treaty or not). This may appear to be a simple question when land is held collectively by the First Nation (where there are no private interests), but each Nation will still need to determine the role that its governing body will play. This role will vary, depending on the way collectively held lands are used and on the rules respecting their use.

The question of what role the governing body should play with respect to private interests in land (either previously created under the *Indian Act* or to be created in future) may be more complicated. When considering this question, First Nations will need to take into account the residual impact of the fiduciary relationship created under the *Indian Act* with respect to land management and land ownership interests. Under the *Indian Act*, Ministerial approval or an order in council is needed for private land transactions. When a First Nation takes over land management, it will need to decide what role, if any, its government will play in private land transactions. Does the governing body want to assume the same role as Canada has with respect to private members in dealing with their land interests on reserve? Community discussion will provide the answer and laws, rules and/or codes will be required to reflect the Nation's choice.

Some Nations that have moved beyond the *Indian Act* to establish land administration systems under sectoral governance initiatives have kept a similar role for their governing body as the Minister previously discharged for land transactions. Other Nations have not continued this fiduciary relationship with their citizens. This is usually for reasons of economic efficiency and appropriateness and to allow private enterprise to come into play, with individuals being responsible for their own decisions regarding their interests in land. While the rules may change for future land management activities and transactions, there is also a need to look back. A community will need to consider who manages and looks after existing interests where the Minister is a party to the transaction on behalf of either the "band" as a whole or an individual member. For example, under the *Framework Agreement on First Nation Land Management*, all of the federal responsibility for these types of transactions are transferred to the First Nation in accordance with an Individual Agreement, as discussed below.

Creating Interests in Lands

When a Nation considers how it is going to govern or manage its lands, regardless of the mechanism it will use to do so (e.g., *Indian Act*, sectoral governance or comprehensive governance arrangements inside or outside treaty or over declared Aboriginal title lands), it will need to make a number of critical policy decisions. One of the most important but controversial decisions will be deciding what types of legal interests in the First Nation land there will be. What types of interests in lands does the Nation want to create and what rights are associated with those interests? Who can hold those interests and how are they acquired? Once interests in lands are created, how are they registered and transferred? Should special consideration be given to interests that might be created for non-citizens (e.g., whether those interests are lesser or the same as for citizens and under what conditions)? These are a few examples of land management questions that a Nation will have to address. The pros and cons of the options will be a subject of much debate in communities and with Canada and, where appropriate, British Columbia. It is also important to remember that the issues, perspectives and options for land management continue to evolve.

Considering the Options

Every Nation should consider creating a critical path that incorporates fundamental policy questions on lands and land management and that reflects its vision and addresses the priorities necessary to meet its vision and needs. It should also have an understanding of how *Indian Act* land management works and what changes are needed. There are now a number of options along the governance continuum for First Nations with respect to lands and land management. These options, some of which have been discussed or alluded to above, include assuming Ministerial powers under the *Indian Act*, participating in a variety of sectoral First Nations–led legislative land governance initiatives, and addressing lands and land management in comprehensive governance arrangements. These options can be divided between those that are generally applicable to reserves, those that are a part of modern treaty-making and those that are developing with respect to governance over Aboriginal title lands and within Nations' ancestral lands. With respect to reserves, these options primarily involve the federal government, whereas off-reserve options may involve both the federal government and the provincial government (i.e., modern treaty-making) but generally involve only the provincial government (e.g., strategic engagement agreements and reconciliation agreements).

It is sometimes hard to determine the difference between the options, and this chapter will help First Nations navigate the evolving options. There are a number of other resources available to assist First Nations on the issue of how title to First Nations lands should be held, what powers of administration are required, and the role First Nations governments will play in managing land transactions.

This is a complicated legal area and good legal advice is essential to understanding the options. Once fundamental questions about land tenure have been discussed and policy considerations developed, how First Nations create interests will have an impact on the use and value of their lands.

***INDIAN ACT* GOVERNANCE**

Under the *Indian Act*, there are no options for First Nations to assume jurisdiction over the category of land governance that is typically carried out by provincial governments through their land acts — such as the ability to create and distribute interests in land. The only jurisdiction for First Nations relates to local administration matters such as zoning under section 81 *Indian Act* (bylaws), as discussed in Section 3.19 — Land and Marine Use Planning. However, with respect to managing interests in land that are created under the *Indian Act*, there is the opportunity to manage these interests under delegated authority (under sections 53 and 60 of the *Indian Act*). It has been argued that *Indian Act* bylaws lack enforceability as well as true local control because of the Minister's ability to "disallow" community created bylaws.

There are 32 sections (approximately 25 percent) of the *Indian Act* that deal with lands and land management. Some sections deal with the same matters addressed off-reserve in provincial legislation (i.e., granting interests in land and registering them, etc.), while others deal with the local governance and management of lands (i.e., band bylaws over zoning, construction of buildings, etc.) found in section 81 of the *Indian Act*. Some First Nations have used these powers to enact a local government or municipal-type system of land-use regulation for planning and zoning purposes. This aspect of land management is also considered in Section 3.19 — Land and Marine Use Planning.

Other sections of the *Indian Act* outline the Minister's role with respect to considering and approving land transactions on behalf of either the "band" or the individual members. In this regard, the Minister has the power to delegate responsibility under sections 53 and 60 of the *Indian Act*:

> 53. (1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,
>
> (a) manage or sell absolutely surrendered lands; or
>
> (b) manage, lease or carry out any other transaction affecting designated lands.
>
> **Control over lands**
>
> 60. (1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.
>
> **Withdrawal**
>
> (2) The Governor in Council may at any time withdraw from a band a right conferred on the band under subsection (1).
>
> R.S., c. I-6, s. 60.

The administrative powers delegated under sections 53 and 60 do not go to the core jurisdiction powers needed by a government over its lands. There is no provision in the *Indian Act* for a First Nation to determine what type of interests can be established in its land and no recognition of customary tenure systems based on Indigenous legal traditions. Interestingly, though, there is one way in which customary possession can be recognized. Under section 42(2), the governor in council may make regulations providing that a deceased Indian, who at the time of death was in possession of land in a reserve, shall, in such circumstances and for such purposes as the regulations prescribed, be deemed to have been lawfully in possession of that land at the time of death.

It is important to recognize that the authorities under sections 53 and 60 are not governmental in nature (i.e., they do not confer law-making authority), but rather confer administrative responsibility for land transactions on behalf of the Crown. This administrative power only addresses aspects of land decision-making, which in the case of an individual off-reserve is strictly a private matter, with little or no government involvement. Typically, private land transactions are subject to land use laws, and two parties cannot contract out of the application of laws such as zoning laws. This is so even if the government is a party to the lease.

However, in the absence of First Nations bylaws or other laws respecting land use on-reserve, there have been attempts by AANDC and First Nations to regulate land use through contractual provisions in leases. That is not the best way to govern lands. First Nations can get away with this approach to some degree, where the "band" itself is the landlord or the lessor, but not where a "band" citizen and third party may be entering into a lease. It is not surprising that leases have been used in this way as people try to make the best of the *Indian Act* system. However, there are now other options.

SECTORAL GOVERNANCE INITIATIVES

On-Reserve

A number of land management sectoral governance initiatives have been developed by First Nations in partnership with Canada, including the *Framework Agreement on First Nation Land Management*, the *First Nations Land Management Act* and the *First Nations Commercial and Industrial Development Act*. Another being proposed is a First Nations property ownership act. These initiatives deal only with reserve lands.

Framework Agreement on First Nation Land Management

The *Framework Agreement on First Nation Land Management* (Framework Agreement) was signed by the Minister of Indian Affairs and Northern Development (now AANDC) and 13 First Nations on February 12, 1996. A 14th First Nation was added shortly afterwards. The Framework Agreement applies only to those First Nations that sign on to it. To date, 112 First Nations across Canada are signatories, of which 52 have passed their own land codes through a community ratification process. The First Nations that signed the Framework Agreement established the Lands Advisory Board (LAB) and Lands Advisory Board Resource Centre (Resource Centre) to support those First Nations seeking to develop land codes and implement land governance. The LAB and Resource Centre's work includes developing model land codes, laws, documents, agreements and management systems, and assisting First Nations in developing their capacity.

The Framework Agreement sets out the principal components of a land governance regime as an alternative to the *Indian Act*. It is not a treaty and does not affect the treaty or other constitutional rights of the First Nations signatories. The Framework Agreement was ratified and brought into effect by Canada through the *First Nations Land Management Act* (FNLMA), which received royal assent on June 17, 1999.

The Framework Agreement provides First Nations with the option to exercise jurisdiction and manage reserve lands outside the *Indian Act*. The first step is to pass a council resolution indicating the community's wish to become a signatory to the Framework Agreement. This resolution is forwarded to the LAB, composed of representatives of First Nations who have signed the Framework Agreement. The LAB processes the resolution and forwards it to the AANDC Minister. Canada has developed an Assessment Questionnaire, which is available on the AANDC website and must be completed by any interested First Nation and submitted to AANDC. If Canada agrees, an adhesion document is signed by the First Nation and the Minister, making the First Nation a party to the Framework Agreement. It should be noted that Canada's acceptance is subject to the availability of federal funding (not just with respect to funds available to the First Nation, but also to AANDC's ability to undertake the federal responsibilities under the Framework Agreement, such as the completion of boundary surveys and environmental assessments) and a favourable review of an Assessment Questionnaire.

A signatory to the Framework Agreement does not automatically exercise any new land governance. As a signatory, the First Nation develops a land code and other documents specified in the Framework Agreement, which are then submitted to the community for ratification (approval). If approval is given, the First Nation has ratified the Framework Agreement and its land code becomes operational, replacing the land management provisions of the *Indian Act*.

AANDC contributes developmental funding to a First Nation that is a signatory of the Framework Agreement to help support the development of the land code. The land code is not approved by the Minister of Indian Affairs and Northern Development but is reviewed by an independent third party, called a "verifier," to ensure that it complies with the requirements of the Framework Agreement by addressing the necessary subjects. The verifier does not "approve" the land code and has no say in the actual wording. The land code must be approved by the First Nation's members in a ratification vote.

The land code provides for the following:

- identification of the reserve lands to be managed by the First Nation (called "First Nation land")
- general rules and procedures for the use and occupation of these lands by First Nation members and others
- financial accountability for revenues from the lands (except oil and gas revenues, which continue under federal law)
- procedures for making and publishing First Nation land laws
- conflict of interest rules
- a community process to develop rules and procedures applicable to land on the breakdown of a marriage
- a dispute resolution process
- procedures by which the First Nation can grant interests in land or acquire lands for community purposes
- delegation of land management responsibilities, and
- procedures for amending the land code.

In addition to the land code, there is an agreement with Canada to address the jurisdictional transfer of responsibility to the First Nation. This is called an Individual Agreement and covers:

- the legal description of the reserve lands to be managed by the First Nation
- the specifics of the transfer of the administration of land from Canada to the First Nation
- the operational funding to be provided by Canada to the First Nation for land management
- transfer of monies held in trust by Canada, otherwise known as revenue dollars, and
- follow-up to certain legacy issues, such as environmental concerns.

As with the land code, the Individual Agreement must be ratified by the members of the First Nation. All members of the First Nation aged 18 and over and living on- or off-reserve have the right to vote on the land code and the Individual Transfer Agreement. The procedure for community ratification is developed by the community in accordance with the Framework Agreement.

The verifier must confirm that the community ratification process and the land code are consistent with the Framework Agreement. The verifier will monitor the ratification process to ensure that the rules identified in the community's ratification procedure document are followed. It should be noted that the land code and Individual Transfer Agreement would not be approved unless at least 25 percent plus one of all eligible voters vote to approve them.

Lands and natural resources that were previously managed under the *Indian Act* will be governed under a land code. Reserve lands remain "Lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867*. Under the Framework Agreement, the current *Indian Act* tax exemption on reserve lands, and on personal property situated on-reserve, also continues.

In addition, First Nations lands will be protected as lands that cannot be alienated (sold) unless the First Nation receives other lands in exchange and those lands are made reserve lands. This protection does not exist under the *Indian Act*. Third-party powers to expropriate reserve land are gone. Only Canada, in a very limited circumstance (war measures), can expropriate reserve lands once a land code is in effect.

First Nations operating under land codes have full legal status and the powers needed to manage and govern their lands and resources. This power covers both the administrative management aspect and the governance or jurisdictional elements of land management. First Nations exercising their jurisdiction not only have local government–type powers over areas such as zoning and land use planning, but also provincial and federal government–type powers, such as the establishment of laws

under which interests are created, transferred and registered, as well as environmental protection and assessment. While operational First Nations are unable to technically "sell" the underlying title to their lands, they are able to lease or develop their lands and resources, subject to any limits imposed by their own community in its laws and land code. This includes creating "ownership" in interests in lands (e.g., a certificate of possession or long-term lease) that can be bought and sold.

A First Nation has the power to make environmental protection and environmental assessment laws once its land code is in effect.

A First Nation has the authority to appoint justices of the peace to enforce and adjudicate offences under these First Nation laws. If no such justices are appointed, First Nation laws can be enforced through any court of competent jurisdiction.

The Framework Agreement provides the First Nation with all the powers of an owner in relation to its First Nation land, except for control over title or the power to sell title. The First Nation's council can manage land and resources, as well as revenues from the land and resources, in accordance with its land code.

After the land code has been ratified, existing third-party interests in land on a reserve, such as leases, continue in effect under the land code, according to their original terms and conditions. No new interests or licences may be acquired or granted except in accordance with the land code.

It is important to note that after a First Nation takes over land governance responsibility, Canada will remain liable for and will indemnify a First Nation for losses suffered as a result of any act or omission by Canada or its agents that occurred before the land code came into effect. After the date on which a land code comes into effect, the First Nation is responsible for its own acts or omissions in governing its lands.

Under the Framework Agreement, a First Nation also has the power to acquire private interests in lands, by expropriation, for community purposes upon payment of fair compensation to those whose interests are affected. Rules for expropriation will be set out in the land code or in a First Nation law.

A land code must make provision for a First Nation to report to its citizens and to be accountable for its governance of lands, resources and revenues. A First Nation is also required to enact a law within 12 months of passing the land code to address spousal rights on First Nation lands subject to the land code if a marriage breaks down. These laws, rules and procedures will ensure the equality of women and men. Canada enacted the *Family Homes on Reserves and Matrimonial Interest or Rights Act* (S.C. 2013, c. 20) regarding matrimonial property on reserves in July 2013 (see Section 3.22 — Matrimonial Property). Essentially, in absence of First Nation laws on this matter, this legislation sets rules for the division of reserve land interests and related matters in the event of marriage breakdown. Enacting a matrimonial property law under a land code jurisdiction exempts a First Nation from the federal regime.

An operational First Nation has the power to make laws establishing its own processes for dealing with land and resource disputes. Processes can include mediation, neutral evaluation and arbitration. This can be an important exercise of First Nations jurisdiction. Today, there is no authority under the *Indian Act* for dispute resolution. As many First Nations are aware, land disputes between individuals over reserve lands go to outside courts. The process is expensive, slow and often contrary to community values (see Section 3.2 — Administration of Justice).

There are also provisions in the Framework Agreement for resolving disputes between a First Nation and Canada on the meaning or implementation of the Framework Agreement, without having to go to court.

Under the *Indian Act*, Canada maintains a registry of interests in reserve lands. Because of the change in land management and jurisdiction when a First Nation enacts a land code, a more modern and effective registry system was needed. The *First Nation Land Registry Regulations* were developed by the Lands Advisory Board and Canada to ensure that interests created under a land code in First Nation lands are registered in priority, electronically and instantly. These important features provide a level of certainty to financial institutions and investors that does not exist under the *Indian Act* land registry (ILRS), which is only based on policy and is less efficient.

The Framework Agreement does not authorize taxation laws relating to real or personal property. Such laws can be made separately under section 83 of the *Indian Act* or under the *First Nations Fiscal Management Act*. The First Nation's council can continue to make bylaws under section 83 of the *Indian Act* (see Section 3.29 — Taxation).

Haisla Nation Liquefied Natural Gas Facility Regulations

In January 2013, the Haisla signed a regulatory agreement with Canada and the operators of Kitimat LNG respecting a proposed multi-billion dollar project proceeding on Haisla reserve land (IR #6) at Bish Cove. The agreement relates to the *Haisla Nation Liquefied Natural Gas Facility Regulations*, which were approved by the federal Cabinet under the *First Nations Commercial and Industrial Development Act* (FNCIDA). The agreement gives the provincial government the authority to administer and enforce federal regulations for projects on IR #6, and ensures that on- and off-reserve projects, in this case LNG facilities, are subject to the same regulations (environmental, etc.) and enforcement. The Haisla Nation was the first community in BC to have successfully negotiated an FNCIDA regulation and implementation agreement. The regulation and the agreement were proposed and negotiated by Haisla Nation Council in order to create the certainty necessary to maximize the chances that this project will be built. If constructed, the Bees LNG facility will be the most valuable on-reserve industrial facility in Canada.

There are currently 112 First Nation signatories of the Framework Agreement, and an additional 62 are on a waiting list. All First Nations that want to use this modern governance tool to essentially exercise their right of self-government should be able to do so.

CHECKLIST	
1.	*Becoming a signatory to the Framework Agreement:* Council passes a resolution requesting to be a signatory to the Framework Agreement and forwards it to the AANDC Minister and Lands Advisory Board. Subject to AANDC funding availability and AANDC agreeing to accept the Nation into the process, the chief signs the Framework Agreement.
2.	*Developing a Land Code:* The First Nation creates a working group or lands committee composed of First Nation citizens to develop a draft land code. Support is provided by the Lands Advisory Board and Resource Centre. A verifier checks the draft land code to ensure compliance with the Framework Agreement.
3.	*Negotiation of Individual Agreement with Canada:* The Individual Agreement addresses the transition to First Nation land governance, identifies the boundaries of reserve lands, outstanding environmental issues, revenue funds to be transferred and funding for new land governance responsibilities.
4.	*Ratification Process:* The First Nation develops the ratification process for the land code and Individual Agreement that meet the requirements of the Framework Agreement.
5.	*Surveys and Environmental Assessment of Lands:* There must be confirmation of boundaries and an assessment of the environmental condition of the lands. This is done at Canada's expense and additional surveys or assessments may be required.
6.	*Ratification:* The land code and Individual Agreement are ratified by the citizens.
7.	*Operational:* Upon coming into force on the date set out in the ratified land code, the First Nation will take over governance of its reserve lands.

First Nations Commercial and Industrial Development Act

The *First Nations Commercial and Industrial Development Act* (S.C. 2005, c. 53) (FNCIDA), and as amended by the *First Nations Certainty of Land Title Act* (S.C. 2010, c. 6), was developed and led by a group including Squamish and other First Nations that saw the need for more comprehensive regulation of major commercial and industrial development on their reserves. The act allows the federal government to produce regulations for complex commercial and industrial development projects on-reserve. Essentially, it provides for the adoption of regulations on reserves that are compatible with provincial rules off-reserve. This compatibility with existing provincial regulations increases certainty for the public and developers, while minimizing costs.

Federal regulations are only made under FNCIDA at the request of participating First Nations. The regulations are project-specific, developed in cooperation with the First Nation and the relevant province, and are limited in application to the particular lands described in the project.

These regulations allow the federal government to have the province carry out the monitoring and enforcement of this new regulatory regime via an agreement between the federal government, the

First Nation and the province. The initiative allows First Nations to opt into the federal legislation and come under the federally enacted regulations.

The regulations will be specific to the First Nation involved, and while they may serve as a model for others, each First Nation will have to address its particular circumstances in a separate FNCIDA regulation. Given the involved process and the First Nation investment necessary to complete a proposal (see checklist below), it appears that this initiative is best suited to major commercial developments. Finally, Canada will have to be convinced of the need to proceed with the regulation for a First Nation and to expend the necessary resources.

To date, regulations under this act have been made for Fort McKay, Fort William and Haisla.

CHECKLIST	
Step 1: Project Identification and Proposal	
•	Prepare the formal written proposal and include supporting documentation.
•	Obtain a council resolution supporting the development of regulations under FNCIDA.
•	Hold exploratory project discussions with the AANDC Regional Office and other key stakeholders (e.g., outside investors).
Step 2: Project Review and Selection	
•	Work with the AANDC Regional Office to complete a legal risk assessment and cost-benefit analysis.
•	Work with the AANDC Regional Office to complete an evaluation of the proposal, including a detailed review of the project, the regulatory needs, the feasibility of using FNCIDA, the level of community support, and more.
Step 3: Negotiation and Drafting	
•	Start preparing the project work plans, specifying required resources, key milestones, plans for engaging stakeholders (who, when and how), strategies for risk management and target timelines.
•	Assist AANDC with preparing the materials required for the AANDC Minister and the federal Treasury Board to approve the regulations.
•	Negotiate and sign the tripartite agreement with the federal government and the province.
•	Negotiate and put in place all required land tenure instruments.
Step 4: Administration, Monitoring and Enforcement	
•	Start construction of project facilities and infrastructure.
•	Start operation of the project.
•	Assist the province in its administration, monitoring and enforcement of the regulations, as set out in the tripartite agreement.

Detailed Description of Each Step: Federal regulations under the FNCIDA are only made at the request of participating First Nations through a project proposal. The checklist above lists the steps involved in developing such a proposal. The following is a detailed description of each of these steps.

Step 1: Project Identification and Proposal: This step involves the First Nation developing a formal written proposal on the project and providing documentation as set out by AANDC. In addition, there must be a council resolution requesting the development of regulations for the First Nation under FNCIDA.

The tasks to be completed during this step are:

1. The First Nation identifies an industrial or commercial project that needs regulations in order to advance, and for which regulations under FNCIDA are possible.
2. The First Nation, the AANDC Regional Office and other key stakeholders (e.g., outside investors) engage in initial exploratory discussions. The aim of the discussions is to determine if further analysis is needed to establish project eligibility under FNCIDA. (See Step 2 for the list of five questions that form the criteria for using FNCIDA.)

3. The First Nation prepares the required documentation, seeks to build the necessary skills and capacity to complete the process, and secures community support.
4. The First Nation passes a council resolution supporting the development of regulations under FNCIDA.

The project proposal sets out all project information supporting the application, including:

- a general description of the project
- a legal description of the land that will be used
- confirmation that the land is reserve land, or that it is proposed as an addition to reserve (ATR), with an indication of the current stage of the approval process
- a description of how the proposed lands will be used
- a general proposal for key lease issues (e.g., term, rent, royalties, licences)
- an identification of any possible contentious issues
- information on potential project risks, including potential loss of economic opportunities should the project not proceed
- an evaluation of the existing or desired regulatory framework
- a confirmation of community support or a timeline to obtain it
- an indication of provincial readiness to negotiate
- a proposed timeline
- an analysis of the economic and other benefits.

Step 2: Project Review and Selection: The second step begins when the AANDC Regional Office receives the council resolution requesting the development of regulations under FNCIDA, the formal written proposal and the appropriate supporting documentation. Most of the tasks required during this step are to be completed by AANDC with help from the First Nation. AANDC may request additional information or clarification from the First Nation, as it assesses and evaluates the submission. At this stage, the First Nation will be in a position to work with the relevant AANDC Regional Office to complete a legal risk assessment and cost-benefit analysis, identifying the cost of developing regulations and the potential for loss of economic development opportunities if the project does not proceed. The First Nation will also work with the AANDC Regional Office to evaluate the proposal based on established criteria set out in this step. Essentially, AANDC undertakes a thorough evaluation that includes a detailed review of the project, its regulatory needs, the feasibility of using FNCIDA, the level of community support, the risks inherent in the project and an analysis of costs and benefits.

The criteria AANDC uses when reviewing a formal proposal to develop regulations under FNCIDA can be summarized by the following questions. If the answer to each of these questions is yes, then the project qualifies in principle for FNCIDA.

1. Do the lands involved in the project meet all requirements (legal, policy, etc.) so that AANDC is able to issue land tenure?
2. Is there currently a lack of regulations to deal with environmental or health and safety issues, regardless of the degree of possible impact?
3. If there is a lack of existing regulations, is it preventing economic development and is there no other regulatory regime that could be used to implement the project?
4. Have all other alternatives for regulating the project, including the *Indian Act*, been considered and ruled out, and is using FNCIDA the only possible approach?
5. Is the province supportive in principle of the project and will it be willing to play a role in the administration and enforcement of the regulations that would be developed under FNCIDA?

This step concludes when AANDC decides whether or not to proceed to the next step — the negotiation and drafting stage — and whether or not to allocate resources to developing the regulations.

Step 3: Negotiation and Drafting: This step starts once AANDC has given its approval for the project proposal. Once approval is granted, detailed project work plans can be developed. These plans set out:

- the resources required to implement the project
- a list of key milestones
- plans for engaging stakeholders (who, when and how)
- strategies for risk management, and
- timelines.

Throughout this step, there will be close communication and consultation between the government of Canada, the First Nation and the provincial government. This is required to develop the three important project-specific documents: the regulations; the tripartite agreement between the government of Canada, the First Nation and the provincial government; and the land tenure instruments.

The tripartite agreement is signed by the government of Canada, the provincial government and the First Nation. AANDC will prepare guidelines and a template that will help the government of Canada, the First Nation and the provincial government negotiate a tripartite agreement. The guidelines will outline the tools for establishing effective working relations with provincial governments and First Nations and compliance with orders in council, including the roles of signing authorities and program authorities. The template for tripartite agreements includes:

- a project description
- the project's technical requirements and processes
- the responsibilities of all parties to the agreement
- the key performance indicators
- a dispute-resolution process
- the prosecution arrangements
- a framework for operational management, including administration, monitoring and enforcement
- the project's costs and resources
- other items as required by the specific project.

The Minister of AANDC and Cabinet approve the regulations. The regulations are prepared by AANDC in consultation with the First Nation. The package — including the regulations, a communication plan, a Regulatory Impact Analysis Statement, and a briefing note — is submitted to Cabinet for consideration. Communication with the First Nation will continue throughout the various stages of the regulatory development process. This step concludes when the lease and tripartite agreement are executed and the regulations come into force.

Step 4: Administration, Monitoring and Enforcement: Once the lease and tripartite agreement have been executed and the regulations are in force, Step 4 begins. This step deals with the ongoing administration, monitoring and enforcement of regulations, agreements and land tenure instruments during the life of the project. This includes the construction of facilities and infrastructure and other project operations. Ultimately, it also includes the decommissioning of the project facilities and the reclamation of the lands used in the project.

Based on the tripartite agreement, and any other signed agreements or contracts, monitoring and enforcement required under the regulations will be done by the provincial government. Provincial governments have a lot of experience in the administration, monitoring and enforcement of off-reserve industrial activities. Carrying out these tasks on the reserve in a way agreed to by the First

Nation and the government of Canada is a natural extension of their work. Because of the provincial government's expertise, their role in administering, monitoring and enforcing the regulatory regime will improve both operational efficiency and transparency, and reduce costs.

Issues arising during the Administration, Monitoring and Enforcement step may necessitate negotiation and drafting of amendments to the regulations and/or tripartite agreement. In such cases, as with the project approval process, approval and allocation of resources would be required. Step 3, the Negotiation and Drafting step, would apply to any such amendments.

Proposed First Nations Property Ownership Act Initiative

A legislative proposal for a First Nations Property Ownership Act (FNPOA) has been promoted through the First Nations Tax Commission addressing one aspect of land management — the creation and registration of interests in reserve lands through a national land registry framework designed around the "Torrens" land registry system. Under this system, First Nations would have the option to grant fee simple interests in their reserve lands to all persons. The proposed act would regularize how these interests on-reserve are established for participating First Nations and recorded in a new national registry that would offer a "guarantee" — a level of insurance that the interest created is valid. The proposal includes establishing a national First Nations institution to serve this purpose. The initiative's stated objectives are to unlock "dead capital" by creating the opportunity for fee simple ownership on reserve, backed by a modern Torrens land registry, with the aim of capitalizing on the land's tremendous economic potential. The details of this initiative are limited and no proposed legislation has been introduced.

It should be noted that all of the sectoral initiatives and comprehensive governance arrangements dealing with land management allow First Nations to choose whether to create private property interests in reserve lands or treaty settlement lands. Indeed, modern treaty arrangements provide a Nation with the ability to grant fee simple interests and to use the provincial Torrens system (with the limitation that some interests can only be held by citizens — namely fee simple interest). This initiative has drawn considerable criticism from First Nations, including concerns that FNPOA would duplicate work already underway through other sectoral initiatives, and that it only considers one aspect of land management — the creation of interest in land and from a particular political perspective on land tenure.

Ancestral Lands

While significant advances have been made through sectoral governance initiatives to address lands and land management on-reserve, there are a growing number of examples of how Nations have begun to address lands and land management off-reserve and within their ancestral lands through various agreements negotiated with the provincial government. These agreements between First Nations and British Columbia constitute a type of sectoral governance initiative that is fast becoming very important in the age of recognition and reconciliation and will likely increase in importance as all governments grapple with the implications of declared Aboriginal title lands. These agreements are generally referred to as reconciliation agreements, reconciliation protocols or strategic engagement agreements (SEA). They are not bound by one set of prescribed policy, legislation or any single overarching agreement with a group of First Nations, as is typically the case with sectoral governance agreements on-reserve with the federal government (e.g., the *Framework Agreement on First Nation Land Management*). Rather, these agreements with the Province are negotiated on a case-by-case basis with individual Nations, based on the priorities of the First Nation government involved and the Province. (Strategic engagement agreements are explored further in Section 1.3 — Sectoral Governance Initiatives.) In some cases, the agreements apply to a number of "bands" through their tribal organizations. The *Kaska Dene Strategic Agreement 2012*, which includes four *Indian Act* bands, and the *Stó:lō First Nations Strategic Engagement Agreement*, which includes 14 *Indian Act* bands,

are examples. These agreements are all without prejudice as to how matters of Aboriginal title and rights might ultimately be resolved, either in court or through negotiations. Further, some of the agreements contemplate the signatory First Nations entering into a modern treaty at a later date. Arguably, what these agreements do provide is some degree of involvement and recognition of a Nation's immediate role in land and resource management, which includes shared decision-making, in its ancestral lands. All of the agreements include a map of the geographical extent of the lands over which the agreement applies, which is usually referenced as the Nation's "traditional territory." The agreements are not usually taken to the citizens for ratification; instead, they are signed by the governing bodies of the *Indian Act* "bands" that constitute the tribal organization and/or the legal representatives of the tribal organization.

The parties to the agreements typically establish government-to-government forums for decision-making purposes (for instance, in the Kaska SEA it is called a "Natural Resource Council" and in the case of the Ktunaxa SEA a "Senior Forum" and a "Joint Resources Forum"). These bodies (forums) are intended to be the venue through which the parties interact and engage in dialogue on land and resource matters, including those respecting shared decision-making and other matters, as set out in the agreements. Often, technical working groups are also formed to support the work of the government-to-government forum. Central to all of these agreements are mutually agreed-upon procedures for consultation and accommodation that involve the various forums and working groups that the agreements establish. The agreements typically adopt a shared decision-making framework that is scaled according on the importance or significance of the land use decision(s) that need to be made. For example, an agreement may provide for a shared decision-making framework/matrix that has four "Shared Decision" levels and a fifth "Strategic Shared Decisions" level, with the agreement then setting out a corresponding description of the First Nation's involvement in the land and resource use decisions being made by the province for each level. An example of a shared-decision making framework and the corresponding decision-making matrix, taken from the *Kaska Dene Strategic Engagement Agreement*, is included at the end of this chapter.

A typical shared decision-making matrix makes specific reference to the involvement of the Aboriginal group with respect to "land tenures" (namely, the creation of legal interests in Crown lands), which is one of the central and most important aspects of these arrangements. It also includes a description of the types of land tenure decisions being made and the First Nation's involvement in that decision, ranging from involvement in minor administrative decisions that are clerical in nature to the full disposition of fee simple grants from previously untenured lands. The First Nation(s) and the Province typically engage through a land and resource council or similarly named body that provides recommendations to provincial decision-makers.

It should be noted that shared decision-making mechanisms are still in the early stages of development and testing for efficiency and effectiveness, and there are no templates; rather, each one is different, depending on the First Nation or Aboriginal group involved in the agreement. Other options may be developed, both as sectoral initiatives or as part of comprehensive arrangements, and any of these arrangements should properly reflect the developments in the law of Aboriginal title and rights, including treaty rights. Further, as is the case with all of the existing agreements, they should typically not be restricted to a single matter, such as land tenures: shared decision-making over ancestral lands involves many other matters, such as forestry, mining, land-use planning, alternative energy, watershed management, environment, and so on. From this perspective, and although described as "sectoral" for the purposes of discussion in this report, these agreements are really more "comprehensive" in nature with respect to ancestral lands, although they cannot be categorized as comprehensive governance arrangements.

Kunst'aa guu — Kunst'aayah Reconciliation Protocol

The Haida Nation has negotiated a unique agreement with British Columbia, the *Kunst'aa guu — Kunst'aayah Reconciliation Protocol*, which is supported by provincial legislation, the *Haida Gwaii Reconciliation Act* (S.B.C. 2010, c. 17). The protocol and the act provide that there is shared decision-making on Haida Gwaii through the Haida Gwaii Management Council. What distinguishes this agreement from other reconciliation agreements and strategic engagement agreements and requires legislation is that the decision-making is truly shared. Amendments were required to other provincial legislation to reflect the shared decision-making — for example, the council setting the annual allowable cut for forestry on Haida Gwaii.

The Haida Gwaii Management Council is established by the joint operation of a resolution of the Haida Nation and the provincial act and consists of two members appointed by resolution of the Haida Nation after consultation with British Columbia, two members appointed by the lieutenant governor in council after consultation with the Haida Nation, and a chair appointed both by resolution of the Haida Nation and by the lieutenant governor in council. A decision of the council must be made by consensus of the members, and failing consensus, by majority vote of members. The council has an important governance role with respect to forest management (see Section 3.13 — Forests), protected areas, and heritage and culture (see Section 3.16 — Heritage and Culture). As of October 2014, for many reasons, the protocol and the act may be a considered high-water mark with respect to the recognition and exercise of a Nation's land management jurisdiction within its ancestral lands and outside of treaty.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All of the comprehensive governance arrangements provide recognition of First Nation law-making power over lands and land management, irrespective of the legal manner in which the lands are held. Subject to any specific provisions in a Nation's self-government agreement, all comprehensive governance arrangements enable the self-governing Nation to create interests in its lands (including private interests) and to register them; manage and administer its public lands; establish a framework for local zoning and municipal control; and establish a framework to govern citizens' private land transactions and the appropriate role of the governing body in private land transactions.

Because of the differences in the way lands are held under treaty arrangements and self-government arrangements outside treaty, there are important distinctions with respect to how land interests are created and registered.

Arrangements outside Modern Treaties

In the non-treaty model at Westbank, the Nation's reserve lands continue to be held by Canada under section 91(24) of the *Constitution Act, 1867*. However, the *Westbank First Nation Self-Government Agreement* provides that Westbank has all the rights, powers and privileges that Canada has as an owner with respect to those lands. The Westbank arrangements restrict the surrender of Westbank lands and limit federal expropriation powers. Under the Westbank arrangements, while the Nation can create private interests in Westbank lands, it cannot grant an interest in fee simple, as Westbank does not hold the lands in fee simple.

For Sechelt, where lands are held as fee simple lands under section 92 of the *Constitution Act, 1867* but remain "Lands reserved for the Indians" under section 91(24) (see Part 1: Section 31 of the *Sechelt Indian Band Self-Government Act*), the Nation also has full authority to manage its lands as an owner in accordance with its constitution and the *Sechelt Indian Band Self-Government Act*.

The *Westbank First Nation Self-Government Agreement* allows for registration of interests in Westbank lands in an alternate registry created by agreement between Westbank and Canada. Pursuant to this power, Canada made the *Westbank First Nation Land Registry Regulation* under the *Westbank First Nation Self-Government Act* to create a land registry system that includes priorities for interests created in Westbank lands.

Sechelt is somewhat different, in that its lands are still federal section 91(24) lands and are registered under the *Sechelt Indian Band Self-Government Act* in the *Indian Act* land registry (see Part 1: Section 27). This will not change until or unless Sechelt Indian Band under section 28 of the Sechelt Act and Sechelt laws chooses to register certain parcels of Sechelt lands in the provincial system. Sechelt Indian Band has passed laws of this nature and identified some parcels of land that are registered in the BC land registry. The remainder of Sechelt lands continue to be registered in the federal Indian lands registry.

Arrangements under Modern Treaties

Under existing modern treaties, First Nations own their land in fee simple, but there are rules regarding this fee simple that are not the same as for fee simple held by a person in accordance with the provincial land tenure system established under the *Land Act*. These treaty provisions have been described as "fee simple plus." As owners of the land and in accordance with the self-governing powers set out throughout a treaty, modern treaty Nations govern over their lands, including through the laws made with respect to the administration of the land (land management). Modern treaty proponents have cited land and resource ownership as one of the most important tools of self-government at their disposal. This is because the source of authority for First Nations laws emanates from the proprietary interest in the land and as such can supersede, displace or, in the event of a conflict, override provincial and federal laws. BC First Nations under modern treaties are relying on the fact that they have ownership of their lands and resources, and increasingly are using the powers of governance associated with ownership of lands and resources to regulate and manage a wide variety of matters independently of other governments and in addition to the specific powers of government set out in their treaty arrangements.

Individual interests in First Nations lands under the treaty arrangements could theoretically include private fee simple interests held by a non-citizen. The Nisga'a under Nisga'a law have permitted individual fee simple interests that are registered in their own land registry, for a small area of land in each of their villages. Under the *Tsawwassen First Nation Final Agreement*, in coordination with the provincial land management system, Tsawwassen First Nation has given fee simple interests to its citizens under Tsawwassen law, and these interests are registered in the BC land registry with restrictive covenants that they cannot be transferred to non-members. Under its law, Tsawwassen can also grant fee simple interest to a related and wholly owned legal entity. In this way, lands have been transferred to a land development corporation that then leases lands to other persons for economic development purposes.

Treaty models such as Tsawwassen are based on the principle that the First Nation may move some lands into a land management model or system that is tied to the provincial government and utilizes its Torrens registry system. If the treaty First Nation does not integrate its land management system with that of the province, it has the jurisdiction to create its own system, including the establishment of its own land registry.

The Yale and Tla'amin final agreements contain similar language, with some expanded explanation of their law-making and registration abilities.

Table — Comprehensive Governance Arrangements

	UNDERLYING TITLE TO LANDS	REGISTRATION OF INTERESTS IN LAND	LAW MAKING POWERS IN RESPECT TO LAND MANAGEMENT	CONFLICT OF LAWS
Sechelt	Reserves under the *Indian Act* are transferred to Sechelt as fee simple. (s. 23) The Sechelt Lands remain section 91 (24) *Constitution Act, 1867* lands as "Lands reserved for Indians." (s. 31)	Sechelt Lands can be registered either in the Reserve Land Register kept under section 21 of the *Indian Act* or where the Council makes a law authorizing it registration of interests in specified parts of Sechelt Lands can be in the BC land registry system. (s. 27)	Sechelt jurisdiction over land management is contained in the *Sechelt Self-Government Act*, the Sechelt Constitution and in Sechelt laws enacted under the Sechelt Act and the Sechelt Constitution. (s. 14(f))	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act. (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)
Westbank	Title remains with Canada and the lands are "Lands reserved for Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*. (Part X, s. 87)	Westbank Lands may be registered in registry established by Westbank, under the Indian Land Register or under a new registry established by Canada. (Part X, s. 96) Currently Westbank Lands are registered in a Federally run self-government land registry under the Westbank Land Registry Regulations.	Westbank has jurisdiction to make laws regarding creation of interests and transfers, procedure for encumbering interests, expropriation of Westbank lands for community purposes, zoning, building standards, access to lands and residency. (Part X, s. 103–107)	Westbank law prevails. (Part X, s. 110)
Nisga'a	Nisga'a Lands are held as fee simple lands by the Nisga'a Nation and are Constitutionally protected. (Ch. 3, s. 3)	May be registered in accordance with Nisga'a law or in the provincial land registry but not the Indian land registry or another registry created by Canada. (Ch. 11, s. 50(a)) Currently register in accordance with the *Nisga'a Land Registry Act*.	Nisga'a Lisims Government and Nisga'a Village Governments have the principal authority under the Agreement to make laws with respect to Lands and assets including the creation of interests in Nisga'a Lands. (Ch. 11, s. 44)	Nisga'a law prevails. (Ch. 11, s. 45)
Tsawwassen	Tsawwassen Lands are held as fee simple lands by Tsawwassen First Nation under the Final Agreement which is a constitutionally protected treaty. (Ch. 4, s. 2) The Tsawwassen state this is a section 35 *Constitution Act, 1982* form of title and is constitutionally protected under that section. Under Tsawwassen Law, Tsawwassen can create Tsawwassen Fee Simple Interests, which are subject to conditions, restrictions, reservations, and provisos set out in Tsawwassen law. This includes restrictions on ownership. (Ch. 4, s. 3)	Tsawwassen Lands are registered in the provincial land registry in accordance with Tsawwassen laws and the Final Agreement. (Ch. 5, s. 1)	Tsawwassen has paramount jurisdiction to make laws with respect to lands, including land management, use and control: creation, ownership and disposition, and establishment and operation of a land title or land registry. Powers to make laws with respect to access to Tsawwassen Lands. Tsawwassen has jurisdiction to make laws to dispose of its estate in fee simple in any parcel of Tsawwassen Lands or lesser estate without the consent of Canada or British Columbia. (Ch. 6, s. 1)	Tsawwassen law prevails. (Ch. 6, s. 5)
Maa-nulth	Lands are held as fee simple lands by the Maa-nulth. Constitutionally protected. (s. 2.3.1)	Registered in the provincial land registry in accordance with Maa-nulth laws and the Final Agreement. (s. 3.3.1)	Each Maa-nulth First Nation Government has jurisdiction to make laws regarding use, ownership and disposition of Maa-nulth Lands. (s. 13.14.1)	Maa-nulth laws prevail. (s. 13.14.2) If the *Land Title Act* applies to a parcel of Maa-nulth First Nation Lands, the *Land Title Act* prevails to the extent of a conflict with respect to that parcel. (s. 3.2.3)

Table — Comprehensive Governance Arrangements... *continued*

	UNDERLYING TITLE TO LANDS	REGISTRATION OF INTERESTS IN LAND	LAW MAKING POWERS IN RESPECT TO LAND MANAGEMENT	CONFLICT OF LAWS
Yale	Lands are held as fee simple lands. (s. 12.2.1)	Registered in the provincial land registry in accordance with this Agreement and the requirements of the *Land Title Act*. (s. 13.1.1)	Yale First Nation Government may make laws with respect to the use, ownership and disposition of Yale First Nation Land. (s. 12.12.1)	Yale First Nation laws prevail. (s. 12.12.2) Notwithstanding 12.12.2, the *Land Title Act* prevails to the extent of a Conflict with Yale First Nation Law under 12.12.1. (s. 12.12.5)
Tla'amin	Lands are held as fee simple lands. (Ch. 3, s. 3)	Registered in the Land Title Office in accordance with this Agreement and the requirements of the *Land Title Act*. (Ch. 3, s. 2)	The Tla'amin Nation may make laws with respect to the use, creation, allocation, ownership and disposition of estates or interests in Tla'amin Lands. (Ch. 5, s. 17) The Tla'amin Nation may make laws regulating public access on Tla'amin Lands. (Ch. 5, s. 19)	Tla'amin laws prevail (Ch. 5, s. 18) Federal or provincial laws prevail with respect to access on Tla'amin Lands. (Ch. 5, s. 20)

Table — BC First Nations' Laws/Bylaw in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(f) Local works			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Nisga'a Village Of Gingolx	6-88	LOCAL WORKS	Bylaw Respecting Governing Roads And Maintenance
Tk'emlups te Secwepemc	1995-05	LOCAL WORKS	Bylaw Respecting Construction — Building
Bylaws — Section 81(1)(i) Survey and allotment of reserve lands			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Skeetchestn	1986-1	LAND SURVEY	Bylaw Respecting Land Use
Tzeachten	1979-12	LAND SURVEY	Bylaw Respecting The Allotment Of Land On Reserve
Bylaws — Section 81(1)(h) Construction			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Aitchelitz	0	BUILDING	Housing Standards
Ashcroft	1980-1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Boston Bar	1980-1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Campbell River	6-79	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards
Campbell River	N/A	CONSTRUCTION	Bylaw Respecting Building
Canim Lake	1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Chawathil	01080-197	BUILDING	Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
Cheam	1-1979	BUILDING	Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
Coldwater	1-1979	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards
Cook's Ferry	1-1980	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards
Dzawada'enuxw	5	BUILDING	Regulation Of Construction, Repair And Use Of Buildings
Gitga'at	9	BUILDING	To Provide For The Regulation Of The Construction And Repair Of Buildings Whether Owned By The Band Or By Individual Members Of The Band
Halalt	93-1	BUILDING	Bylaw Respecting Housing

Table — BC First Nations' Laws/Bylaw in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Heiltsuk	16-1980	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
			Bylaw
Katzie	2-1980	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Ka:'Yu:'K't'h'/Che:K:Tles7et'h'	01/80	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
K'omoks	6-1980	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards
Kwaw-Kwaw-Apilt	0	BUILDING	Bylaw Re Housing Standards
Kitasoo	1-1979	BUILDING	Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
Little Shuswap Lake	19891-1	BUILDING	Bylaw Re Housing Regulations, The Construction Of Buildings, Etc.
Lower Nicola	1-1979	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P. Standards)
Matsqui	0	BUILDING	Re: Housing Standards
Musqueam	IR#2	CONSTRUCTION	Bylaw Respecting Land Use And Development
Musqueam	N/A	CONSTRUCTION	Bylaw Respecting Construction Of Buildings
Musqueam	N/A	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Namgis	11	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Nak'azdli	1	BUILDING	Bylaw To Provide For Occupancy And Building Maintenance Standards (R.R.A.P.)
Nisga'a Village Of New Aiyansh	1-1979	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Nooaitch	1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Old Massett Village Council	6-1980	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Penelakut Tribe	No. 2	WATER SUPPLIES	Bylaw Respecting The Zoning And Land Use Regulation.
Peters	1-79	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Popkum	0	BUILDING	Re: Housing Standards
Qualicum	2-1980	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Qualicum	1985-1	BUILDING	Bylaw Concerning Building
Seabird Island	1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards
Sechelt	1982-01	BUILDING	Bylaw Concerning Building
Semiahmoo	2	BUILDING	Bylaw Respecting Building
Seton Lake	2	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Shackan	1-1979	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Shxwha:y Village	0	BUILDING	Re: Housing Standards
Shxw'ow'hamel	0	BUILDING	Re: Housing Standards
Simpcw	H-1-80	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Skeetchestn	1986-2	BUIILDING	Bylaw To Establish Rrap Building Standards
Skowkale	1-1979	BUILDING	Being A Bylaw Re Occupancy And Buiilding Maintenance Standards (R.R.A.P.)

Table — BC First Nations' Laws/Bylaw in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Snuneymuxw	001-1979	BUILDING	To Provide For Occupancy And Building Standards (R.R.A.P.) Bylaw
Songhees	1	BUILDING	To Provide For Provisions Of Mobile Home Parks Or Mobile Home Subdivisions On The Songhees Indian Res.
Soowahlie	0	BILDING	Re: Housing Standards
Sumas	1-1979	BUILDING	Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
Stswecem'c Xgat'tem	1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Tk'emlups te Secwepemc	N/A	CONSTRUCTION	Bylaw Respecting Band Development Approval Process — Development, Prevention Of Nuisances, Construction And Regulation Of Land Use And Ancillary Matters On The Reserve.
Tk'emlups te Secwepemc	1980-1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Standards (R.R.A.P.)
Tla'amin	1-1979	BUILDING	Being A Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
Tsawwassen	N/A	CONSTRUCTION	Bylaw Respecting Construction Of Buildings
Tsawwassen	2-1980	BUILDING	Being A Bylaw For The Regulation For Occupancy And Building Maintenance Standards (R.R.A.P.)
Tsawwassen	3-1980	BUILDING	Bylaw To Regulate Construction And Repair Of Buildings And Standards To Maintain Buildings And Land
Ts'kw'aylaxw	1-1979	BUILDING	Bylaw To Provide For Occupancy And Building Standards (R.R.A.P.)
Tsleil-Waututh Nation	UNNUM-BERED	CONSTRUCTION	Bylaw Respecting Buildings
Tzeachten	1-1980	BUILDING	Bylaw To Provide Occupancy And Building Maintenance Standards (R.R.A.P. Standards)
Upper Nicola	1	BUJILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Westbank	#2, 1996-07	CONSTRUCTION	Bylaw Respecting Building
Westbank	1979-1	BUILDING	Re: Housing Standards
Westbank	1998-01	CONSTRUCTION/ RESIDENCE	Bylaw Respecting Residential Premises On Reserve
Williams Lake	1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Yale	1-1980	BUIILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Yakweakwioose	0	BUILDING	Bylaw Re Housing Standards
Bylaws — Section 81(1)(p1) Residency			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Fort Nelson First Nation	UNNUM-BERED	RESIDENCY	Bylaw Respecting Residency
Gitga'at (f. Hartley Bay)	01-1988	RESIDENCY	Bylaw Respecting Residency
Gwa'sala-Nakwaxda'xw	1994.06	RESIDENCY	Bylaw Respecting Residency On Band Owned Houses
Heiltsuk	20	RESIDENCY	Bylaw Respecting Residency
Homalco	1992-001	RESIDENCY	Bylaw Respecting Residency
Kanaka Bar	02-93	RESIDENCY	Bylaw Respecting Residency
Katzie	01-1988	RESIDENCY	Bylaw Respecting Residency
Kitasoo	UNNUM-BERED	RESIDENCY	Bylaw Respecting Residency
Metlakatla	1997-04	RESIDENCE	Bylaw Respecting Residency
Musqueam	UNNUM-BERED	TRESSPASSING	Bylaw Respecting Dangerous Persons
Musqueam	UNNUM-BERED	RESIDENCY	Bylaw Respecting Residency

Table — BC First Nations' Laws/Bylaw in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Nak'azdli	01-01-2011	RESIDENCE	Bylaw Respecting Residency, Allocation, Use And Occupancy Of All Band Owned Housing Units
Namgis First Nation	1995-01	RESIDENCY	Bylaw Respecting Residency
Nicomen	02-93	RESIDENCY	Bylaw Respecting Residency
Nuchatlaht	1987-01	RESIDENCY	Being A Bylaw Respecting The Vote Of Band Members
Nuxalk Nation	1989-01	RESIDENCY	Bylaw Respecting Residency
Qualicum First Nation	01-1987	RESIDENCY	Bylaw Respecting Residency
Saulteau First Nations		RESIDENCY	Bylaw Respecting Residency
Skuppah	02-93	RESIDENCY	Bylaw Respecting Residency
Spuzzum	02-93	RESIDENCY	Bylaw Respecting Residency
Stz'uminus (f. Chemainus)	UNNUM-BERED	TRESPASS AND RESIDENCY	Bylaw Respecting Trespass And Residency
Sumas First Nation	1998-01	RESIDENCE	Bylaw Respecting A Bylaw To Regulate Residency And The Orderly Allocation, Use And Occupancy Of Band Owned Houses
Tl'azt'en Nation	19	RESIDENCE	Bylaw Respecting Residency And The Orderly Allocation Use And Occupancy Of Band Owned Houses
T'sou-Ke First Nation	05	RESIDENCE	Bylaw Respecting Residency
Yale First Nation	2002-2	RESIDENCE	Bylaw Respecting Residency
Yekooche	2002-3	RESIDENCE	Bylaw Respecting The Regulation Of Residency
SECTORAL GOVERNANCE INITIATIVES			
FNLMA - FRAMEWORK AGREEMENT - OPERATIONAL	**DATE**	**FIRST NATION LAW DESCRIPTION**	
Beecher Bay First Nation/Scia'new		Land Code	
Kitselas First Nation	Jun 19, 2005	Kitselas Reserve Lands Management Act	
Kitselas First Nation	May 18, 2007	Kitselas Land Interests Law K.B.C. 2007 No.1	
Kitselas First Nation	Feb 2009	Kitselas Policy Manual — Land Grants To Members	
Kitselas First Nation	Feb 7, 2011	Kitselas Policy Manual — Land Grant Transfers Upon Death	
Leq'a: Mel First Nation	Apr 2, 2007	Leq'a: Mel Land Code	
Lheidli-T'enneh Band	Nov 15, 2000	Lheidli T'enneh Band Land Code	
Matsqui First Nation	Oct 17, 2007	Matsqui First Nation Land Code	
Pavilion Indian Band (Ts'kw'aylaxw)	Dec 14, 2003	Ts'kw'aylaxw First Nation Land Code	
Seabird Island Band		Land Code	
Shxwha:Y Village (Skway First Nation)		Land Code	
Skawahlook First Nation		Land Code	
Songhees Nation		Land Code	
Squiala First Nation	Jul 20, 2007	Squiala First Nation Land Code	
Sumas First Nation	Aug 31, 2010	Sema:Th Land Code	
Tla'amin First Nation		Land Code	
Tsawout First Nation	Oct 31, 2006	Tsawout First Nation Land Code	
Tsawout First Nation	Oct 10, 2007	Tsawout First Nation Lands Advisory Committee Policy No. 01-2007	
Tsawout First Nation	May 2008	Tsawout First Nation Trespass Law No. 02-2008	
Tsawout First Nation	Nov 2010	Tsawout First Nation Band Land And Natural Resource Disposition Law 02-2010	
Tsekani (f. Mcleod Lake)	May 20, 2003	Mcleod Lake Indian Bands Land Code	
Tsekani (f. Mcleod Lake)	MLIB 618-041111:022	Act To Apply The Mcleod Lake Indian Band Land Code To Weston Bay Indian Reserve #20 And Finlay Bay Indian Reserve #21	
Ts'kw'aylaxw First Nation	Dec 14, 2003	Ts'kw'aylaxw First Nation Land Code	
Tsleil-Waututh First Nation	Feb 2007	Tsleil-Waututh Nation Land Code	
T'sou-Ke Nation	Jan 11, 1996	T'sou-Ke First Nation Land Code	

Table — BC First Nations' Laws/Bylaw in Force... ***continued***

FNLMA - FRAMEWORK AGREEMENT - OPERATIONAL	DATE	FIRST NATION LAW DESCRIPTION
T'sou-Ke Nation	2007	T'sou-Ke First Nation Land Committee Selection Process Law
Tzeachten First Nation	Apr 24, 2008	Tzeachten First Nation Land Code
We Wai Kai Nation (f. Cape Mudge)	Aug 1, 2008	We Wai Kai Nation Land Code
Wei Wai Kum (f. Campbell River)		
MEMBER COMMUNITIES OF THE LANDS ADVISORY BOARD		
COMMUNITY	**OP**	**VOTE DATE**
BRITISH COLUMBIA		
Aitchelitz First Nation	Yes	Dec. 14, 2013
?Akisqnuk First Nation	No	
Beecher Bay First Nation	Yes	June 25, 2003
We Wai Kum First Nation (formerly Campbell River)	Yes	June 2-5, 2011, Nov. 24, 2012
Chawathil First Nation	No	
Cheam First Nation	No	
Cowichan Tribes	No	
Haisla Nation	Yes	N/A
Homalco First Nation	No	
Katzie First Nation	No	
Kitselas First Nation	Yes	Oct. 5, 2005
K'omoks First Nation	No	
Kwantlen First Nation	No	
Leq'a:mel First Nation	Yes	Dec. 3-5, 2003, June 18, 2007, March 16, 2009
Lhedili Tenneh First Nation	Yes	Oct. 28, 2000
Lil'wat First Nation (Formerly Mount Currie)	No	
Lower Nicola Indian Band	No	
Malahat First Nation	No	
Matsqui First Nation	Yes	Mar. 15, 2008
McLeod Lake Indian Band	Yes	Jan. 26, 2003
Metlakatla First Nation	No	
Musqueam	Yes	Dec. 3, 2012
Nak'azdli Band	No	
Nanoose First Nation	Yes	Aug. 8-9, 2011
N'Quatqua Band	Yes	Oct. 3, 2001
Osoyoos Indian Band	Yes	June 28, 2007
Scowlitz First Nation	No	
Seabird Island Band	Yes	Mar. 12, 2009
Shuswap Band	Yes	Sept. 5, 2014
Shx'wha:y Village	Yes	June 14, 2006
Shxw'owhamel First Nation	No	
Skawahlook First Nation	Yes	May 29, 2010
Skeetchestn Indian Band	No	
Skowkale First Nation	Yes	Dec. 14, 2013
Tla'amin First Nation (formerly Sliammon)	Yes	Mar. 20, 2004
Songhees First Nation	Yes	June 11, 2006
Soowahlie First Nation	No	

Table — BC First Nations' Laws/Bylaw in Force... ***continued***

COMMUNITY	OP	VOTE DATE
Squamish Nation	No	
Squiala First Nation	Yes	Sept. 11, 2007
St. Mary's First Nation	Yes	Apr. 16, 2014
Stz'uminus First Nation (formerly Chemainus)	Yes	Dec. 6, 2013
Sumas First Nation	Yes	Dec. 10-11, 2010
Tahltan Central Council	No	
Tsawout First Nation	Yes	Mar. 23, 2007
Tsawwassen First nation	Yes	Nov. 13, 2003
Ts'kw'aylaxw First Nation	Yes	Mar. 28, 2004
Tsleil-Waututh First Nation	Yes	Apr. 22, 2007
T'sou-ke Nation	Yes	Apr. 10, 2006
Tzeachten First Nation	Yes	June 12, 2008
We Wai Kai First Nation	Yes	Sept. 24-26, 2009
Westbank First Nation	Yes	June 3, 2003
William Lake Indian Band	Yes	May 7, 2014
Yakweakwioose First Nation	Yes	Dec. 14, 2013
ALBERTA		
Alexis Nakota Sioux Nation	No	
Fort McKay First Nation	No	
Siksika Nation	No	
Tsuu T'ina Nation	No	
SASKATCHEWAN		
Cowessess First Nation	No	
English River First Nation	No	
Flying Dust First Nation	Yes	June 21, 2013
George Gordon First Nation	No	
Kahkewistahaw First Nation	Yes	Oct. 27, 2011
Kinistin Saulteaux Nation	Yes	Nov. 17, 2003
Mistawasis First Nation	No	
Muskeg Lake Cree Nation	Yes	Mar. 16, 2005
Muskoday First Nation	Yes	Jan. 21, 1998
One Arrow First Nation	Yes	Mar. 18, 2014
Pasqua First Nation	No	
Whitecap Dakota First Nation	Yes	Nov. 7, 2003
Yellowquill First Nation	No	
MANITOBA		
Brokenhead Ojibway Nation	No	
Buffalo Point First Nation	No	
Chemawain Cree Nation	Yes	Nov. 30, 2009
Fisher River Cree Nation	No	
Long Plain First Nation	No	
Nisichawayasihk Cree Nation	No	
Norway House Cree Nation	No	
Opaswayak Cree Nation	Yes	June 17, 2002
Sagkeeng First Nation	No	
Swan Lake First Nation		

Table — BC First Nations' Laws/Bylaw in Force... *continued*

COMMUNITY	OP	VOTE DATE
ONTARIO		
Alderville First Nation	No	
Algonquins of Pikwakanagan	No	
Anishinaabeg of Naongashiing	Yes	June 22 & 25, 2011
Beausoleil First Nation	No	
Bingwi Neyaashi Anishinaabek	Yes	Mar. 29, 2014
Chippewas of the Thames	No	
Dokis First Nation	Yes	Feb. 7, 2009
Garden River First Nation	No	
Chippewas of Georgina Island	Yes	Mar. 11, 1997
Henvey Inlet First Nation	Yes	Dec. 7, 2009
The Chippewas of Kettle & Stony Point First Nation	No	
Long Lake #58 First Nation	No	
Magnetawan First Nation	No	
M'Chigeeng First Nation	No	
Mississauga First Nation	Yes	Oct. 12 & 15, 2007
Chippewas Rama First Nation	No	
Moose Deer Point First Nation	No	
Nipissing First Nation	Yes	May 9, 2003
Mississaugas of Scugog Island First Nation	Yes	Mar. 11, 1997
Shawanaga First Nation	No	
Temagami First Nation	No	
Wasauksing First Nation	No	
Atikameksheng Anishnawbek	Yes	Nov. 17, 2008
QUÉBEC		
Abenakis de Wolinak	No	
Innue Essipit	No	
Montaignais du Lac St-Jean (Mashteuiatsh)	No	
NEW BRUNSWICK		
Kingsclear First Nation	No	
Madawaska Maliseet First Nation	No	
Saint Mary's First Nation	No	
NOVA SCOTIA		
Membertou First Nation	No	
NEWFOUNDLAND		
Miawpukek First Nation	No	
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Huu-ay-aht First Nation	2011	Land Act
Huu-ay-aht First Nation	2011	Land Use Plan Regulation
Huu-ay-aht First Nation	2013	Land Interest And Temporary Permit Regulation
Huu-ay-aht First Nation	2013	Land Use Plan Schedule
Ka:'Yu:'K't'h'/Chek'tles7et'h' First Nations	12/2011	Land Act

Table — BC First Nations' Laws/Bylaw in Force... ***continued***

CGA	LAW NO.	DESCRIPTION
Nisga'a Nation	2000/06	Nisga'a Land Act
Nisga'a Nation	2010/06	Nisga'a Land Title Act — Unofficial Consolidation (August 29, 2008)
Nisga'a Nation	2013	Nisga'a Land Title Regulation
Nisga'a Nation	2009/02	Nisga'a Landholding Transition Act (October 2009)
Nisga'a Nation	2000/14	Nisga'a Lands Designation Act (May 11 2000)
Nisga'a Nation	2000/12	Nisga'a Nation Entitlement Act
Nisga'a Nation	2000/13	Nisga'a Nation Village Entitlement Act
Nisga'a Nation	2010/07	Nisga'a Law and Equity Act
Nisga'a Nation	2010/08	Nisga'a Partition of Property Act
Nisga'a Nation	2010/09	Nisga'a Property Law Act
Sechelt Indian Band	1988-03	Access & Residence On Band Lands
Sechelt Indian Band	1989-01	Torrens System
Sechelt Indian Band	1989-03	Residency List Law Amendment
Sechelt Indian Band	1989-04	Land Title Registration
Sechelt Indian Band	1989-05	Land Title Registration
Sechelt Indian Band	1989-06	Land Title Registration
Sechelt Indian Band	1989-07	Land Title Registration
Sechelt Indian Band	1991-02	Adoption Of Housing Policy Manual
Sechelt Indian Band	1991-03	Land Title Registration
Sechelt Indian Band	1995-01	Land Title Registration
Sechelt Indian Band (Sigd)	1996-01	Appoint Approving Officer Of Lands
Toquaht Nation	12/2011	Land Act
Toquaht Nation	06/2011	Lands Registry Forms Regulation
Tsawwassen First Nation	Apr 2009	Land Act Consolidated
Tsawwassen First Nation	015/2011	Industrial Land Water Connection Land Availability Regulation
Tsawwassen First Nation	014/2014	Social Housing Land Availability Regulation No. 4
Tsawwassen First Nation	044/2010	Manner And Form To Review Proposed Amendments Regulation
Tsawwassen First Nation	042/2010	Falcon Way Land Availability Regulation
Tsawwassen First Nation	043/2010	Land Disposition Forms Regulation
Tsawwassen First Nation	125/2013	Land Disposition Eligibility Regulation
Tsawwassen First Nation	017/2010	Proposed Land Measures Regulation
Tsawwassen First Nation	009/2009	Land Act Form Regulation
Tsawwassen First Nation	044/2012	Commercial Lands Fill License Land Availability Regulation
Tsawwassen First Nation	086/2013	Consolidated Public Lands Availability Regulation
Uchucklesaht Tribe	12/2011	Land Act
Uchucklesaht Tribe	06/2011	Lands Registry Forms Regulation
Ucluelet First Nation	12/2011	Land Act
Ucluelet First Nation	06/2011	Lands Registry Forms Regulation
Westbank First Nation		WFN Constitution — Part Xi — Land Rules
Westbank First Nation		WFN Land Registry Regulations
Westbank First Nation	2006-03	WFN Allotment Law
Westbank First Nation	2008-03	WFN Residential Premises Law [As Amended March 22, 2010]
Westbank First Nation	2010-01	WFN Expropriation Law

Table — Shared Decision-Making Framework and Corresponding Matrix

SHARED DECISION MAKING FRAMEWORK

4.0 Shared Decision Framework / Example — The *Kaska Dene Strategic Engagement Agreement*

4.1 The Shared Decision Framework will be the means through which the Provincial Agencies and the Kaska will engage on Shared Decision Level "information available upon request", Shared Decision Levels 1 to 4 and Strategic Shared Decisions.

4.2 The Shared Decision Framework is composed of:
(a) a process for interaction between the Parties, as described in sections 1 to 6 of Appendix C;
(b) the Natural Resources Council, including the Shared Decision Working Group, as described in section 6 of this Agreement;
(c) the Spatial Reference Layer as described in Appendix D; and
(d) the Shared Decision Matrix as described in section 8 of Appendix C.

4.3 The Parties accept that a Shared Decision has been made when:
(a) the Parties have followed the process described in Appendix C; and
(b) the Provincial Agency has made a decision in serious consideration of the Recommendation, and other available information.

4.4 The Parties acknowledge that this Agreement will constitute the means by which Provincial Agencies fulfill the Province's duty to meaningfully consult and where appropriate, accommodate the Kaska with respect to Applications and Strategic Shared Decisions within the scope of this Agreement.

SHARED DECISION MAKING MATRIX

8.0 Shared Decision Matrix / Example — The *Kaska Dene Strategic Engagement Agreement*

8.1 The following table provides a range of Shared Decision Levels based on the program themes and types of decision.

PROGRAM THEMES	INFORMATION AVAILABLE UPON REQUEST	SHARED DECISION LEVEL 1	SHARED DECISION LEVEL 2	SHARED DECISION LEVEL 3	SHARED DECISION LEVEL 4	STRATEGIC SHARED DECISIONS
Ecosystems	*Forest and Range Practices Act* related decisions • Wildlife habitat features • General wildlife measures		*Forest and Range Practices Act* • Government Action Regulations (GAR) – exemptions			*Forest and Range Practices Act* • Government Action Regulations (GAR) – designation and amendments
Fish and Wildlife	Angling • Summary of Classified water licenses • Summary of angling licenses issued in the Province • Angling prescriptions for a water body – Fishery objectives Fish and Wildlife Authorizations • Summary of administrative authorizations • Guide outfitting quotas • Guide and assistant guide licenses • Disposal of guide certificate • Removal of traplines • Summary of trapping returns for previous year • Summary of hunting licenses and tags in the Province • Possession of live wildlife – captive animals • Miscellaneous authorizations	Operational Work • Lake stocking – changes to lake stocking regimes Fish and Wildlife Authorizations • Angling guide licenses & assistant angling guide licenses • Non-lethal low disturbance fish and wildlife projects • Fish collection permits – emergencies / exemptions • Trapping – transfer of traplines held by non-Kaska	Angling Regulation Changes • Angler day allocation on classified waters Fish and Wildlife Authorizations • Guide outfitting – renewal / transfer of guide certificate • Trapping – transfer of traplines held by Kaska • Trapping – trapline cabin registration Transporters • Transporter licenses and management plans Operational Work • Lake enhancement – aeration, fertilize • Stream enhancement	Operational Work • Lake stocking – initial lake stocking decision Fish and Wildlife Authorizations • Possession of live wildlife – new long term care facilities • High disturbance fish and wildlife projects • Guide outfitting – new guide territory certificate • Trapping – New traplines, registration and disposition		Land Use Designations, Boundaries • Wildlife management areas – designation • Wildlife management areas – critical habitat or wildlife sanctuary in a WMA • Wildlife management areas – WMA management plans

Table — Shared Decision-Making Framework and Corresponding Matrix… ***continued***

PROGRAM THEMES	INFORMATION AVAILABLE UPON REQUEST	SHARED DECISION LEVEL 1	SHARED DECISION LEVEL 2	SHARED DECISION LEVEL 3	SHARED DECISION LEVEL 4	STRATEGIC SHARED DECISIONS
Forests and Range	Other Tenures • Free use permit / special use permit issuance Woodlots • Direct award of woodlot through FRA/FRO process • Existing and new woodlot management plans and amendments • Woodlot minor boundary change Range • Range developments – small scale • Range tenure - minor boundary change • Range tenure - minor amendments • District annual weed plan & weed activities Other Activities • Current Fire and Pest Reforestation • Forest Health • Site Productivity • Sustainable Forest Management (SFM) Planning • Management Unit or Watershed Level Strategies • Backlog reforestation • Impeded stands - (brushing) • Stand Treatments to meet timber objectives • Stand Treatments to meet timber objectives (fertilization) • Stand Treatments to meet non-timber objectives • Recreation (site and trail maintenance) • Monitoring • Forest Dynamics and Decision Support • Forest Investment Account – Resource inventories	Timber Supply Area • Allowable annual cut (Section 18 of the Forest Act) transfer Non-replaceable forest license • Transfer Forest license • Transfer Forest license to cut • Transfer Forest stewardship plan • Extension Salvage • Small scale salvage forest license to cut • Salvage plan amendments • Salvage - blanket CP's for major licensees Community Forest Agreement • Allowable annual cut determination • Management plan approval and amendments Woodlots • Replacement • Transfers • FDP/WLP submissions and amendments Range • 1 year grazing permits issuance • Range animal unit month (AUM) adjustment	Opportunity to lower to Shared Decision Level 1 should the Applicant choose to engage with the Kaska using the Shared Decision Level 3 process on their Annual Operating Plan • TSL issuance • CP issuance • CP amendments – major • Road permits Salvage • Non replaceable Forest License issuance Forest License to Cut • BCTS • Non small scale salvage • Major amendment Timber Sale License • Transfer or major amendment • Conversion Other Tenures • Occupant license to cut issuance Community Forest Agreement • Award Woodlots • Award • Top ups (area increases, AAC increases) • Private land deletions Range • New range tenure - new opportunity (no previous tenure in area) • Direct award of new range tenure • Range tenure replacement (existing tenure) • Range tenure major amendments, boundary changes • Grazing lease replacement • Range developments-large scale not in RUP • New range tenure vacancy (relinquished tenure) Other activities • Forests for Tomorrow • BCTS Silviculture Other Backlog Activities • Mechanical Site Preparation (MSP) • Snag falling • Brushing • Fertilization • Planting Forest Investment Account (FIA) • District staff will inform proponent that they should bring larger FIA plan to Natural Resources Council • If the work involved Authorizations will default to that Shared Decision Level	Timber Supply Area • AAC TSR re-apportionment • AAC TSA license consolidation or subdivision Forest License • Issuance • Replacement • Amendment Non Replaceable Forest License • Issuance • Amendment Forest Stewardship Plan • Major amendment Annual Operating Plan (no Provincial authority) • Opportunity to lower TSL/CP/RP engagement to Shared Decision Level 1 should the Applicant choose to engage with the Kaska using the Shared Decision Level 3 process on their annual operating plan Woodlots • New woodlot opportunity/and new woodlot management plan (sets AAC) Salvage • Community salvage license issuance and license amendments Range • Range Use Plan (RUP), or stewardship plan • Range Use Plan amendments • Weeds: invasive "plant pest management plan"process	Forest Stewardship Plan • New	Timber Supply Area • AAC timber supply review • AAC uplift disposition

Table — Shared Decision-Making Framework and Corresponding Matrix... *continued*

PROGRAM THEMES	INFORMATION AVAILABLE UPON REQUEST	SHARED DECISION LEVEL 1	SHARED DECISION LEVEL 2	SHARED DECISION LEVEL 3	SHARED DECISION LEVEL 4	STRATEGIC SHARED DECISIONS
General (only applies to specific legislation	• Minor administrative applications that are clerical in nature and that will have no impact on the interests of the Kaska or land and resource values • Activities that are legally permitted without provincial authorization • Emergency measures required for the protection of life and property • Maintenance activities within existing Transportation and Infrastructure right-of-ways	• Short-term or seasonal activities • No or minor new surface disturbance, or new minor to moderate ground disturbance in previously disturbed areas • No new permanent access • No or very small permanent infrastructure • Non-exclusive tenures • Administrative applications where there are no historic issues and no new impacts	• New minor to moderate surface disturbance in previously disturbed areas • Minor new permanent access • Temporary or small new permanent infrastructure • Semi-exclusive tenures (potential to limit some other land uses) • Administrative applications where there are potential historic issues and no low-to-moderate new impacts	• Moderate to significant new ground disturbance • Moderate new permanent access • Moderate to large new permanent infrastructure • Exclusive tenures (likely to limit other land uses) • Administrative applications where there are identified historic issues and moderate-to-significant new impacts	• Major new ground disturbance • Significant new permanent access (expands permanent access network) • Large or extensive new permanent infrastructure	
Land Tenures	• Minor administrative applications that are clerical in nature and that will have no impact on the interests of the Kaska or land and resource values • Emergency measures required for the protection of life and property • Minor assignments of tenures • Land Tenure Transfers between Federal Provincial agencies • Most Notation of Interest files • Establishment of Map Reserves (Section 17) in which a higher level of engagement is required prior to development.	Activities with no or negligible new ground disturbance or effect on other uses, including one or more of the following types of activities: • Administrative applications incl. scheduled renewals of existing tenures, licenses or permits engagement will occur annually on a batched basis • Major client assignments of tenures • Communication sites and associated buildings with less than 1 ha site footprint and no new road access • Navigation aids, including beacons • Work permits for existing infrastructure or with no incremental disturbance footprint • Transfers of administration between Provincial Agencies	Activities with potential for new ground disturbance or effect on other uses, including one or more of the following types of activities: • Administrative applications including amendments to existing tenures, licenses, or permits where there are low to moderate new impacts • Activities requiring investigative permits • Gravel pits or quarries with annual production <200,000 tonnes • Communication sites and associated buildings with more than 1 ha site footprint and / or new road access • New roads less than 2 km in length • New utility rights-of-way less than 2 km in length • Commercial recreation involving non-motorized light-impact extensive uses, including river rafting, backcountry hiking, and guided nature tours • Community or institutional uses • General commercial in developed areas • Light industrial activities, such as log landings and work camps • Residential licences • Legalizations of recreational/residential cabins • Forfeited residential lots • Reserves for environmental, conservation, or recreational uses (Section 16)	Activities with potential for significant new ground disturbance or effects on other uses, including one or more of the following types of activities: • Administrative applications including amendments to existing tenures, licenses, or permits where there are significant new impacts • Gravel pits or quarries with annual production of 200,000 to 500,000 tonnes • New roads greater than 2 km in length • New utility rights-of-way greater than 2 km in length • Commercial recreation involving motorized or intensive uses, including heli-skiing • Intensive agriculture in an area less than 15 ha • Extensive Agricultural tenures • General commercial outside of developed areas • Fee simple transfers of previously tenured lands • Residential development or simple Fee simple sales within settled areas • Heavy industrial activities, such as industrial parks, within the developed area.	• New wilderness lodges • Fee simple transfers of previously un-tenured lands (remote)	

Table — Shared Decision-Making Framework and Corresponding Matrix... *continued*

PROGRAM THEMES	INFORMATION AVAILABLE UPON REQUEST	SHARED DECISION LEVEL 1	SHARED DECISION LEVEL 2	SHARED DECISION LEVEL 3	SHARED DECISION LEVEL 4	STRATEGIC SHARED DECISIONS
Mineral Exploration	Non-mechanized mineral exploration work legally allowed without provincial authorization including: • Emergency measures required for the protection of life and property	Non-mechanized mineral exploration work including: • Geophysical surveys • Underground exploration with nil or negligible surface disturbance Date extension of Notice of Work and Leases – Coal, Mineral, Placer	Mechanized mineral exploration work on pre-existing or in previously disturbed areas , including: • Drilling, trenching, or test-pitting with or without the use of explosives • Helicopter supported drill program • Re-opening of existing roads or trails within in previously disturbed areas • Existing placer mining operations Aggregate development, sand and gravel quarry and industrial quarry less than 200,000 tonnes: • Requires either a Land Act tenure or Fee Simple Land prior to issuance of Mine Act Permits	Mechanized mineral exploration work in undisturbed areas, including: • Drilling, trenching, or test-pitting with or without the use of explosives • New access development where previous access has only been by water or air • New underground development for mineral exploration purposes • New placer mining operations Bulk samples Aggregate development, sand and gravel quarry and industrial quarry between 200,000 to 500,000 tonnes: • Requires either a Land Act tenure or Fee Simple Land prior to issuance Mine Act Permits		
Mineral Titles	Free Miner Certificates Claims • Mineral and Placer No Registration and Conditional Registration Reserves • Coal, Mineral and Placer		Tenures associated with Shared Decision Level 1 and Level 2 mineral exploration and may include: • Licenses – Coal • Leases – Coal, Mineral, Placer	Tenures associated with Shared Decision Level 3 mineral exploration and may include: • Licenses – Coal • Leases – Coal, Mineral, Placer		
Petroleum and Natural Gas Titles	Areas with no tenure issuance		Land Sales for Sub-Surface Resources • Petroleum and Natural Gas • Geothermal Permitting • Geothermal			
Parks and Protected Areas	Operations • Hazard tree removal • Facility maintenance & repair • Park Use Permit Reports • Research Reports • Attendance Reports	Land Use Occupancy • Existing • Filming – minor film shoot Research • Low disturbance (e.g. inventories, surveys and habitat assessments) Commercial Recreation • Guide Outfitting & Angling Guiding without infrastructure and non motorized Transfers and minor amendments	Designation • Private land for protected areas Commercial Recreation • Non-motorized Land Use Occupancy • New • Filming – major film shoot Operations • Ecosystem restoration (e.g. prescribed burning) • New facility development, or construction • Extensive hazard tree removal requiring a prescription	Amendments • Park boundaries Commercial Recreation • Motorized & new fixed roof accommodation facilities • Guide Outfitting & Angling Guiding with infrastructure and/or motorized access Research • High disturbance (e.g. collaring, wildlife transplants)		Designation • New parks or protected areas

Table — Shared Decision-Making Framework and Corresponding Matrix… ***continued***

PROGRAM THEMES	INFORMATION AVAILABLE UPON REQUEST	SHARED DECISION LEVEL 1	SHARED DECISION LEVEL 2	SHARED DECISION LEVEL 3	SHARED DECISION LEVEL 4	STRATEGIC SHARED DECISIONS
Pesticides	• Vegetation management on industrial sites on public land – sites maintained in near vegetation-free state (roads, etc) or with no public access • Mosquito management – occurs in municipalities • Noxious weed and invasive plan management – use of herbicides to treat weeds, not applied to surrounding vegetation • Wood pole preservation – application of preservatives to installed telephone and hydro poles • Structural pest management – management of pests inside or outside of buildings • Landscape pest management – management of insects or diseases in ornamental plans or weeks in lawns around buildings and in parks • On-site inspections, data reviews • Response to public complaints regarding use and application of pesticides and herbicides • Issuance of Pesticide Applicator and Dispenser Certificate • Suspension orders, revocations, investigation referrals • Registration of use notifications	• Pest management on railways – ballast area, switches, maintenance yards, treatment of selected trees & shrubs outside ballast area (typically on private land) • Vegetation management on right-of-ways – sites maintained in near vegetation-free state (roads etc), or with no public access	• Vegetation management of right-of-ways – selective management of encroaching trees & shrubs or with public access • Vegetation management on industrial sites on public land – general selective vegetation management, or with public access	Forest pest management – management of vegetation to benefit seedling growth, or managing insect outbreaks (5 year plans) pending further discussion		
Project Permitting: • **EA reviewable (post EA certificate)** • **Large non-EA reviewable projects**						Clean energy • Wind • Water Mining: • Mineral • Coal Resort Development Roadways • upgrades on primary and secondary highways Utilities • non-OGC

Table — Shared Decision-Making Framework and Corresponding Matrix... *continued*

PROGRAM THEMES	INFORMATION AVAILABLE UPON REQUEST	SHARED DECISION LEVEL 1	SHARED DECISION LEVEL 2	SHARED DECISION LEVEL 3	SHARED DECISION LEVEL 4	STRATEGIC SHARED DECISIONS
Waste Management	• Transfer of a permit to discharge waste • Administrative amendments or temporary amendments • Registrations under misc. codes of practice • Minor amendments – air permits or approvals (as defined in the Public Notification Regulation)	• New effluent permits or approvals – small • New registration – Municipal Sewage Regulation – small • New refuse approvals (garbage, solid waste) – small • Minor amendments – effluent and refuse permits or approvals (as defined in the Public Notification Regulation) • Significant amendments – small approvals (as defined in the Public Notification Regulation) • New air permits or approvals • Solid waste operating certificate (authorized under solid waste management plans) if no outstanding Kaska concerns with solid waste management plan • Liquid waste operating certificate (authorized under liquid waste management plans) if no outstanding Kaska concerns with liquid waste management plan	• New effluent approvals other waste discharges – large • New refuse approvals – large • Operational certificate (authorized under solid waste management plans) if outstanding Kaska concerns with solid waste management plan • New refuse permits (garbage, solid waste) – small • New registration – Municipal Sewage Regulation – large • Hazardous waste facility registration	• New refuse permits – large • New effluent permits other waste discharges – large • Significant amendments – permits or large approvals (as defined in the Public Notification Regulation)		• Liquid waste management plans • Solid waste management plans (consultation undertaken by Regional Districts and Municipalities)
Water	• Water licensing – domestic on all sources that do not involve Crown Land • Water license amendment – no change in base flow requirements, name change (including to new user), change of works on private lands, transfer of water licenses on private lands, apportionment, re-description, extension of time and cancellation / abandonment of water licenses • Transfer of Appurtenancy, and addition or changes in purpose where the change does not alter the downstream impacts • Issuance of a final license (sec14) • Leave to commence (final authorization to do work as per license conditions) • Part 7 – notification water regulation of Section 9 work in and about a stream • Orders to regulate water use or in-stream activities and groundwater issues • All remediation orders over non-compliance • *Dike Maintenance Act* – maintenance repairs and orders • Dam Safety Regulations – maintenance and repair and orders	• New water licenses with nil or negligible risk of impact to fish or fish habitat • Permit over Crown Land Section 26 – nil to negligible risk of impact to water quality/quantity or habitat values • Section 8 – short term use of water when Kaska do not hold a water license downstream of application site and nil or negligible risk of impact to fish or fish habitat • Section 9 –for public safety projects (imminent impact) • Section 9 – nil or negligible risk of impact to fish or fish habitat	• New water licenses that are low to moderate risk of impact to quality / quantity. • Permit over Crown Land Section 26 – low to moderate risk of impact to water quality / quantity or habitat Approval for changes in and about a stream: • Section 9 – for low to moderate risk of impact to fish habitat and / or large impact projects that require approval • Section 8 – low to moderate risk of impact to water quality/ quantity or habitat values	• New water licenses – moderate to high risk of impact to water quality/quantity • Permit over Crown Land – moderate to high risk of impact to water quality / quantity or habitat Approvals: • Section 9 – for moderate to high risk of impact to fish habitat and/or large impact projects that require approval • Section 8 – moderate to high risk of impact to water quality/quantity or habitat values	• New water licenses – small sub EA projects e.g. industrial projects; mine operations; water works (local community drinking water); storage (dams as per Dam Safety Regulation); power purposes (commercial and general)	• New water licenses – EA and large sub EA projects • Water Management Plans • Water Allocation Plans • Water Reserves

RESOURCES

First Nations

First Nations Land Advisory Board (LAB)
First Nations Land Management Resource Centre (LABRC)
Suite 106, 350 Terry Fox Drive
Kanata, ON K2K 2W5
Phone: 613-591-6649
Fax: 613-591-8373
Email: webadmin@labrc.com
www.fafnlm.com

National Aboriginal Land Managers Association (NALMA)
Small Business Centre, General Delivery
Curve Lake, ON K0L 1R0
Phone: 705-657-7660
Fax: 705-657-7177
www.nalma.ca

First Nations Gazette
c/o Native Law Centre — University of Saskatchewan
Room 160, Law Building, 15 Campus Drive
Saskatoon, SK S7N 5A6
Phone: 306-966-6189
Fax: 306-966-6207
Email: nlc.publications@usask.ca
www.fng.ca

First Nations Alliance 4 Land Management (FNA4LM)
302 – 345 Yellowhead Hwy
Kamloops, BC V2H 1H1
Phone: 250-828-9804
Toll-free: 1-877-828-9805
Fax: 250-828-9809
Email: info@fna4lm.ca
www.fna4lm.ca

First Nations Property Ownership Initiative (FNPOI)

Head Office:
321 – 345 Yellowhead Hwy
Kamloops BC V2H 1N1
Phone: 250-828-9857
Fax: 250-828-9858
Email: mailkamloops@fntc.ca
www.fnpo.ca

National Capital Region:
160 George St., Suite 200
Ottawa, ON K1N 9M2
Phone: 613-789-5000
Fax: 613-789-5008
Email: info@fnpo.ca

Federal

Aboriginal Affairs and Northern Development Canada
British Columbia Region
Suite 600, 1138 Melville Street
Vancouver, BC V6E 4S3
Phone: 604-775-5100
Toll-free: 1-800-567-9604
Fax: 604-775-7149
TTY: 1-866-553-0554
Email: Infopubs@inac-ainc.gc.ca

Natural Resources Canada
9700 Jasper Avenue Northwest
6th Floor, Room 605
Edmonton, AB T5J 4C3
Phone: 780-495-7347
Fax: 780-495-4052

Canadian Environmental Assessment Agency
Pacific and Yukon Office
Suite 320, 757 West Hastings Street
Vancouver, BC V6C 1A1
Phone: 604-666-2431
Fax: 604-666-6990
Email: ceaa.pacific@ceaa-acee.gc.ca
www.ceaa-acee.gc.ca

Canadian Wildlife Service
Pacific Wildlife Research Centre
Environment Canada
RR1, 5421 Robertson Road
Delta, BC V4K 3N2
Phone: 604-940-4700
Fax: 604-946-7022
www.sararegistry.gc.ca

LINKS AND SOURCES

First Nations

- *Professional Lands Managers Certification Program (PLMCP):* www.nalma.ca/PDU%20FILES/certification.htm

First Nations/Federal

- *Framework Agreement on First Nation Land Management:* www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973

Federal

- *Indian Lands Registry System (ILRS):* www.aadnc-aandc.gc.ca/eng/1100100034803/1100100034804
- *First Nation Land Register System (FNLRS)*
- Self Government First Nations Lands Registry (SGFNLR)
- *Canada Lands Survey System:* www.nrcan.gc.ca/earth-sciences/geomatics/canada-lands-surveys/canada-lands-survey-system/10870
- *Canada Lands Survey System (CLSS) Map Browser:* http://clss.nrcan.gc.ca/map-carte-eng.php
- *Land Management Manual:* www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/enr_lds_pubs_lmm_1315105451402_eng.pdf

LEGISLATION

Federal

- *First Nations Land Management Act* (S.C. 1999, c. 24)
- *First Nations Land Registry Regulations* (SOR/2007-231)
- *Canadian Environmental Assessment Act* (S.C. 2012, c. 19, s. 52)
- *Species at Risk Act* (S.C. 2002, c. 29)

PART 1 /// SECTION 3.21

Licensing, Regulation and Operation of Businesses

3.21

LICENSING, REGULATION AND OPERATION OF BUSINESSES

3.21

LICENSING, REGULATION AND OPERATION OF BUSINESSES

BACKGROUND

Governments license, regulate and control the operation of businesses to meet a number of different policy objectives. At one end of the spectrum, senior governments may establish strict and comprehensive rules regarding the manner and conduct of a particular type of business and pass laws and regulations or set standards that persons operating the business must adhere to. These rules seek to ensure consistency of service between different business operators and enforce compliance with established standards. Standards typically are set to protect consumers and producers alike and create trust within the marketplace. The rules can be specific to a particular type of business (e.g., food producers, restaurateurs, hoteliers, railway companies, oil and gas producers) or can apply to any type of business (e.g., marketing, advertising and sales; health and safety; environment; privacy). Through licensing, governments can also limit or control the number of businesses operating in a particular business sector (e.g., airlines, telecommunications, liquor industry, gaming). At the other end of the spectrum, governments may choose not to regulate business activity and establish few if any rules for business operations, or they may not have the jurisdiction to do so even if they want to.

In Canada, the federal and provincial governments retain the right to license and regulate certain types of business activities, wherever they are located. For example, banks are regulated federally and liquor establishments are regulated provincially. Subject to any federal and provincial licensing requirements and regulations, local governments for the most part license and regulate businesses and their operations within their geographical boundaries. Requiring all businesses to obtain a business licence and meet some basic conditions to operate allows local governments to keep track of the number and type of businesses located within their boundaries. It is also a way for local governments to raise non-tax revenues from business activity, as long as the fee charged exceeds the cost to issue and administer the licence. Businesses are typically charged different business rates, depending on the policy of the local government. Some local governments use the business licensing system to control the types of businesses that locate within their jurisdiction — either by not allowing them at all or, in some cases, such as pawn shops, charging higher rates to discourage their establishment.

On reserves, First Nations are exercising the power to license and regulate the operation of businesses both under the *Indian Act* and through comprehensive governance arrangements. While the exercise of this authority does not remove the need for businesses to obtain other required licences (e.g., liquor licences, professional licences for doctors or dentists), recognition of this jurisdiction provides a measure of control by a First Nation over the type of business that can locate in the community, as a First Nation licence will be required for the business to operate. This is particularly important for those Nations with significant economic development on their lands.

In addition, some First Nations may seek to exercise this jurisdiction as a means to license broader land-based activities — for example, through natural resource charges or royalties from resource development operations on their lands. These fees and charges could also be raised through the exercise of law-making authority over granting third party interests in lands and natural resources.

INDIAN ACT GOVERNANCE

Section 81 bylaw-making power has been used by some communities to regulate on-reserve business operations. Specifically, section 81(1)(n) allows for the "the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise." In addition, section 83(1)(a.1) recognizes the jurisdiction of a band council to make bylaws for "the licencing of businesses, callings, trades and occupations." Bylaws made under section 81 can be disallowed by the Minister, and section 83 bylaws need Ministerial approval before they are valid.

Three First Nations have exercised bylaw-making power under section 83(1)(a.1).

SECTORAL GOVERNANCE INITIATIVES

There are no sectoral governance initiatives dealing with this subject matter.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All agreements provide First Nation jurisdiction over the licensing and regulation of business activities on First Nation lands. Although this jurisdiction is stated broadly in agreements, in all cases it is qualified and does not extend to certain areas where the federal or provincial government retains the right to regulate and set standards (e.g., banking, bankruptcy and insolvency, interprovincial and international trade, and incorporation). Further, with a few exceptions, it does not include the authority to make laws respecting the accreditation, certification or professional conduct of professions and trades.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	Sechelt has the power to make laws with respect to the operation of businesses, professions and trades on Sechelt Lands. (s. 14(1)(n)) A law made by the Council may require the holding of a licence or permit and may provide for the issuance thereof and fees therefor. (s. 14(4))	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)
Westbank	Westbank has the power to make laws with respect to the licensing, regulation and operation of businesses on Westbank Lands. (Part XIX, s. 204–205)	Westbank law prevails. (Part XIX, s. 207)
Nisga'a	Nisga'a has the power to make laws with respect to the regulation, licensing and prohibition of businesses on Nisga'a Lands. (Ch. 11, s. 47(b))	Nisga'a law prevails. (Ch. 11, s. 49)
Tsawwassen	Tsawwassen has the power to make laws with respect to the regulation, licensing and prohibition of businesses on Tsawwassen Lands. (Ch. 16, s. 118–120)	Federal or Provincial law prevails. (Ch. 16, s. 121)
Maa-nulth	Maa-nulth First Nation have the power to make laws with respect to the regulation, licensing and prohibition of businesses on that Maa-nulth First Nation's Lands. (s. 13.28.1–13.28.2)	Federal or Provincial law prevails. (s. 13.28.3)
Yale	Yale has the power to make laws with respect to the regulation, licensing, and prohibition of business on Yale First Nation Land. (s. 3.27.1–3.27.2)	Federal or Provincial law prevails. (s. 3.27.3)
Tla'amin	Tla'amin has the power to make laws with respect to the regulation, licensing and prohibition of businesses on Tla'amin Lands. (Ch. 15, s. 135–137)	Federal or Provincial law prevails. (Ch. 15, s. 138)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 83(a.1) Licensing			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Cowichan	No. 2, 1997	BUSINESS LICENSING	
Tk'emlups te Secwepemc	2001-04	BUSINESS LICENSING	Tk'emlups Band Business Licensing Bylaw
Westbank		BUSINESS LICENSING	Being A Bylaw To Provide For The Issuance Of Licences
Bylaws — Section 81(1)(n) Regulation of activities of hawkers and peddlers			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Ahousaht	4	HAWKERS & PEDDLERS	To Provide For The Regulation Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Enter The Marktosis Res. 15 To Buy Or Sell Or Otherwise Deal In Wares Or Merchandise
Dzawada'enuxw First Nation	4	HAWKERS & PEDDLERS	To Provide For The Regulation Of The Conduct And Activities Of Hawkers And Peddlers On The Tsawatai-Neuk Reserve
Gingolx (Nisga'a Village Of)	3	HAWKERS & PEDDLERS	Regulation Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Buy, Sell Or Otherwise Deal In Wares
Gitga'at First Nation	1	HAWKERS & PEDDLERS	Regulation Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Enter The Reserve To Buy Or Sell
Gitga'at First Nation	2	HAWKERS & PEDDLERS	Regulation Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Enter The Reserve To Buy, Sell Or Otherwise Deal In Wares And Merchandise And Charging Of A Licence Fee
Gitwangak	1991-17	HAWKERS & PEDDLERS	Bylaw Respecting Hawkers And Peddlers
Gitxaala Nation	5	HAWKERS & PEDDLERS	To Provide For The Licensing Of Businesses, Callings, Trades, Etc.
Gitxaala Nation	6	HAWKERS & PEDDLERS	To Provide For The Regulation Of The Conduct And Activities Of Hawkers And Peddlers
Gitxaala Nation	7	HAWKERS & PEDDLERS	To Provide For The Regulation Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Enter The Reserve To Buy, Sell Or Otherwise Deal In Wares
Haisla Nation	2	HAWKERS & PEDDLERS	Regulation Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Buy, Sell Or Otherwise Deal In Wares Or Merchandise And Charging Of A Fee
Kispiox	2	HAWKERS & PEDDLERS	To Provide For The Licensing Of Businesses, Callings, Trades And Occupations Within The Kispiox Reserve
Kispiox	5	HAWKERS & PEDDLERS	To Provide For The Regulation Of The Conduct And Activities Of Hawkers, Etc.
K'omoks	5	HAWKERS & PEDDLERS	To Provide For The Regulations Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Enter The Comox Indian Reserve To Buy Or Sell Or Otherwise Deal In Wares
Kwakiutl	4	HAWKERS & PEDDLERS	To Provide For The Regulation Of The Conduct And Activities Of Hawkers And Peddlers Or Others Who Enter The Reserve To Buy Or Sell Or Otherwise Deal In Wares And Merchandise
Lax-Kw'alaams	6	HAWKERS & PEDDLERS	Regulations Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Enter The Reserve To Buy, Sell Or Otherwise Deal In Wares Or Merchandise
Nak'azdli	1987-05	HAWKERS & PEDDLERS	Bylaw Respecting Hawkers And Peddlers
Namgis First Nation	6	HAWKERS & PEDDLERS	To Provide For The Regulation Of The Conduct Of Hawkers, Peddlers Of Others Who Enter The Nimpkish Res. To Buy Or Sell Or Otherwise Deal In Wares Or Merchandise

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Namgis First Nation	19	HAWKERS & PEDDLERS	Bylaw Respecting Hawkers And Peddlers
New Aiyansh (Nisga'a Village Of)	5	HAWKERS & PEDDLERS	Licensing Of Businesses, Callings, Trades And Occupations
New Aiyansh (Nisga'a Village Of)	6	HAWKERS & PEDDLERS	Regualtion Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Buy, Sell Or Otherwise Deal In Wares Or Merchandise
New Aiyansh (Nisga'a Village Of)	7	HAWKERS & PEDDLERS	Regulations Of The Conduct And Activities Of Hawkers, Peddlers, Or Others Who Buy, Sell Or Otherwise Deal In Wares Or Merchandise And The Charging Of A License Fee
Nuxalk Nation	6	HAWKERS & PEDDLERS	To Provide For Regulations Of The Conduct Of Hawkers, Peddlers Or Others Who Enter The Reserve To Buy, Sell Or Otherwise Deal In Wares Or Merchandise And The Charging Of A Licence Fee
Old Massett Village Council	3	HAWKERS & PEDDLERS	To Provide For Regulations Of The Conduct Of Hawkers, Peddlers Or Others Who Enter The Masset Reserve To Buy, Sell Or Otherwise Deal In Wares Or Merchandise
Old Massett Village Council	3	HAWKERS & PEDDLERS	Bylaw Respecting Hawkers And Peddlers
Quatsino	4	HAWKERS & PEDDLERS	To Provide For The Regulation Of The Conduct And Activities Of Hawkers, Peddlers, Or Others Who Enter The Reserve To Buy Or Sell Or Otherwise Deal In Wares Or Merchandise
Songhees First Nation	2001-05	REGULATION OF HAWKERS AND PEDDLERS	Bylaw Respecting Door To Door Sales
Squamish	1,2003	REGULATION OF HAWKERS AND PEDDLERS	Bylaw Respecting Retail Business Hours
Tlowitsis Tribe	5	HAWKERS & PEDDLERS	To Provide For The Regulation Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Enter The Turnor Island Res. To Buy Or Sell Or Otherwise Deal In Merchandise
We Wai Kai (f. Cape Mudge)	5	HAWKERS & PEDDLERS	To Provide For Regulations Of The Conduct And Activities Of Hawkers, Peddlers Or Others Who Enter The Cape Mudge Reserve To Buy, Sell Or Otherwise Deal In Wares
Wei Wai Kum (f. Campbell River)	1996.7	REGULATION OF HAWKERS AND PEDDLERS	Bylaw Respecting Shopping On Holidays
Wei Wai Kum (f. Campbell River)	5	HAWKERS & PEDDLERS	To Provide For Regulation Of The Conduct Of Hawkers And Peddlers Or Others Who Enter The Campbell River Reserve To Buy, Sell Or Otherwise Deal In Wares
Westbank	2005-09	HAWKERS & PEDDLERS	Bylaw Respecting Second Hand Dealers And Pawnbrokers
SECTORAL GOVERNANCE INITIATIVES			
FNLMA - FRAMEWORK AGREEMENT - OPERATIONAL	**DATE**	**FIRST NATION LAW**	
Tzeachten First Nation		Tzeachten Business Permit Law — Fee Schedule — Nov 16th 2010	
Tzeachten First Nation		Tzeachten Application For Business Licence — V3	
Tzeachten First Nation	NO. 10-04	Tzeachten Business Licence Law	
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Sechelt Indian Band (SIGD)	1989-05	Business License	
Westbank First Nation	2005-09	WFN Second-Hand Dealers and Pawnbrokers Law	
Westbank First Nation	2005-20	WFN Outdoor Events Law	

RESOURCES

First Nations

First Nations Land Management Resource Centre
22250 Island Road
Port Perry, ON L9L 1B6
Phone: 1-888-985-5711
Fax: 1-866-817-2394
Email: webadmin@labrc.com
www.labrc.com/contact-us/

Provincial

BC Chamber of Commerce
1201 – 750 West Pender Street
Vancouver, BC V6C 2T8
Phone: 604-683-0700
Fax: 604-683-0416
Email: bccc@bcchamber.org
www.bcchamber.org

Ministry of Jobs, Tourism and Skills Training — Small Business BC
82 – 601 West Cordova St.
Vancouver, BC V6B 1G1
Phone: 604-775-5525
Toll-free: 1-800-667-2272
TTY: 1-800-457-8466
Email: askus@smallbusinessbc.ca
www.gov.bc.ca/jtst/contacts.html

- Mobile Business Licence: www.resourcecentre.gov.bc.ca/mobile.html
- Mobile Business Licence Pilot Project: www.smallbusinessbc.ca/general-business/new-mobile-business-licence-program

PART 1 /// SECTION 3.22

Matrimonial Property

3.22

MATRIMONIAL PROPERTY

3.22

MATRIMONIAL PROPERTY

BACKGROUND

Matrimonial property is a legal term used to describe buildings and the land on which they are located. It often means the family home, but can also include recreational property and, in some circumstances, business property.

Under section 92(13) of the *Constitution Act, 1867*, provincial governments have jurisdiction over property and civil rights, which gives the provinces authority to make laws on the division of matrimonial property. However, this is not the case for persons registered as Indians who have interest in property located on-reserve.

In 1986, the Supreme Court of Canada ruled in *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, a case involving two members of the Westbank First Nation, that provincial matrimonial property laws have no real effect on reserves where the interest is held by an Indian. The federal government has exclusive jurisdiction over reserve lands under its responsibility for "Indians, and Lands reserved for Indians" pursuant to section 91(24). As a result, orders for possession of lands on-reserve or for division of real property on-reserve cannot be made under provincial law and the courts cannot force the transfer of an interest in reserve land from one person to another.

Section 35(1) of the *Constitution Act, 1982* (s. 35 being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.) protects existing Aboriginal and treaty rights of First Nations peoples. The courts have confirmed that First Nations have Aboriginal and treaty rights over reserve lands, and, in *Delgamuukw*, the Supreme Court of Canada held that Aboriginal title, in its full form and when proven, includes the right to manage lands held by such title. In June 2014, the Supreme Court of Canada handed down its first declaration of title in *Tsilhqot'in Nation v. British Columbia* (2014 SCC 44). The court ruled that the Tsilhqot'in Nation have collective rights to their Aboriginal title lands, including their reserve lands, and therefore the right to manage their Aboriginal title lands. The latter necessarily includes the right to make laws about the division of matrimonial property upon marriage breakdown.

Because the *Derrickson v. Derrickson* decision rejected the application of provincial laws, and given that Canada had never legislated with respect to matrimonial property, a gap was created in the law and provided no remedy for First Nations. This was compounded by the absence of a clear court decision on First Nations' inherent authority with respect to this matter. These legislative gaps and grey areas with respect to who has jurisdiction over First Nations and their lands are gradually being resolved as First Nations governments evolve.

To fill the legislative gap, a number of initiatives have been undertaken by First Nations through sectoral and comprehensive governance arrangements. For example, Nations that have enacted land codes under the *Framework Agreement on First Nation Land Management*, or have comprehensive governance arrangements, are all making matrimonial property laws or adopting provincial systems. Meanwhile, Canada has made it a priority to fill the legislative gap until such time as Nations develop their own laws in this area. After several unsuccessful attempts to enact legislation governing on-reserve matrimonial property rights, the federal government introduced the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20). This act and the other initiatives to fill the legislative gap are discussed below.

Important to recognize is that rules affecting the division of property upon matrimonial breakdown cross a number of jurisdictional lines, a fact that makes law-making in this area more complicated than in most. This area is linked to lands and land management, administration of justice, citizenship, adoption, child and family, heath, social services, solemnization of marriages, and wills and estates. Indeed, it is arguably so difficult to separate this jurisdiction from the ability to make rules in other areas in order to have a complete system that it raises the question of whether it can really be separated at all. For instance, the type of interests in land that can be granted to a party upon marriage breakdown depends on the land rules of the Nation and specifically on who can hold interests in land. Furthermore, other aspects of a divorce settlement will, in all likelihood, be resolved in accordance with different rules, and addressed in different and potentially incompatible dispute resolution processes, including using the provincial courts (e.g., dealing with custody of children or property located off reserve). This reality further complicates matters and is something that policy-makers designing systems on First Nation lands need to consider.

INDIAN ACT GOVERNANCE

The *Indian Act* does not contain rules with respect to matrimonial property on-reserve in the event of a breakdown of marriage. The act also has no provisions authorizing a band council to enact bylaws in relation to this matter.

SECTORAL GOVERNANCE INITIATIVES

Framework Agreement on First Nation Land Management

The *Framework Agreement on First Nation Land Management* (Framework Agreement) provides for recognition of a First Nation's law-making powers over the division of matrimonial property on-reserve. The background to this sectoral governance initiative is more fully set out in Section 3.20 — Lands and Land Management.

In addition to recognizing the power of a First Nation to adopt a land code, the Framework Agreement and *First Nations Land Management Act* (S.C. 1999, c. 24) (FNLMA) sets out a First Nation government's powers to establish rules and procedures respecting matrimonial property rights on reserve lands. In particular, section 17(1) of the FNLMA states that a First Nation shall "establish general rules and procedures, in cases of breakdown of marriage, respecting the use, occupation and possession of First Nation land and the division of interests or rights in First Nation land." These rules and procedures must ensure the equality of women and men.

Both Canada and the original signatories to the Framework Agreement recognized the importance of this law-making power as an aspect of land management jurisdiction, and the need to implement it quickly. Consequently, after ratifying the Framework Agreement, a First Nation has 12 months from the date their land code takes effect to enact the rules and procedures dealing with matrimonial rights or interests in reserve land, either within their land code or in a separate law (s. 17(2) of the FNLMA). A First Nation must also establish a community consultation process for developing their matrimonial property rules, procedures and law (s. 6(1)(f) of the FNLMA).

As of October 2014, a total of 96 First Nations across Canada had adopted or were developing land codes and participating in the processes outlined under the Framework Agreement on First Nations Land Management. Twenty-five First Nations had enacted rules and procedures to address matrimonial rights or interests, and a further 19 Nations were in the process of doing so.

Federal Legislative Initiatives

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20) (FHRMIRA) was given Royal Assent on June 19, 2013. Developed by the federal government to seek to address the lack of matrimonial real property laws applicable on-reserve, the legislation provides for the enactment of First Nations laws and establishes provisional rules and procedures that apply during a conjugal relationship, when that relationship breaks down, or on the death of a spouse or common-law partner. The provisional laws establish a default regime to address the use, occupation and possession of family homes on reserves and the division of the value of any interests or rights held by the spouses or common-law partners in or to the structures and lands on reserves. These rules are set out in sections 12–52 of the act.

The act came into effect in two stages. The First Nations law-making mechanism came into force on December 16, 2013, allowing for a 12-month period for First Nations to enact their own laws under the FHRMIRA before the provisional federal rules apply. After December 16, 2014, communities without their own laws are subject to the provisional rules under the federal legislation, although First Nations retain the right to enact their own laws at any time and remove themselves from the federal regime.

The provisional federal rules provide a set of interim rules that allows parties to determine, upon breakdown of a marriage or common-law relationship, what they are entitled to in terms of their family home and their real property on-reserve. The provisional rules apply only to a First Nation that has reserve lands and that has not enacted its own laws under section 7 of the FHRMIRA. In addition, the provisional federal rules will not apply to First Nations that are on the schedule to the *First Nations Land Management Act* until three years from the date of that act receiving Royal Assent (June 19, 2013). The provisional rules will then apply if: (1) the land code adopted by the First Nation in accordance with the *First Nations Land Management Act* is not in force (s. 12(2)(a)); and (2) the First Nations laws enacted under section 7 of the FHRMIRA or rules and procedures established under section 17 of the *First Nations Land Management Act* (rules on breakdown of marriage) are not in force (s. 12(2)(b)). The provisional rules will apply to First Nations that have the power to manage their reserve lands under a self-government agreement only if: (1) they opt to have the federal rules apply to them (section 12(3)(a)); and (2) the First Nation laws enacted under section 7 of the FHRMIRA or under a self-government agreement are not in force (section 12(3)(b)).

Under the provisional rules, the courts can make orders such as an emergency occupation order, an order allowing a surviving spouse or partner to occupy the family home for a period of 180 days after the death of a spouse or partner, or an order forcing one partner to vacate the home based on violent behaviour or other extenuating factors. The provisional rules also contain provisions for the division of assets. The legislation refers regularly to the need for children to remain connected to their culture and recognizes the collective interests of First Nation people on their reserve lands. Generally, the default rules are silent on land tenure types to be divided, assuming that the First Nation in question is an *Indian Act* band, that the only types of interests that might be legally granted are in accordance with the FHRMIRA, and that there are no customary or other informal land holdings.

To assist First Nations in the transition to the new provisional rules on the division of matrimonial property on reserve and in developing their own laws, Canada has appointed the National Aboriginal Land Managers Association (NALMA) to host a Centre of Excellence for Matrimonial Real Property. NALMA has been operating since 2000 in areas relating to reserve lands and has a mandate to assist with the development and provision of accredited professional development opportunities (such as Professional Lands Management Certification) that support lands managers. NALMA was chosen to host the Centre of Excellence in conjunction with the FHRMIRA coming into effect. Along with offering information on its website, NALMA has developed a matrimonial real property law toolkit and has held sessions across Canada to provide communities with information on law development, community engagement, legal

services, ratification and practical considerations (e.g., when to involve the courts). For more information on the FHRMIRA and its implementation, visit the Centre of Excellence website (www.coemrp.ca).

Of note is how the provisional rules under the FHRMIRA do not address two outstanding issues that ultimately need to be resolved in ensuring a complete system of remedies to address matrimonial disputes. Those two issues are that: 1) on-reserve property cannot be seized from a spouse who does not follow support orders; and 2) the court cannot make orders about on-reserve family homes or require homes or other on-reserve property holdings to be sold to ensure equal division of assets, as it can with off-reserve. These matters of cross-jurisdiction and enforcement are typically addressed more completely in self-government arrangements that speak to the rationale for tackling such matters in a non-piecemeal, more comprehensive manner. Moving forward, as legal recognition of First Nations laws in the area of matrimonial property is achieved through the FHRMIRA and otherwise, new challenges related to implementation and enforcement of these laws and to the relationship of First Nation governments to Crown governments on enforcement are expected. Indeed, in anticipating implementation challenges in the area of matrimonial property law, the Province of BC, First Nations and First Nations organizations (including the First Nations Leadership Council in BC) have been exploring opportunities and best practices jointly.

The law-making power of a First Nation under the FHRMIRA is described somewhat differently than under the Framework Agreement on Land Management or in the existing self-government arrangements where such law-making power is recognized. The FHRMIRA states: "A First Nation has the power to make laws that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on its reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on its reserves." The laws must include procedures for amending and repealing them and may include provisions for administering and enforcing them. There are no further restrictions on the content of such laws, but they must be approved in a community referendum in which at least 25 percent of the eligible voters participate in the vote and a majority vote is obtained in favour of these laws. The First Nation law cannot be disallowed, altered or cancelled by the Minister or any other government official. When a First Nation intends to enact laws, the First Nation must notify the Attorney General of any province in which a reserve of the First Nation is situated (which assumes the laws will be enforced in a provincial court).

Before the FHRMIRA was passed, the Minister of AANDC commissioned an independent study to consider matrimonial real property policy issues and to recommend approaches and solutions (*Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserves*, March 9, 2007). Dialogue sessions were also held with First Nations communities through the AFN and a report was prepared (*Our Lands, Our Families, Our Solutions*; Final Report on AFN Regional Dialogue Sessions, February 2007). Many First Nations and First Nations organizations, including the AFN, felt that the findings and recommendations of the special report and the AFN dialogue sessions were not adequately considered or incorporated into the federal legislation. As various matrimonial property bills were introduced and reintroduced by the federal government, there was, and has continued to be, more analysis and comment by the AFN and others on the implications of this federal legislation.

Important to remember is that where sectoral initiatives led by Canada results in new federal law, as is the case here, that law will impact all First Nations that do not have their jurisdiction recognized under their own governance arrangements, unless that law is challenged and struck down on the grounds of infringing on the inherent right of self-government.

With the passage of the FHRMIRA, it is therefore important that all First Nations understand the act's implications. In particular, where the provisional rules for the division of matrimonial interests or rights on the breakdown of conjugal relationships, or on the death of a spouse or common-law partner,

might be viewed as problematic. For some, the provisional rules are considered unworkable or inappropriate, being based on policy made by the Crown and not First Nations' law-makers. How well the provisional rules will work in practice remains to be seen. First Nations that are not comfortable with the policy framework of the provisional rules under the FHRMIRA can pursue, and many are now pursuing, the option to develop their own laws under the act. Others seek to address this matter as part of assuming jurisdiction over land management under the Framework Agreement or through a comprehensive governance arrangement, whether as part of the BC treaty process or otherwise. Additionally, this is a matter where further court decisions might provide clarity on the scope and extent of a First Nation's law-making authority in this area, as some Nations choose to simply develop and adopt their own matrimonial property laws without reference to any recognition by Canada under federal legislative mechanisms. Ultimately, whether these laws can be relied on by third parties will likely be better known following a decision of the courts where parties to a matrimonial dispute have different legal perspectives about which laws apply to them living on reserve or First Nation land.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

The provincial and federal governments have entered into comprehensive governance arrangements with BC First Nations that recognize the authority of the First Nations governments to make laws about the disposition of matrimonial property upon marital breakdown.

The *Westbank First Nation Self-Government Agreement* recognizes the power of Westbank First Nation to enact a law on the use, occupancy and possession of Westbank lands and the division of interests in these lands upon marriage breakdown. Westbank law prevails in the event of a conflict. Westbank has enacted a law pursuant to this jurisdiction.

The *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27) recognizes Sechelt jurisdiction over several land-related subject areas. This act also allows Sechelt to adopt any laws of the Province of BC as its own law if it is authorized by the Sechelt Constitution to make laws on that subject matter (s. 14(3)). The Sechelt Constitution provides that council may make laws in relation to access and residence on Sechelt lands (s. 14). Sechelt Indian Band has, based on those powers, enacted a *Law Regarding the Division of Matrimonial Property* (Sechelt Indian Band), 1991-01) that adopts several sections of the BC *Family Relations Act* (R.S.B.C. 1996, c. 128), with appropriate changes to reflect Sechelt's circumstances.

The power to make laws about the division of matrimonial property upon marriage breakdown may also be found in the broad land management provisions of the Nisga'a, Tsawwassen and Maa-nulth Final Agreements. The *Nisga'a Final Agreement* authorizes the Nisga'a Lisims government to make laws with respect to the disposition of an estate or interest in any parcel of Nisga'a lands, which arguably includes the authority to make laws with respect to the division of matrimonial property on Nisga'a lands. Any such laws must be consistent with federal and provincial laws addressing those estates or interests. This may mean that any matrimonial property law enacted by the Nisga'a Lisims government must be consistent with any matrimonial property law that may eventually be enacted by the federal government.

The *Maa-nulth First Nations Final Agreement* authorizes each Maa-nulth First Nation government to make laws addressing the ownership and disposition of estates or interests in Maa-nulth First Nation lands, arguably including the authority to make laws with respect to the division of matrimonial property on Maa-nulth lands. Any laws made under section 13.14.1(b) must be "consistent with federal or provincial law in respect of estates or interests in land." This again may mean that any matrimonial property law enacted by a Maa-nulth First Nation must be consistent with any matrimonial property law that may eventually be enacted by the federal government.

For Tsawwassen First Nation, while the general rule is that Tsawwassen land laws prevail over federal or provincial laws in the event of a conflict (Chapter 6, section 5), there is a different approach to

matrimonial property law. The *Tsawwassen First Nation Final Agreement* has a specific provision (Chapter 6, section 6) that states that a federal or provincial law with respect to the division of matrimonial property prevails to the extent of a conflict with a Tsawwassen law on this matter made under section 1(a) or 1(b) of Chapter 6. These references suggest that the jurisdiction for Tsawwassen to make a matrimonial real property law lies within its land management jurisdiction. Section 1(a) sets out the right of the Tsawwassen government to make laws with respect to the creation, ownership and disposition of a Tsawwassen fee-simple interest. Section 1(b) sets out the right of the Tsawwassen government to make laws on the ownership and disposition of estates or interests on Tsawwassen lands.

Since federal or provincial matrimonial property laws will prevail over Tsawwassen laws that address the division of matrimonial property, the *Tsawwassen First Nation Final Agreement* gives the Tsawwassen government, as an added measure to protect Tsawwassen lands, standing in any judicial proceedings concerning division of matrimonial property on Tsawwassen lands and involving at least one member of the Tsawwassen First Nation.

The Yale and Tla'amin final agreements stipulate that those communities may restrict the disposition of real property with respect to the division of matrimonial real property. The agreements contain no further references to matrimonial real property other than to note that federal or provincial law prevails in cases where conflicts arise.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS	STANDING IN JUDICIAL PROCEEDINGS WITH RESPECT TO MATRIMONIAL PROPERTY
Sechelt	Sechelt has the power to make laws with respect to access and residence on Sechelt Lands. (s. 14(1)(a)) SIB Law 1991-01 A Law Regarding the Division of Matrimonial Property	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)	No provisions.
Westbank	Westbank First Nation has jurisdiction in relation to treatment of interests in Westbank Lands on marriage breakdown. (Part X, s. 103(e)) Westbank have enacted a law (WFN Family Property Law) that sets out rules and procedures regarding use, occupancy and possession of Westbank Lands and the division of interests in these lands on marriage breakdown. (Part X, s. 108(a))	Westbank law prevails. (Part X, s. 110)	No provisions.
Nisga'a	The Nisga'a Lisims Government may make laws with respect to the disposition of an estate or interest in any parcel of Nisga'a Lands. (Ch. 11, s. 44(c)) This arguably includes the power to make laws relating to the disposition of matrimonial real property on Nisga'a Lands on marriage breakdown.	Nisga'a law prevails. (Ch. 11, s. 45)	No provisions.
Tsawwassen	The Tsawwassen government may make laws with respect to the creation, ownership and disposition of a Tsawwassen fee simple interest and the ownership and disposition of estates or interests in Tsawwassen Lands. (Ch. 6, s. 1(a) and (b)) This includes the power to make laws relating to the disposition of matrimonial real property Tsawwassen Lands on marriage breakdown.	Federal or provincial laws prevail. (Ch. 6, s. 6)	Tsawwassen First Nation has standing in any judicial proceedings in which the treatment of interests in Tsawwassen lands upon the breakdown of a marriage involving at least one Tsawwassen member is in dispute, and the court will consider any evidence and representations with respect to Tsawwassen law which may restrict the alienation of Tsawwassen Lands to Tsawwassen members in addition to any other matters it is required by law to consider. (Ch. 16, s. 109–110)

Table — Comprehensive Governance Arrangements... *continued*

	GENERAL JURISDICTION	CONFLICT OF LAWS	STANDING IN JUDICIAL PROCEEDINGS WITH RESPECT TO MATRIMONIAL PROPERTY
Maa-nulth	Each Maa-nulth First Nation Government may make laws with respect to the ownership and disposition of estates or interests in the Maa-nulth First Nation Lands. (s. 13.14.1(b)) This arguably includes the power to make laws relating to the disposition of matrimonial property on Maa-nulth Lands upon marriage breakdown.	Maa-nulth First Nation law prevails. (Ch. 13.14.2) However, Maa-nulth First Nation law under 13.14.1(b) with respect to estates or interests that are recognized under federal law or provincial law must be consistent with federal law or provincial law with respect to estates or interests in land. (s. 13.14.3)	No provisions.
Yale	Yale First Nation Government may make laws with respect to the ownership and disposition of interests in Yale First Nation Land owned by Yale First Nation, a Yale First Nation Corporation, a Yale First Nation Public Institution or a Yale First Nation Member. (s. 12.12.1(b) This arguably includes the power to make laws relating to the disposition of matrimonial property on Yale Lands upon marriage breakdown.	Federal or provincial law with respect to the division of matrimonial real property prevails to the extent of a conflict with Yale First Nation law. (s. 12.12.4)	No provisions.
Tla'amin	Tla'amin Nation may make laws with respect to the allocation, ownership and disposition of estates or interests in Tla'amin Lands. (Ch. 3, s. 116) This arguably includes the power to make laws relating to the disposition of matrimonial property on Tla'amin Lands upon marriage breakdown.	Federal or provincial law with respect to the division of matrimonial real property prevails to the extent of a conflict with Tla'amin law. (Ch. 3, s. 119)	No provisions.

Table — BC First Nations' Laws/Bylaws in Force

SECTORAL GOVERNANCE INITIATIVES		
First Nation operational under the FNLMA with Matrimonial Real Property (MRP) Laws in place		
Framework Agreement communities with MRP Laws in place:		
FIRST NATION	**PROVINCE**	**MRP LAW**
Beecher Bay	BC	August 1, 2004
Kitselas	BC	March 18, 2009
Leq'a:mel	BC	September 2011
Lheidli T'enneh	BC	December 1, 2001
Matsqui	BC	October 29, 2012
Shxwha:y Village	BC	May 15, 2008
Skawahlook	BC	October 2011
Songhees	BC	October 2012
Squiala	BC	September 30, 2014
Sumas	BC	December 12, 2013
Tsawout	BC	March 2012
Tsekani (Formerly Mcleod Lake)	BC	May 20, 2004
T'souke	BC	January 26, 2009
Ts'kawlaxw (Pavilion)	BC	November 21, 2005
Tzeachten	BC	November 20, 2009
Chemawawin	MB	November 25, 2013
Opaskwayak Cree Nation	MB	February 15, 2006
Georgina Island	ON	January 1, 2001

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	PROVINCE	MRP LAW
Mississauga #8	ON	September 2012
Nipissing	ON	June 2007
Scugog Island	ON	June 30, 2001
Kinistin	SK	October 2010
Muskeg	SK	November 2010
Muskoday	SK	January 1, 2001
Whitecap Dakota	SK	December 1, 2004
First Nations operational under the FNLMA with Matrimonial Real Property (MRP) Laws in development (as of October 2014)		
FIRST NATION	**PROVINCE**	**LAND CODE IN EFFECT**
Aitchelitz	BC	December 14, 2013
Haisla	BC	April 1, 2016
Seabird Island	BC	September 1, 2009
Skowkale	BC	December 14, 2013
Stz'uminus	BC	August 30, 2014
Tla'amin	BC	September 30, 2004
Tsleil-Waututh	BC	July 1, 2007
We Wai Kai	BC	December 7, 2009
Wei Wai Kum	BC	November 30, 2012
Williams Lake	BC	July 1, 2014
Yakweakwioose	BC	December 14, 2013
Swan Lake	MB	October 1, 2010
Anishnaabeg Of Naongashiing	ON	August 1, 2011
Atikameksheng Anishnawbek	ON	March 1. 2009
Bingwi Neyaashi Anishinaabek	ON	March 29, 2014
Dokis	ON	April 1, 2014
Henvey Inlet #1	ON	January 1, 2010
Henvey Inlet #2	ON	March 22, 2013
Flying Dust	SK	October 7, 2013
One Arrow	SK	April 1, 2014
Kahkewistahaw	SK	December 22, 2011
Land codes ratified but not operational		
FIRST NATION	**PROVINCE**	**DATE RATIFIED**
Musqueam	BC	December 4, 2012
Snaw Naw As	BC	August 8/9, 2011
*Tsawwassen and Westbank are operating under their own self-government agreements		
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Sechelt	1991-01	Division Of Matrimonial Property
Westbank First Nation	2006-02	WFN Family Property Law

RESOURCES

First Nations

Centre of Excellence, Matrimonial Real Property
National Association of Land Managers
1024 Mississauga Street
Curve Lake, ON K0L 1R0
Phone: 705-657-7660
Toll-free: 1-877-234-9813
Fax: 705-657-711
www.nalma.ca

- 2003 Report on Matrimonial Real Property on Reserve: *A Hard Bed to Lie In: Matrimonial Real Property On Reserve*

First Nations Land Advisory Board (LAB)
First Nations Land Management Resource Centre (LABRC)
Suite 106, 350 Terry Fox Drive
Kanata, ON K2K 2W5
Phone: 613-591-6649
Fax: 613-591-8373
Email: webadmin@labrc.com
www.labrc.com

- *Framework Agreement on First Nation Land Management*
- *First Nation Land Registry Regulations*

Assembly of First Nations
Suite 1600 – 55 Metcalfe Street
Ottawa, ON K1P 6L5
Phone: 613-241-6789
Toll-free: 1-866-869-6789
Fax: 613-241-5808
www.afn.ca

- W. Grant-John, *Report of the Ministerial Representative: Matrimonial Real Property Issues On Reserves*: www.nwac.ca/sites/default/files/download/admin/rmr_e.pdf
- Assembly of First Nations, Matrimonial Real Property on Reserve: *Our Lands, Our Families, Our Solutions — Reconciling First Nations and Crown Jurisdiction over Matrimonial Real Property on Reserves and Addressing Immediate Needs of First Nations Families* (February 2007): http://64.26.129.156/misc/MRP-Reconciling.pdf

SELECT LEGISLATION

Federal

- *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20)
- *First Nations Land Management Act* (S.C. 1999, c. 24)

PART 1 /// SECTION 3.23

Minerals and Precious Metals

3.23

MINERALS AND PRECIOUS METALS

3.23

MINERALS AND PRECIOUS METALS

BACKGROUND

Federal and provincial legislation specifically address minerals and precious metals, both on- and off- reserve. First Nations are generally of the opinion that significant legislative and regulatory reform regarding mineral and precious metals and mining activities is required to relieve conflict between First Nations, the Crown and industry in BC. This view is shared by others. In moving beyond the *Indian Act*, First Nations will need to consider governance arrangements that could apply not only to existing reserve lands but also potentially to settlement lands, Aboriginal title lands or throughout their ancestral lands (e.g., under shared decision-making arrangements with the province).

Fraser Institute's 2013 Mining Executives Survey

The Fraser Institute publishes an annual mining report after surveying hundreds of mining executives. While BC's attractiveness as a jurisdiction for investment in mining operations has improved since being ranked the second worst jurisdiction in Canada in 2010, in the 2013 report, 64% of those surveyed said unresolved land claims issues would be a mild to strong deterrent for investment and 6% said they would not invest in BC at all for that reason. The only other factors that rivalled land claims were the changing environmental protection regulations and uncertainty regarding protected wilderness areas and archaeological sites (the latter again, presumably, closely related to First Nations issues and territorial rights).

Definition of Minerals and Precious Metals

The definition of what constitutes minerals and precious metals as a category of subsurface resources can vary, depending on the context and use. Subsurface resources that are of economic interest generally include rocks and solid minerals. These resources include metallic ores (e.g., iron), copper and zinc, industrial minerals (e.g., limestone), precious metals (e.g., gold and silver), coal, uranium and precious stones (e.g., jade). Sand and gravel are often considered in the same category, as are building stones when quarried for that purpose. Given the unique circumstances with respect to oil and gas resources, they are considered separately in Section 3.24 — Oil and Gas. This subject matter is also linked to land management, land and marine use planning, environment, and water. There are also similarities with approaches and issues in other renewable and non-renewable natural resource areas, such as forests; fish, fisheries and fish habitat; and wildlife; and in particular with respect to questions of "ownership" versus "jurisdiction" with respect to Aboriginal title lands.

The First Nations Energy and Mining Council

In BC, the First Nations Energy and Mining Council (FNEMC) was formed by the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations to address First Nations involvement in and jurisdiction with respect to mining and the implementation of Aboriginal title and rights within ancestral lands (traditional territories). The *BC First Nations Mineral Exploration and Mining Action Plan* (2008) set out six goals in relation to mining exploration and development in BC. The first goal is to implement First Nations decision-making and effective legislative and policy development and reform.

BC First Nations Energy and Mining Council

The FNEMC's focus covers the province as a whole. Since most reserve lands in BC are very small, the inclusion of significant mineral resources in reserve lands is rare. The plan's focus is therefore, not surprisingly, predominantly off-reserve, given that by far the greatest impacts with respect to mining and energy are not on the small parcels of land set aside as reserves. In fact, many reserves were chosen by the Reserve Commissioners precisely because they did not have valuable mineral resources. In the late 1980s, the Geological Survey of Canada undertook a review of mineral potential for all reserves in BC and located virtually no subsurface resources of major economic value. Those that existed were already known and were mostly already in use.

Division of Property and Powers

Who owns sub-surface rights, including minerals and precious metals, and who governs them? These are two separate but related questions that need to be answered when First Nations are considering

governance over minerals and precious metals, including exploration for and development of mines. Property rights in Canada, such as land (including renewable and non-renewable resources such as minerals and precious metals), can belong to the Crown, Aboriginal peoples, corporations and individuals. Who owns the property and which government is actually responsible for legislating with respect to that property are not one and the same. Governments can own property, but they may or may not also have jurisdiction over that property as a government.

The Canadian constitution clearly divides the property rights of the Crown (mainly in s. 108 and s. 109) and, somewhat less clearly, the legislative powers (s. 91 and s. 92). Under section 109, all lands, mines, minerals and royalties are given to the provinces. However, this division of property rights is subject to all pre-existing property rights, including Aboriginal title to land. Where Aboriginal title exists (e.g., as now recognized by the court for the Tsilhqot'in people) because of the exclusive proprietary nature of Aboriginal title, the Province's underlying title to Aboriginal title land does not include the beneficial proprietary interest in the land. This means that all of the minerals and precious metals belong to and are "owned" by the Aboriginal title-holder.

With respect to jurisdiction over minerals and precious metals, the provinces have authority under section 92(13), "Property and Civil Rights in the Province," of the *Constitution Act, 1867*. In addition, section 92A, which was added in the *Constitution Act, 1982*, clarified that the provinces have jurisdiction over non-renewable natural resources, forestry resources, and electrical energy sites and facilities within their borders.

While the distinction between property rights and jurisdiction over property is well established within Canadian law, it is not so clear when one considers the status of First Nations lands (whether ancestral lands, Aboriginal title lands, treaty settlement lands, or reserve lands). With respect to Aboriginal title lands, the property aspect of Aboriginal title is clear. The Supreme Court has said that Aboriginal title is "a right to the land itself" and encompasses the right to exclusive use and benefit of those lands. However, as discussed elsewhere in this report, Aboriginal title also has a "jurisdictional aspect," because Aboriginal peoples have decision-making authority over Aboriginal title lands that is governmental in nature. This right to self-government is inherent; it is not derived from, and does not depend on, the Canadian constitution. This is not the same for property held by the other two levels of government, given the constitutional division of powers and the way property has been distributed. However, while federal and provincial authority over Aboriginal title land is not proprietary, both the federal and provincial governments do have jurisdictional authority over Aboriginal title lands, although these powers are significantly constrained by both the proprietary and jurisdictional aspects of Aboriginal title. Governments cannot legislate in such a way as to unjustifiably impair or infringe the property interests of the Aboriginal title-holder or its inherent decision-making power, which is incidental to that title. Sorting out the relationship between and the application of each government's laws will necessarily need to take place with respect to Aboriginal title lands. As this work is undertaken, there are implications for how we consider the subject of ownership and jurisdiction of minerals and precious metals on-reserve, to which we now turn our attention.

The Situation around Mineral Developments On-Reserve in BC

First Nations start from the position that they own all minerals and precious metals on existing reserves, based on the assumption that the reserves are subject to Aboriginal title. The question of ownership of minerals and precious metals on reserves in BC has nevertheless become a complicated one to untangle because of the constitutional division of property and powers and specifically the federal section 91(24) power in relation to "Indians, and Lands reserved for Indians." Notwithstanding the assumption today that there is Aboriginal title to reserves, ownership of minerals and precious metals on-reserve has been an issue in the past between the federal and provincial governments, and the legacy of this issue remains.

In other parts of Canada, the *Indian Mining Regulations* (C.R.C., c. 956) made under the *Indian Act* govern the extraction of most minerals on-reserve. In BC, this is not the case. In 1943, the BC Indian Reserves Mineral Resources Agreement (the 1943 Agreement) between Canada and British Columbia was entered into to ensure that should any previously unknown on-reserve mineral resource be needed for the war effort, it could be brought into production easily, without further wrangling between the two governments. Although it may seem irrelevant today, the 1943 Agreement and supporting legislation (the *British Columbia Indian Reserves Mineral Resources Act* [S.C. 1943-44, c. 19]) continue to restrict possible developments that might include reserve lands and resources. The act's structure reflects the complex legal situation around subsurface rights to existing reserve lands as understood at that time.

At the time of Confederation, the original Crown colony of BC had already made laws that excluded minerals from defined interests in land, including the land that would later be transferred to Canada as "reserves." These laws granted all mineral rights to the Crown and the definitions continued in BC after Confederation, despite different definitions being in use in other parts of Canada. In the case of minerals located under reserve lands, the courts have decided that the precious metals (gold and silver) were not incidents of the land (included in the reserve), but were owned directly by the Crown in the right of British Columbia. Base metals (e.g., all other minerals), on the other hand, went with the land title, and consequently were transferred to Canada when the reserve lands were transferred. Since precious and base metals are invariably intertwined in the same rock, it is not possible to mine one without the other. In order to ensure an orderly development of any mineral resources located on-reserve, Canada and British Columbia agreed that the Province would have charge of the development of all minerals and mineral claims, both precious and base, upon or under reserve lands. This remains the situation today for all First Nations, apart from those with comprehensive arrangements negotiated under the BC treaty-making process.

This system assumed that the ownership of the mineral resources was split between the Province, which owned the precious metals, and Canada, which owned the base metals. Of course, at the time there was no consideration of Aboriginal title. The 1943 Agreement specified that "mineral" included gold and silver, but excluded coal, petroleum and similar products. The federal and provincial legislation enacted to bring the 1943 agreement into effect allows the Province to collect all revenue from any minerals extracted, and to divide the proceeds equally between British Columbia and Canada. British Columbia kept its share, but Canada was to hold what it received for the benefit of the Indians for whose use and benefit the reserve lands had been set aside and where the extraction took place. The 1943 Agreement does provide that one-half of the proceeds of revenues collected are paid to the First Nation affected. The key word here is "proceeds."

One major mine has been developed in BC to which the BC *Indian Reserves Mineral Resources Act* (S.C. 1943-44, c. 19) applied. In that case, the First Nation, faced with the realities of these acts, chose to surrender and sell the reserve lands to the developer, as the only possible way to make economic use of the extensive mineral resources under its reserve lands. There have been other situations were a developer and the First Nation, realizing the effect of these acts on their proposed extraction of coal, walked away from the project. Essentially the problem was what constituted the "proceeds."

In order to begin to mine a resource, investments need to be made and permits are required. In the case of a small development like the coal mine noted above, the First Nation and the developer identified the project and the process was started with the province. The developer had the capital to invest, and an agreement was struck to first pay back the development costs and permit fees, after which the developer expected to take its profit, which was to be shared with the First Nation. The Province then explained that it was the trustee for the First Nation's interest, and provided a breakdown showing that all of the projected royalties and fees for the entire ore body would have to be paid to the Province first, before the "proceeds" could be calculated. The percentage return

suggested was so low that both the developer and the First Nation walked away from the project entirely. The coal remains in the ground today.

Clearly, the arrangements under the 1943 Agreement need to be replaced. They are outdated and may be of questionable legal value, given that the whole issue of Aboriginal title was never considered. With negotiations around economic benefit agreements between First Nations and British Columbia, it may be possible to develop a specific agreement that renders the 1943 Agreement inoperable. The FNEMC has stated that it would support changes or repeal of the federal and provincial reciprocal legislation that currently governs any mineral development on reserve lands in BC.

There were, in fact, attempts by Canada in the 1980s to renegotiate the 1943 Indian Reserves Mineral Resources Agreement with involvement of federal, provincial and Aboriginal leaders. The goal was to have the Province vacate its role in mineral development on-reserve, and have this come under the *Indian Mining Regulations* of the *Indian Act*, with all the proceeds of such development going to the First Nation on whose reserve lands the exploration took place. While this initiative did not recognize First Nations jurisdiction, it was a step forward, as Canada was seeking to remove the application of provincial laws and administration. British Columbia did not respond to the federal proposal, since the initiative did not take into account the Province's view that it continued to have legal ownership of precious metals underlying reserve lands. The initiative died. There is still a need to address the matter so that these provisions do not impede future First Nations economic plans on-reserve.

Other materials on reserve lands, such as clay, sand, building materials and gravel, are managed by the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) and First Nations under the *Indian Act* (s. 58(4)) and are not subject to the 1943 Agreement.

Implementing Aboriginal Title and Rights

First Nations Aboriginal title and rights are, of course, not limited to existing reserve lands. Ancestral lands, including those areas shared with neighbouring Nations, provide a far greater area with the potential for mineral extraction (both precious and base). The Haida Nation decision (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511) made it clear to government and business interests that there can be no exploration, extraction or development without consultation and accommodation of the Aboriginal interests present in the area. The *Tsilhqot'in* decision has confirmed that test and expanded it so as to make consent a virtual requirement before major development projects, including mining development, can take place. Where resources are located on declared or recognized Aboriginal title lands, the benefits of those resources would go to the Aboriginal group as the "owner." Any interest by a third party to develop those resources would necessarily require the permission of the Aboriginal group and terms arranged for any potential access. With respect to the governance of such projects, the rules that would apply need to be confirmed. A First Nation may develop its own mechanisms to permit third parties to explore and potentially invest and then develop resources on its Aboriginal title lands in accordance with the Nation's laws and regulations.

Subject to the Crown's duty to consult, accommodate and where necessary seek consent, First Nations ancestral lands, including unproven Aboriginal title lands and representing over 85 percent of the province, are still open to mineral exploration and development. How and when First Nations become involved in a mine's development must always be considered when a proposed project is on First Nations ancestral lands. First Nations involvement can arise through a shared decision-making model for provincial government permitting decisions (see *Haida Reconciliation Act*, [S.B.C. 2010, c. 17]). It can also be addressed through negotiation of an impact benefits agreement with the proponent/developer. Whichever approach they choose, it is important to recognize that First Nations are in a strong position to have an impact on decisions and to receive employment and economic benefits if projects proceed.

With respect to implementing Aboriginal title and rights, the FNEMC has been advocating for reforms to the province's mining and environmental assessment laws and respect for international agreements. With British Columbia hoping to have eight new mines in operation and nine expanded by 2015, according to the FNEMC, First Nations will clearly have to be consulted, their rights considered and, where required, their consent sought. The FNEMC recommends that:

- the existing BC *Mines Act* be reformed so that it recognizes and affirms Aboriginal rights and Indigenous legal traditions in provincial laws and supports First Nations capacity development
- cultural heritage be protected through a pledge and cultural awareness program, with a cultural heritage assessment included in exploration permit packages and exploration stopped and any finds reported if a cultural object is found on-site; and
- equal legal weight be given by the Province to scientific and traditional knowledge.

Potential reforms that would benefit First Nations include consultation agreements between First Nations and governing levels; mandatory consultation prior to issuing mining permits; participatory decision-making processes; compensation agreements prior to issuing permits; and agreements that companies will compensate First Nations for any damage caused by mining activities.

Where First Nations legal rights and interest are not respected, the consequences can be harsh. There are now several good examples of First Nation opposition to a significant mining development resulting in the project not proceeding because a court, approving body or tribunal decided the First Nation had not been sufficiently consulted or accommodated or that the project would have significant adverse effects on Aboriginal peoples. Some of these cases have been very high profile and at times confrontational. For example, the "New Prosperity Mine" proposed by Taseko Mines went through the federal environmental review panel once in 2010 and again with an updated project plan in 2013. In 2013, the federal environmental review panel found that the project "would result in several significant adverse environmental effects; the key ones being effects on water quality in Fish Lake (Teztan Biny), on fish and fish habitat in Fish Lake, on current use of lands and resources for traditional purposes by certain Aboriginal groups, and on their cultural heritage." In 2014, Taseko was denied a development permit by the Ministry of Environment. As of October 2014, the company is challenging the decision. On October 4, 2014, the Xeni Gwet'in and Yunesit'in Government, with the support of the Tsilhqot'in National Government, announced the creation of Dasiqox Tribal Park, the lands of which cover the areas of the proposed mine site. The First Nations involved describe the park as both an expression of self-determination and a means of governing a land base, which includes focus in three main areas: ecosystem protection, economy and cultural revitalization.

In other situations, where the representative body of the proper title-holder has been engaged and does not believe a project to be detrimental to its collective interest, and where its interests have been satisfied in exchange for its support for the project, the First Nation or Nations affected have received significant and ongoing benefits through impact benefit agreements. First Nations have been prepared to accept and consent to mining projects provided that there are sufficient environmental, traditional practice and other protections and that First Nations communities will receive sufficient economic and employment benefits. Impact benefit agreements are discussed further under Initiatives on Ancestral Lands, in Sectoral Governance Initiatives, below, with a list of agreements in force provided in the tables at the end of this chapter.

The decision as to how to proceed rests with the representative body of the proper title-holder and is dependent on the specifics of the proposed project and the potential impact on the Nation and its territory. As such, there is no single rule for how to proceed, other than for a Nation to assert its interest and carefully evaluate any proposed project.

To assist in this work, the FNEMC has developed a strategy paper, *Sharing the Wealth*. This provides a guide that First Nations can use to engage with mineral exploration and mining companies, from exploration to reclamation. Companies must engage at the earliest stages of exploration, prior to field exploration, to develop agreements with the affected First Nations. Agreements must be created on the basis of the principle of free, prior and informed consent.

BC's Regulatory Scheme for Mining Activity

Before considering the options, it is important for First Nations to understand both the regulatory regime that exists for mineral development in BC generally as well as the federal/provincial interactions involved in the environmental assessment of a proposed project. Environmental regulation issues are more fully considered in Section 3.10 — Environment. In BC, mining activities are governed in accordance with the BC *Mines Act* (R.S.B.C. 1996, ch. 293) and associated regulations.

There are five general phases of mining:

1) *Prospecting* — Prospecting takes place to find mineral bodies that warrant exploration.

2) *Exploration* — The purpose of exploration is to find areas of high mineralization and to discover the boundaries of those areas. Exploration activity ranges from seismic or magnetic surveys to field work (collecting samples, trenching and drilling) and extensive drilling and road-building.

3) *Development* — Pre-feasibility and feasibility studies are conducted to estimate development costs and analyze/certify the ore body. If the deposit is viable, an environmental assessment, either federal or provincial or both, is done. First Nations may conduct their own assessment. Where they do not conduct their own assessment, First Nations often become involved in the other government's process, as the body assessing the environmental impact will ask if the First Nation's interest has been addressed and what the views of the potential Aboriginal title-holder are.

4) *Production* — If a project has received an environmental assessment certificate and federal approval, it moves into a permitting phase. A large number of permits are required — as many as 25 for mine start-up. Following permitting, one to two years of construction may take place before a mine is fully operational (there are a number of different ways to extract minerals — for example, open pit or underground). BC mines generally have a life of less than 20 years. It is at the production stage that royalties are collected by the provincial government, some of which are shared with the affected First Nations under specific agreements (see below).

5) *Closure/Reclamation* — Reclamation should take place throughout the life of the mine in order to reduce long-term liabilities. In BC, conceptual closure plans must be filed before a mine receives its Certificate of Environmental Compliance, and companies are also required to pay into a Mine Reclamation Fund. When a company cannot or will not pay for reclamation costs, the mine is considered orphaned or abandoned and the provincial government becomes responsible for reclamation.

First Nations involvement in any one of these phases is dependent upon a number of factors, including the prevailing policy or legislation of the province, the policy or laws of a First Nation, and the willingness of the proponent/developer or mine operator. The evolving law of Aboriginal title and rights, including the law respecting consultation, accommodation and consent, guides First Nations participation and involvement.

Engagement of First Nations in mineral exploration, extraction and permitting processes at all stages, based on Aboriginal title and rights, has real significance and can bring benefits when Nations agree that developments should take place and all accommodations have been made. While Aboriginal title-holders expect to be involved in all stages of the process, there are particular concerns with respect to the early stages of the process.

BC's Free-Entry Tenure System

BC has a free-entry tenure system for mineral staking. Prospectors acquire mineral rights over a defined area by registering mineral claims with the provincial government. This is done through Mineral Titles Online (MTO), launched in January 2005. People can now use a credit card and a computer from anywhere in the world to stake a claim, notwithstanding the Aboriginal title and rights of First Nations. In its first week of operation, the MTO website received 2.56 million hits and 3,110 claims were acquired. Less than nine months after the launch of MTO, 12,800 claims had been acquired online — an increase of 160 percent over the previous year. For the most part, the system does not recognize Aboriginal title and rights, although some "no staking reserves" have been established to prevent new mineral rights being granted on lands that are potentially subject to Aboriginal title. This free-entry staking system is a cause of much conflict with First Nations and leads to money and effort being wasted on potential projects that may not be acceptable to First Nations. A lack of recognized First Nations involvement in land-use planning and shared decision-making has prevented co-operation in the early stages of potential mining exploration and project development, although this is situation is improving with new agreements reached between some Nations and the Province. Further, the MTO website does make a point of notifying parties interested in mineral extraction that Aboriginal interests must be considered. It urges corporations or others interested to connect with affected First Nations before proceeding. It also refers people to the Association for Mineral Exploration in BC, which has developed a toolkit for working with First Nations communities.

The FNEMC has made free mining entry a priority and is advocating for other legislative changes, working with the BC First Nations Leadership Council to engage with the Crown and industry to find solutions. Free mining entry means that mining is given precedence over virtually all other land uses and, under current law, the Province cannot deny a mineral lease based on the applicant's relationship with affected First Nations. The FNEMC continues to make the case for changes to the free mining entry system that would include making mineral claims conditional on obtaining a free, prior and informed consent agreement as well as requiring mandatory notice on conditional-status mineral claims. Alternatively, the free entry system could be replaced by a competitive bidding system.

In reality, regardless of what rights may supposedly be granted to those staking claims, court decisions have set out strong consultation and accommodation rules that require potential Aboriginal title and rights to be addressed. As a result, First Nations must be involved and are becoming more involved in the decision-making processes that follow initial staking and prospecting activity,

Government-to-Government Revenue Sharing Models

British Columbia now has a mineral tax-sharing policy under which it shares direct mineral tax revenues with First Nations for all new mines and major mine expansions. There is no revenue-sharing for existing operations, even where permits to operate are renewed or transferred. Under this policy, a First Nation enters into an Economic and Community Development Agreement (ECDA) with the Province through which the First Nation receives revenues from the royalties the Province expects to generate from the mine in exchange for support for the mine proceeding. Such agreements are made on a without-prejudice basis to Aboriginal title and other section 35 rights, including treaty rights. The first of these agreements were signed in August 2010 with the McLeod Lake Economic and Community Development Agreement and the Stk'emlupsemc of the Secwepemc Nation (as

represented by the Tk'emlups Indian Band and Skeetchestn Indian Band) Economic and Community Development Agreement. Today, nine such agreements, involving 24 Nations, have been reached. As of the end of 2013, revenues of more than $11.7 had been split with First Nations with ECDAs, including a $7-million legacy trust for the eight Nlaka'pamux communities, based on revenues from the Highland Valley Copper Mine. ECDAs are entered into on a case-by-case basis with the affected First Nations.

As of May 2014, the province had shared over $12 million in mineral tax revenues as a result of ECDAs with First Nations in whose traditional territories mines operations are located. It should be noted that First Nations are continually analyzing the relative benefits of the evolving revenue-sharing models, including the BC mineral tax-sharing policy. There are, of course, other taxes generated from resource extraction activities within ancestral lands; questions of tax reform and tax sharing are discussed generally and in more specific terms in Section 3.29 — Taxation.

Business Arrangements and Benefits Agreements

Agreements made with the Crown to share decision-making or to govern mining activities, including the sharing of royalties, should never be confused with agreements made with third-party mining companies (whether prospecting, exploring, developing or producing). The nature of the relationships, one government-to-government and the other business-to-government, must always be kept in mind, because both conceptually and legally they are quite different. This is particularly important where a First Nation may have a development arm of its operations as the related entity to the government but the business objectives of that arm are not necessarily the same as those of the body that represents the proper title-holder. First Nations need to be mindful of this dichotomy when establishing policy and organizing their administrations. It can lead to conflicts where the governing body has not properly considered a project and the development arm is anxious to proceed with a potential joint venture with another corporate partner.

Similarly, mining companies may believe they are no longer required to seek the approval of the proper title-holder if they have made a business deal with a related First Nations development entity. Conversely, a mining company may believe there is no need to negotiate an impact benefit agreement beyond minimal job and contract standards in cases where a Nation has entered into an agreement with the province dealing primarily with the mineral tax. Where the First Nation sees itself as the owner of lands, where given the balance of probabilities such lands would be declared Aboriginal title lands if the matter were to go to court, the First Nation will expect not only to share in the governmental revenues but also to be a possible partner in the project and share in the profits of the business activities.

The FNEMC has reviewed industry impact benefit agreements across Canada and established that the more proactive mining companies were sharing profits and providing equity at no cost to the First Nation, notwithstanding any royalty arrangements between the Nation and a provincial or territorial government. These industry impact benefit agreements provide substantial benefits beyond what may be included in provincial revenue-sharing agreements. First Nations have stated that Nations affected by agreed-upon mining development have a right to both Crown revenue-sharing and industry impact benefit agreements.

Other mining and energy related guides, templates and policy-related documents can be found on the FNEMC website (http://fnbc.info/fnemc).

INDIAN ACT GOVERNANCE

While the *Indian Mining Regulations* have no application to British Columbia in light of the 1943 *Indian Reserves Mineral Resources Agreement* and the *British Columbia Indian Reserves Mineral Resources Act*, there are provisions in the *Indian Act* dealing with other non-metallic materials on reserves that

currently apply to First Nations in BC. Section 58(4)(b) provides that the Minister may, with the consent of the First Nation council, dispose of sand, gravel, clay and other non-metallic substances and give permits for their extraction. The proceeds from such extraction or permits go to the First Nation and to any individual who holds a Certificate of Possession on the lands where the materials are taken (section 58(5)). This is a very weak provision, which, while requiring council consent, does not recognize First Nations jurisdiction. It is not a suitable model for the future.

SECTORAL GOVERNANCE INITIATIVES

Sectoral Initiatives On-Reserve

There are no sectoral initiatives with respect to mineral extraction on reserve lands. Political work is focused off-reserve and within ancestral lands, including Aboriginal title lands, and on the potential for ownership rights and governance rights in the context of recognition of Aboriginal title. Although there are no sectoral initiatives specifically directed to minerals and precious metals, a number of the sectoral governance initiatives addressing land management address aspects of this subject matter and are consequently discussed below. The reality of the primary focus being off-reserve does mean that when First Nations do consider their governance structures and supporting policies on-reserve with respect to these matters, they must keep in mind both on-reserve and off-reserve needs and ensure that the policies and governance approaches are consistent.

The *Framework Agreement on First Nation Land Management*

The *Framework Agreement on First Nation Land Management* (Framework Agreement) deals with recognition of a First Nation's jurisdiction and management of its reserve lands, referred to as its "First Nation lands." The Framework Agreement states that First Nation lands include "the resources that belong to that land to the extent that these are under the jurisdiction of Canada and are part of that land" (section 2.2). In BC, this means that, because of the 1943 *Indian Reserves Mineral Resources Agreement*, the Framework Agreement probably does not extend to minerals. However, it does replace ministerial control over non–metallic substances such as sand, gravel and clay found in the *Indian Act* under section 58(4)(b) and recognizes First Nations jurisdiction over these matters.

When a First Nation adopts a land code, the code must have rules granting interests in First Nation lands (this includes rules for granting interests in natural resources such as gravel, sand, timber, etc.). The land code must also have procedures for the management of revenues from natural resources obtained from First Nation lands. The Framework Agreement recognizes that after the land code comes into effect, the First Nation has the power to grant interests in the land and to manage its natural resources (clause 12.2). This is subject to the continuance of the *Indian Oil and Gas Act* (R.S.C. 1985, c. I-7), environmental regime harmonization and recognition of existing interests. Thus, while the *Indian Act* fails to provide a jurisdiction or management role for "band" councils with respect to minerals, the Framework Agreement is a step forward, as it provides for recognition of First Nations jurisdiction and management authority over many of the natural resources on reserve lands.

It is possible that a First Nation with a land code in place would be successful at negotiating an exemption from the *British Columbia Indian Reserves Mineral Resources Act*, if there were a need to do so.

Sectoral Initiatives within Ancestral Lands

With respect to mineral exploration and development off-reserve, in addition to the Economic and Community Development Agreements described above, some First Nations have negotiated Reconciliation Agreements or Strategic Engagement Agreements with British Columbia that include a commitment to consult and potentially accommodate a Nation's interests where resource extraction

is proposed in its ancestral lands and therefore potentially its Aboriginal title lands. These agreements can provide for shared decision-making. For example, the *Kunst'aa guu — Kunst'aayah Reconciliation Protocol* and associated legislation provide for the creation of the Haida Gwaii Management Council, a joint British Columbia/Haida statutory decision-making body that can make resource use decisions (see Section 3.20 — Lands and Land Management). While there is no specific treatment of mining activities in this arrangement, it is expected that the Haida Nation would be involved in any strategic or land use planning decisions that involved the establishment of a mine.

The Strategic Engagement Agreements provide for a shared decision-making framework and a corresponding shared decision-making matrix that has four "Shared Decision" levels and a fifth "Strategic Shared Decisions" level (a sample shared decision-making matrix is reproduced in Section 3.20 — Lands and Land Management). Essentially, the matrix scales decision-making with a corresponding description of the First Nation's involvement in the land and resource use decisions made by the Province. The matrix makes specific reference to the involvement of the Aboriginal group with respect to "Mineral Exploration" and "Mineral Titles."

It should be noted that shared decision-making mechanisms are still in the early stages of development and testing for efficiency and effectiveness. Other options may be developed, either as sectoral initiatives or as part of comprehensive arrangements, and these arrangements should reflect the developments in the law of Aboriginal title and rights, including treaty rights. Further, the mechanisms should typically not be restricted to a single matter, such as mining: shared decision-making over traditional territories can involve other matters, such as forestry, land-use planning, alternative energy, watershed management, environment, and so on.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

Under the Sechelt and Westbank comprehensive governance arrangements, there are no changes to mineral and precious metal ownership and governance: they are the same as for any other First Nation governed under the *Indian Act*. In modern treaty arrangements, the Nations, with the exception of Tsawwassen, own all minerals and precious metals on their settlement lands. In addition to being the owners of these resources, these Nations have jurisdiction over the authorization of resource-extraction activities on their lands, in accordance with their recognized law-making powers. They consequently can benefit from and regulate any mining activity or development on their lands as both an owner or as the final governmental authority. They authorize any development on their lands in accordance with their laws. They also have the ability to collect fees, rents, royalties or other charges with respect to mining activities.

Tsawwassen is something of an anomaly, in that it provided a release of its interests in mines and minerals under English Bluff in exchange for $2 million. The *Tla'amin Final Agreement* also contains one unique element: it gives Tla'amin access to the Lund Hotel Parcels and its subsurface resources, though while having to pay compensation. The off-reserve land parcels are owned by the Nation. While the Nations with modern treaties have jurisdiction over natural resource development, this jurisdiction does not extend to regulating mining activity and the manner in which mining takes place. These regulations and standards are set by the province and are the same as across the rest of the province.

With respect to interests in minerals and precious metals off-reserve and mining exploration and development, Nations with comprehensive governance arrangements typically have guaranteed involvement in land and marine-use planning (see Section 3.19 — Land and Marine Use Planning). Nations with comprehensive arrangements can also benefit in the same way as other Nations with respect to proposed projects within their traditional lands but outside of their settlement lands. Again, as Westbank and Sechelt's arrangements are not part of a treaty and do not address off-reserve matters, these issues are the same for these two Nations as for other Nations without a modern treaty.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	*British Columbia Indian Reserve Minerals Resources Act* applies and the federal *Indian Reserves Minerals Resource Act* applies. (s. 40–41) Sechelt Constitution, Part 1 Decision (3) s. 1–4.	N/A
Westbank	Westbank First Nation does not have jurisdiction over minerals (defined as gold, silver and all naturally occurring useful minerals). The *BC Indian Reserves Minerals Resources Act* and the federal *Indian Reserves Minerals Resource Act* continue to apply. Subject matter is identified for future negotiations. (Part XXIV, s. 222) Westbank has jurisdiction over non-metallic substances (sand, gravel, building stone coal, natural gas, etc). (Part XII, s. 138)	Westbank law prevails in relation to non-metallic substances. (Part XII, s. 140)
Nisga'a	The Nisga'a Nation owns all mineral resources on or under Nisga'a Lands (Ch. 3, s. 19). The Nisga'a Lisims Government has the exclusive authority to determine, collect, and administer any fees, rents, royalties, or other charges with respect to mineral resources on or under Nisga'a Lands. (Ch. 3, s. 20).	No provision.
Tsawwassen	Tsawwassen First Nation owns subsurface resources (including minerals and precious metals) on or under Tsawwassen lands. Tsawwassen First Nation may set fees, rents, royalties or charges other than taxes, related to the exploration, development, extraction or production of those subsurface resources. Does not limit BC from determining, collecting and receiving administrative fees, charges or other payments, relating to the exploration, development, extraction or production of subsurface resources from Tsawwassen Lands or other Tsawwassen Lands, as applicable. (Ch. 4, s. 22–23) The Tsawwassen First Nation released all of its interests to mines and minerals under English Bluff in exchange for $2 million dollars (Ch. 4, s. 96, 97, 98)	No provision.
Maa-nulth	Each Maa-nulth First Nation owns the subsurface resources on or under its Maa-nulth First Nation Lands, except for the subsurface resources in Appendix G, Part 2 of the *Maa-nulth First Nations Final Agreement*. (s. 4.1.1) As the owner of subsurface resources, each Maa-nulth First Nation has the authority to set fees, rents, royalties and other charges, except taxes, for exploration, development, extraction and production of subsurface resources owned by that Maa-nulth First Nation. (s. 4.1.2)	Federal and provincial law prevails. (s. 4.1.5)
Yale	Yale First Nation owns the Subsurface Resources on or under Yale First Nation Land and, as such, has the authority to set fees, rents, royalties and other charges, except taxes, for exploration, development, extraction and production of those Subsurface Resources. (s. 12.3.1–12.3.2) Yale First Nation does not have the authority to establish fees, rents, royalties or other charges in relation to Subsurface Tenures or the exploration, development, extraction or production of Tenured Subsurface Resources. (s. 12.3.3)	No provision.
Tla'amin	The Tla'amin Nation owns Subsurface Resources on or under Tla'amin Lands and, as such has exclusive authority to set, collect and receive fees, rents, royalties and charges other than taxes for the exploration, development, extraction and production of Subsurface Resources. (Ch. 3, s. 67 and 69)	Federal or provincial law prevails. (Ch. 3, s. 74)

Table — BC First Nations' Laws/Bylaws in Force

SECTORAL GOVERNANCE INITIATIVES
Bill 18 — 2010: *Haida Gwaii Reconciliation Act*

Table — Provincial Economic and Community Development Agreements

PROVINCIAL ECONOMIC AND COMMUNITY DEVELOPMENT AGREEMENTS
Economic and Community Development Agreements (ECDA) are agreements between Government and First Nations for sharing the direct mineral tax revenue on new mines and major mine expansions. As part of the New Relationship, the Province committed to share revenue with First Nations as a means to create certainty on the land and to make First Nations partners in resource development. As part of commitments made in the *Transformative Change Accord*, the Province committed to seeking ways to address the socio-economic gap between Aboriginal and non-Aboriginal citizens by working in partnership with Aboriginal communities. Economic and Community Development Agreement are entered into on a case-by-case basis with the impacted First Nations.
• ***McLeod Lake Indian Band Economic and Community Development Agreement*** — is a revenue-sharing agreement between the Province of British Columbia and the McLeod Lake Indian Band to share 15 per cent of mineral tax royalties from the Mt. Milligan Mine. http://www2.gov.bc.ca/gov/DownloadAsset?assetId=A26A692EA89743409648D98FC6BF8A52&filename=ecda_mcLeod_lake.pdf
• ***Stk'emlupsemc of the Secwepemc Nation Economic and Community Development Agreement*** — is a historic mining revenue-sharing agreement between the Province of British Columbia and the Stk'emlupsemc of the Secwepemc Nation to share mineral tax royalties from the New Afton Mine. http://www2.gov.bc.ca/gov/DownloadAsset?assetId=63B4A3C1428949F7B8EF8ED7645ECA8C&filename=ecda_secwepemc.pdf
• ***Ktunaxa Nation Economic and Community Development Agreement*** — A revenue sharing agreement ensuring the communities benefit from resource development within their traditional territory. Includes an amendment signed in August 2013. The Nation receives 37.5 per cent of tax revenues on the first $23 million of taxable revenues with additional formulas applied if revenues exceed $23 million. http://www2.gov.bc.ca/gov/DownloadAsset?assetId=FD285A8F00DF433C9BCD870900632244&filename=ecda_ktunaxa_amendment.pdf
• ***Lower Similkameen Indian Band and the Upper Similkameen Indian Band Economic and Community Development Agreement*** — a revenue sharing agreement signed in March 2013 that enables the two communities to benefit from the Copper Mountain Mine. Under this joint agreement, the Bands share 35 per cent of the Net Mineral Tax Revenue. http://www2.gov.bc.ca/gov/DownloadAsset?assetId=A0AF7C1E73DF4301998C9DA8B1356581&filename=ecda_similkameen.pdf
• ***Nak'azdli First Nation Economic and Community Development Agreement*** — signed in June 2012, it provides greater economic opportunity and greater certainty for the Mt. Milligan Mine project. The First Nations receives 12.5 per cent of mineral tax revenues. http://www2.gov.bc.ca/gov/DownloadAsset?assetId=FD4F200D8B9A4C72BCAC26E6F52465CA&filename=ecda_nakazdli.pdf
• ***Nlaka'pamux Economic and Community Development Agreement*** — The March 2013 agreement involving eight communities (Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band) provides a $7 million legacy trust investment which is the result of a revenue-sharing agreement on tax revenues from the Highland Valley Copper Mine, BC's largest operating metal mine. http://www2.gov.bc.ca/gov/DownloadAsset?assetId=ABF650D2E3D04DD29C7F0086359DACE1&filename=ecda_nlakapamux.pdf
• ***Williams Lake Indian Band Economic and Community Development Agreement*** — revenue-sharing agreement that provide the community a share of mineral tax revenues collected by the province from the Mt. Polley mine expansion. Community share is 18.5 per cent. http://www2.gov.bc.ca/gov/DownloadAsset?assetId=C532CD6615954C64B3D5BEE8F8702D20&filename=ecda_williams_lake.pdf
• ***Soda Creek (Xatsull First Nation) Economic and Community Development Agreement*** — provides the community a share of mineral tax revenues by the province from the Mount Polley mine operation. Community share is 16.5 per cent.
• ***Cheslatta Carrier First Nation Economic and Community Development Agreement, the Nee-Tahi-Buhn Band Economic and Community Development Agreement, the Skin Tyee Nation Economic and Community Development Agreement, the Wet'suwet'en Economic and Community Development Agreement*** — signed in May 2014, all relate to the Huckleberry Mine Expansion. Community shares range between 4.2% and 5.2%.

RESOURCES

First Nations

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www.fnemc.ca

- BC First Nations' Mineral Exploration and Mining Action Plan (2008). www.fnemc.ca/wp-content/uploads/2014/04/FINAL_Mining-Action-Plan_w-pics.pdf
- *Sharing the Wealth: First Nation Resource Participation Models*: www.fnemc.ca/wp-content/uploads/2014/01/Sharing-the-Wealth-v2.pdf

Fair Mining Collaborative
Email: info@fairmining.ca
www.fairmining.ca

- Fair Mining Practices: A New Mining Code for British Columbia [Chapter Summaries]. www.fairmining.ca/wp-content/uploads/2014/08/Fair-Mining-Practices-A-New-Mining-Code-for-BC-Web-Copy.pdf
- The Mine Medicine Manual: A Community Resource: www.fairmining.ca/wp-content/uploads/2014/09/MMM_Sep_2014.pdf

First Nations Women Advocating Responsible Mining
Email: info@fnwarm.com
www.fnwarm.com/8301.html

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Provincial

Ministry of Energy and Mines
PO Box 9053 Stn Prov Govt
Victoria, BC V8W 9E2
Phone: 250-387-5896
Fax: 250-356-2965
www.gov.bc.ca/ener/

- Mineral Titles Online: www.mtonline.gov.bc.ca/mtov/home.do

Association for Mineral Exploration in BC
Suite 800 – 889 West Pender Street
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Fax: 604-681-2363
Email: info@amebc.ca
www.amebc.ca/Home.aspx

- Aboriginal Engagement Guidebook: www.amebc.ca/resources-and-publications/publications/current.aspx

Mineral Titles — Vancouver
300 – 865 Hornby Street
Vancouver, BC V6Z 2G3
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Aboriginal Affairs and Northern Development Canada
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- Survey of Mining Companies 2013: www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/mining-survey-2013.pdf

SELECT LEGISLATION

Provincial

- *BC Mineral Tenure Act* (R.S.B.C. 1996, c. 292)
- BC *Mines Act* (R.S.B.C. 1996, c. 293)

Federal

- *Indian Oil and Gas Act* (R.S.C., 1985, c. 1-7)
- *Indian Mining Regulations* (C.R.C., c. 956)
- *British Columbia Indian Reserves Mineral Resources Act* (S.C. 1943-44, c. 19)

PART 1 /// SECTION 3.24

Oil and Gas

3.24

OIL AND GAS

3.24

OIL AND GAS

BACKGROUND

For many First Nations in BC, jurisdiction, control and approval of oil and gas exploration, development, processing and distribution have become an increasingly significant issue. While only a handful of First Nations in BC may actually have oil and gas resources that are located on or form part of their reserves or treaty settlement lands, some have oil and gas within Aboriginal title lands (declared or not), many have oil and gas resources that are found within their ancestral lands, and all, in some way, are impacted by oil and gas development generally.

Over the past two decades, as a result of market demand, new technologies and the policies of the federal and provincial governments, the oil and gas industry has seen steady growth in BC and Alberta (including the controversial development of the Alberta tar, or oil, sands), with significant new investments being made or contemplated. In BC, most of the drilling for gas and oil is located in the Peace Country in the northeastern part of the province, around Fort Nelson (Greater Sierra oil field), Fort St. John (Pink Mountain, Ring Border) and Dawson Creek. The provincial government has placed particular importance on the fledgling BC liquid natural gas (LNG) industry in supporting the future of the BC economy, and with a major focus on building an LNG market, largely for export to Asia. For its part, the federal government has tended to focus on oil production and its export, also to Asia.

What is liquefied natural gas (LNG)?

Liquefied natural gas (LNG) is natural gas that is cooled to -160 degrees Celsius. At this temperature, the gas condenses to a liquid state that takes up only 1/600th of its original volume, making it easier to transport in areas where pipelines are not available (e.g., shipping via tanker or rail).

Made up mostly of methane — with small amounts of ethane, propane and butane — LNG is odourless and considered non-toxic and non-corrosive.

As the western Canadian petroleum industry continues to grow, issues such as gas fracking practices, tar sands development, and pipeline approvals have become increasingly controversial. Concerns about development have been greatest on lands where there is a strong case for Aboriginal title and where, for example, pipelines cross ancestral lands and in some cases reserve or treaty settlement lands (e.g., Enbridge's Northern Gateway twin bitumen and condensate pipeline proposal, and Kinder Morgan's Trans Mountain pipeline and expansion plans); and where the site of holding and export facilities and the potential routes for tanker traffic create environmental risks to the local (non-petroleum based) economy (e.g., through Douglas Channel). This has created an environment of uncertainty with respect to the future of the petroleum industry in the province and a need to closely consider which levels of government (including Aboriginal) exercise jurisdiction and control in this highly politically charged situation.

First Nations are generally more optimistic or open to LNG opportunities, although there are concerns about the exploitation of resources on ancestral lands, about appropriate compensation and about transportation across First Nations lands. There are also concerns about whether the government or the companies involved will consult appropriately with First Nations.

However, jurisdiction over oil and gas is tied to a much more philosophical debate and broader dialogue taking place in Canada about balancing the need to have a petroleum industry with concerns about climate change and the type of economy Canadians want. The oil and gas industry today is an important part of the Canadian economy (approximately 3.4 percent of GDP), yet it is only a small part of what is a much larger and diversified economy — albeit an important contributor to all other sectors of the economy and a significant contributor to merchandise exports (over 20 percent). While there are those that politically support growth in the petroleum industry and, in fact, see Canada as becoming a future global energy "superpower", there is also a growing recognition by many others of the reality of climate change and the corresponding need to transition away from a global reliance on fossil fuels and to take action that, over time, will reduce global dependence on fossil fuels. Much

like other resource sector jurisdictions, the challenge is finding the right balance between exploiting natural resources and protecting the environment.

There is no simple solution to this challenge. Most people appreciate that simply halting fossil fuel energy development in its entirety is not feasible, yet they still want governments to adopt policies that would take the planet in that direction. Moving from a place of dependence on fossil fuels in Canada, as part of a global effort, will require governments of all levels — federal, provincial and Aboriginal — to adopt strategic policies for making the transition toward economies built on sustainable energy development and use. Very few First Nations oppose natural resource development outright. Rather, their debate is about the appropriate scope and scale at which development takes place, the manner in which it is regulated, who will benefit, and the environmental assessment and protections necessary to manage risk. In the coming years, First Nations and Canadians more generally will be challenged to define not only what they mean by sustainable development, but also what types of development are acceptable, and in particular, as applies to the petroleum industry.

The subject matter of oil and gas is linked to lands and land management, land and marine use planning, environment, water, wildlife, emergency preparedness, and traffic and transportation. There are also similarities with approaches and issues for other renewable and non-renewable natural resources, such as minerals and precious metals, forest, and fish, fisheries and fish habitat.

Understanding the Petroleum Industry

While there are technical differences between oil development and gas development, both involve exploration, processing and transport, and together they form part of the broader petroleum industry. The petroleum industry is typically divided into three major sectors: upstream, downstream and midstream.

- The upstream sector is also referred to as the exploration and production sector. It includes searching for potential underground or underwater crude oil and natural gas fields, drilling exploratory wells, and subsequently drilling and operating the wells that recover and bring the crude oil or raw natural gas to the surface.
- The downstream sector typically involves the processing and purifying of raw natural gas (including LNG), the refining of crude oil, and the marketing and distribution of products derived from natural gas and crude oil.
- Midstream operations are often included in the downstream category and considered to be a part of the downstream sector. The midstream sector involves the transportation of oil and gas (e.g., by pipeline, rail, barge, truck or ship [i.e., oil tanker]) and the storage and wholesale marketing of crude or refined petroleum products. Pipelines and other systems of transport are used to move crude oil and gas from production sites to refineries, and to deliver the various refined products to downstream distributors and ultimately the consumers.

First Nations Energy and Mining Council

In BC, the First Nations Energy and Mining Council (FNEMC) was established by the First Nations Summit, Union of BC Indian Chiefs and BCAFN. Part of the council's remit is to address First Nation involvement in energy, including matters concerning oil and gas development. In 2007, following a province-wide First Nations Energy Summit, a BC First Nations Energy Action Plan was adopted. Part of the vision of the FNEMC is that the "stewardship of our lands and resources and the acceptance of energy development in our territories will be based on our traditional values, sustainability, the potential to enhance the common good of our communities and the protection of our environment" and that "our political and economic relationships with the Crown, industry and other third parties with regard to energy development will be grounded in respect, recognition and accommodation of our constitutionally recognized and affirmed Aboriginal title and rights, and treaty rights."

Indian Resource Council

Based on recommendations of a task force established in the 1980s to study the role of the federal government in the management of First Nations oil and natural gas resources, the national Indian Resource Council (IRC) was founded in 1987 by chiefs representing those First Nations across Canada that have oil and gas production, or potential for that, on their land (i.e., upstream production). The IRC was established at the same time Canada expanded and restructured Indian Oil and Gas Canada (IOGC), the federal body responsible for on-reserve oil and gas (see below). The majority of IRC member First Nations are located in the Western Canada sedimentary basin, but there are IRC members from coast to coast. In BC, the IRC members are the West Moberly, Saulteau, Halfway River, Doig River, Fort Nelson and Blueberry River First Nations.

Division of Powers

Given the constitutional divisions of powers and the way property is divided between the two Crowns, jurisdiction with respect to the different sectors of the petroleum industry is divided between the federal and provincial governments. Most of the upstream and downstream regulation is principally a provincial responsibility as the constitutional "owners" of the resource with the powers to govern the disposition and development of them. Specifically, section 92A of the *Constitution Act, 1982* sets out the jurisdictional powers of the provinces over non-renewable natural resources, including over exploration, development, management, conservation, facilities development and taxation. The federal government, however, also has an important role to play in the midstream sector with respect to the transport of oil and gas, given its national role in the economy and in the movement of goods and services between provinces, its powers with respect to exports, and its powers over navigation and shipping. The federal government can also have an ancillary role with respect to environmental approvals, which, in some cases means that it has to be involved in project approvals (e.g., pipeline development).

It is important to appreciate how Canada gets it jurisdiction, particularly with respect to pipeline approvals. Section 92(13) of the *Constitution Act, 1867* may give the provinces legislative authority over "property and civil rights in the province" and, under section 92(10), for "local works and undertakings." However, provincial powers are balanced by section 92(10) (a), which gives the federal Parliament jurisdiction over railways, canals and "other works and undertakings." Today this would include pipelines that cross provincial boundaries. Arguably, this means that BC, or any other province, would not have the constitutional power to block a pipeline coming from another province if the federal government approved it. Furthermore, the so-called "declaratory power" found in subsection 92(10)(c) gives Parliament the power to declare a work, even though "wholly situated within the province," to be "for the general Advantage of Canada, or for the Advantage of Two or more of the provinces," and therefore to come under federal jurisdiction. In theory, Parliament could use this declaratory power over all the local roads, bridges, storage facilities, hydro connections and any other physical infrastructure required to build and then maintain and operate a gas or oil pipeline. In fact, the federal government has used this power dozens of times, most notably during Canada's early history and the building of the railway. In more recent times this power was used to bring Canada's nuclear industry under federal control.

First Nations assert ownership of rights to natural resources, including oil and gas, within their ancestral lands and seek to exercise an increased degree of governmental control over the exploration and potential development of those resources. Generally, First Nations seek confirmation of their ownership of subsurface rights, including of oil and gas, and greater law-making powers with respect to oil and gas resources located on reserve lands and treaty settlement lands. Off-reserve, First Nations seek to be involved in shared decision-making and, where projects are acceptable to First Nations, to share royalties and other revenues from oil and gas resources found within their ancestral lands. Where Aboriginal title is declared, this would presumably include — as with forests and other natural resources — the beneficial rights to oil and gas resources as the

"owner." Determining how these property rights would be governed must take into consideration the jurisdictional aspects of Aboriginal title and the constitutional division of powers.

The interrelated roles of First Nations, federal and provincial governments, and industry in this area are evolving. As already noted, the transport of oil and gas has implications for multiple levels of governments and for citizens, and thus is subject to an intertwined regulatory regime. No matter who may own oil and gas resources, the regulation and management of oil and gas exploration and processing are very complex and highly technical. So, while subject to Aboriginal governance rights, Canada has primary jurisdiction for on-reserve lands, while the provinces have primary jurisdiction over oil and gas exploration and processing on off-reserve lands.

Geographical Scope of Governance

When considering jurisdiction over oil and gas, it is important to consider whether it is with respect to reserve lands, treaty settlement lands, Aboriginal title lands or the broader ancestral lands of a First Nation that transcend all other lands. With the exception of the Peace River area, most Nations in BC do not have oil and gas resources located on reserve lands and so there is little upstream interest in oil and gas development from this perspective. However, some First Nations may look to locate downstream facilities on their reserves or treaty settlement lands or other lands (e.g., communities along the coast for processing, storage and export purposes, such as converting aqueous gas into a liquid gas). For Nations wishing to exercise jurisdiction on-reserve with respect to upstream oil and gas activities, this section examines the various governance options available. It also considers options that are being used to support downstream development. However, for most First Nations, their interest will be in exercising jurisdiction and control over projects located off-reserve and with respect to midstream activities (e.g., pipelines).

Whether upstream, midstream or downstream, oil and gas regulation can be viewed along a continuum from source to market. Each sector and each step of the process of moving oil and gas from source to final consumer carries with it certain environmental and social risks. While the exploration and processing of oil and gas may take place in one region, the transport of the resource (whether by pipeline, rail or tanker) may occur across large tracts of land, even over transcontinental boundaries. For this reason, authority and jurisdiction over oil and gas are of interest to many if not all First Nations in BC. While there are certainly economic benefits to oil and gas development for First Nations, the question is often: Who stands to benefit and who will carry the environmental risk? Thus, the transport of oil and gas often provokes national debate where governments and citizens from all levels can be impacted at one or more parts of this oil and gas industry continuum.

Provincial Regulation

In BC, the Province regulates oil and gas exploration and development under the *Oil and Gas Activities Act* (S.B.C. 2008, c. 36) and *Petroleum and Natural Gas Act* (R.S.B.C. 1996, c. 361), and the regulations made under those statutes. There is a well-developed and complex system for managing oil and gas interests that operates separately from other land management systems and processes. Accordingly, the BC Ministry of Energy and Mines (BCMEM) is not the primary ministry responsible for oil and gas. This function is performed through the more recently created BC Ministry of Natural Gas Development and Minister Responsible for Housing. That ministry provides a range of natural gas and oil related services, including management of Crown petroleum and natural gas resource rights and of royalty programs, public geoscience and policy. It has also established an LNG Task Force, to provide ministries and Crown agencies with an overarching framework for ensuring that policies, programs and decisions support the government's LNG priority. The ministry also guides the development of recommendations related to energy exports and the opening of new export markets related to interprovincial pipelines, oil projects and value-added natural gas products. This work includes

ensuring that BC's five requirements as set out in its policy paper, *Requirements for British Columbia to Consider Support for Heavy Oil Pipelines*, are met. The Province of British Columbia released its natural gas strategy in 2012.

In 1998, the Province established the BC Oil and Gas Commission (OGC) as a Crown corporation and regulatory body. The OGC was created through the *Oil and Gas Commission Act*. In October 2010, the commission was brought under the *Oil and Gas Activities Act* (S.B.C. 2008, c.36). This body is an independent regulatory agency with responsibilities for overseeing oil and gas operations in BC. Regulatory responsibility of the OGC extends from the exploration and development phases, through to facilities operation and ultimately decommissioning — a model designed to be a "one-stop." The OGC's responsibilities are delegated not only through the *Oil and Gas Activities Act* (S.B.C. 2008, c.36), but also through the *Forest Act* (R.S.B.C. 1996, c. 157), *Heritage Conservation Act* (R.S.B.C. 1996, c. 187), *Land Act* (R.S.B.C. 1996, c. 245), *Environmental Management Act* (S.B.C. 2003, c. 53), and *Water Act* (R.S.B.C. 1996, c. 483).

The commission is charged with balancing a broad range of environmental, economic and social considerations. In this regard, it is responsible for consulting with First Nations on proposed oil and gas activities within First Nations ancestral lands. The Commission and the Province have consultation process agreements with several First Nations, which set terms and conditions for any exploration and development of oil and gas resources in the respective Nation's territory. Those agreements include the Halfway River First Nation Oil and Gas Consultation Agreement, the Interim Consultation Procedure with Treaty 8 First Nations, the Treaty 8 First Nations Long Term Oil and Gas Agreement (Doig River, Prophet River, West Moberly), the McLeod Lake Indian Band Oil and Gas Consultation Agreement, and the Fort Nelson First Nation Oil and Gas Consultation Agreement.

Important to note is that there are no modern treaty arrangements under the BC treaty process with any Nations that have oil and gas resources within their territory. McLeod Lake, for example, which does have such resources, chose to adhere to Treaty 8, and therefore its oil and gas arrangements are outside the BC treaty process. Interestingly, in BC treaty negotiations, the Province has supported First Nations ownership of all the subsurface resources, with the exception of oil and gas. The provincial government has also insisted at treaty tables that the governance arrangements under treaty should not include First Nations jurisdiction with respect to oil and gas exploration and exploitation (i.e., the process and permitting of the development of oil and gas resources). It is likely that oil and gas development would follow the provincial system and be the same on treaty settlement lands (including former reserve lands) as in areas outside settlement lands and under general provincial law.

Notwithstanding the positions taken by the Province in treaty negotiations, the obligation remains to consult and accommodate First Nations interests where proposed oil and gas development is within the Aboriginal title territory of a Nation. Where the proposed development may impact Aboriginal rights or where title is determined and the resources are therefore owned by the Nation, that reality must be respected

Federal Regulation

The National Energy Board (NEB) is an independent federal agency established in 1959 by the Parliament of Canada to regulate international and interprovincial aspects of the oil, gas and electric utility industries. The NEB is accountable to Parliament through the Minister of Natural Resources Canada. The board's regulatory powers address:

- the construction and operation of interprovincial and international pipelines;
- pipeline traffic, tolls and tariffs;
- the construction and operation of international and designated interprovincial power lines;

- the export and import of natural gas;
- the export of oil and electricity; and
- frontier oil and gas activities.

Other responsibilities of the board include:

- providing energy advice to the Minister of Natural Resources in areas where the board has expertise derived from its regulatory functions;
- carrying out studies and preparing reports when requested to do so by the Minister;
- conducting studies into specific energy matters;
- holding public inquiries when appropriate; and
- monitoring current and future supplies of Canada's major energy commodities.

In addition to its responsibilities under the *National Energy Board Act* (R.S.C., 1985, c. N-7), the NEB also has responsibilities under the *Canada Oil and Gas Operations Act* (R.S.C. 1985, c. 0-7), the *Canadian Environmental Assessment Act* (S.C. 2012, c. 19, s. 52), the *Northern Pipeline Act* (R.S.C. 1985, c. N-26), and certain provisions of the *Canada Petroleum Resources Act* (R.S.C. 1985, c. 36, s. 2.). As a result of the *Canada Transportation Act* (S.C. 1996, c. 10), which came into effect on July 1, 1996, the NEB's jurisdiction has been broadened to include pipelines that transport commodities other than oil or natural gas.

The NEB handles approximately 750 applications annually. For major applications, it holds public hearings where applicants and interested parties can participate. These hearings can involve written or oral proceedings, and they are usually held at locations across Canada where there is a particular interest in the application and which will be most affected by the board decision. Normally, a panel consisting of three board members is assigned to hear applications.

The NEB operates as a court of record, similar to a civil court. Its powers include the swearing in and examination of witnesses and the taking of evidence. Before a hearing, individuals, interest groups, companies, First Nations and other organizations are given an opportunity to register as intervenors or interested parties in the process.

In addition to the NEB, Natural Resources Canada (NRCac) also has an Oil and Gas Policy and Regulatory Affairs Division (Oil and Gas Division) that provides an annual review and looks at trends in the oil, natural gas and petroleum products industry in Canada and the United States.

Environmental Management

In line with the constitutional division of powers, both the federal and provincial governments can exercise jurisdiction in the areas of environmental assessment and protection as pertains to the oil and gas industry.

Projects that trigger a federal environmental assessment include those that fall under the NEB, cross provincial or international boundaries, involve a federal jurisdiction, or involve a project deemed to be of national interest. Therefore, the transport of oil or gas where it crosses provincial boundaries is within federal jurisdiction. Because the federal government also has jurisdiction over navigation and shipping, proposed projects that include the marine transport of oil and/or gas would trigger a federal environmental assessment. The *Canadian Environmental Assessment Act* (S.C. 2012, c. 19, s. 52) sets parameters for the responsible authority and assessment required. Types of assessment can include screening, environmental assessment by a responsible authority, and review by a panel. When a proposed project requires a decision from both the federal government and the provincial government in question, a joint review panel agreement can be negotiated. Environmental assessment is explored further in Section 3.10 — Environment.

Unfortunately, there is no guaranteed way to eliminate risk where the transport of oil or gas is concerned, although the risk from the movement of bitumen oil is much more than for natural gas (the former is heavy and sinks; the latter is light and dissipates). Thus, the prospect of oil and gas transport is of key concern to many First Nations. The regulatory regime for environmental emergency preparedness is complex, as transport often occurs through different jurisdictional boundaries. Provincially, BC's *Emergency Program Act* (R.S.B.C. 1996, c.111) and regulations identify the BC Ministry of Environment as the responsible authority for preparedness and response in the case of oil and hazardous material spills (marine and inland), gas and gas leaks (pipeline), and water-related debris flows.

Under Canada's *Emergency Management Act* (S.C. 2007, c.15) (EMA), federal departments are responsible for emergency planning for their area of authority. The EMA also includes spill cost-recovery and spill reporting regulations. The responsible federal authority for preparedness and response to ship-source spills is Transport Canada. The Canadian Coast Guard is the lead federal agency for cleanup of ship-sourced spills of oil and other pollutants. For interprovincial pipelines, the federal government is responsible for preparedness and response. Where there is an incident in which the NEB shares responsibility with the Transportation Safety Board, the NEB investigates whether regulations have been followed and the Transportation Safety Board looks at the cause and contributing factors to the incident. The roles and responsibilities of each body in the case of pipeline accident investigations are outlined in an MOU between the two boards. Environmental emergency preparedness is explored further in Section 3.9 — Emergency Preparedness.

Oil and Gas Regulation On-Reserve

In recognition of the uniqueness of regulating and managing oil and gas on-reserve, Canada has enacted specific legislation. Prior to 1974, governance of oil and gas on-reserve was covered in the *Indian Act*. In the 1970s, rapid increases in the price of oil and gas caused administrative difficulties in determining royalty rates under the *Indian Act*. As a result, Canada enacted the *Indian Oil and Gas Act* (R.S.C. 1985, c. I-7), which removed oil and gas from section 57 (c) of the *Indian Act*. In 1977, the *Indian Oil and Gas Regulations* (C.R.C., 1978, c. 963) were developed to support the new legislation. These regulations set out the manner in which oil resources on-reserve are developed. In accordance with the act and regulations, oil and gas resources located on-reserve are managed through a special operating agency within Aboriginal Affairs and Northern Development Canada (AANDC) called Indian Oil and Gas Canada (IOGC).

The *Act to Amend the Indian Oil and Gas Act* (S.C., 2009, c.7), passed in 2009, introduced new regulation-making powers with respect to licences, permits and leases for the exploration and exploitation of oil and gas on-reserve. A process was initiated between the federal government and the Indian Resource Council (IRC) to modernize the *Indian Oil and Gas Regulations* (S.O.R./94-753). Once new regulations are passed, the amended *Indian Oil and Gas Act* (S.C., 2009, c.7, s.1) will come into force.

Of note with respect to these extensive and detailed regulation-making powers is the policy intention of the federal government to bring oil and gas producing First Nations under provincial regulatory systems and administration through adoption, by reference, of provincial laws. The amended act and regulation-making powers also provide new provisions to ensure that the Minister, who generally has very broad powers under the amended act, would consult with the governing body of an oil and gas producing First Nation on most matters of importance. Furthermore, the amendments to the act include much tougher penalties for offences made under the act and other lesser breeches.

Important to stress, though, is that this act is in no way a recognition of First Nations jurisdiction or even authority over oil and gas. Neither IOGC nor the IRC has any statutory recognition or powers, and they remain as administrative bodies only, although their role may be addressed in regulations. Thus, this is not to be confused with the sectoral governance initiative or, specifically with respect to this subject, the

First Nations Oil and Gas and Moneys Management Act (S.C. 2005, c. 48), as described below. In the case of the amended *Indian Oil and Gas Act* (R.S.C., 1985, c. I-7), power and control, while being clarified, is still solely in the hands of the Crown, in accordance with the fiduciary responsibilities the Crown has for oil and gas management on behalf of those Indians for whom the reserves that were set aside happened to have oil and gas resources. A joint process is currently underway between IOGC, the IRC and AANDC to finalize regulations, with a target date for completion of April 2015.

IOGC is the special operating agency responsible for managing and regulating the day-to-day oil and gas resources on First Nation reserve lands across Canada. The IOGC board was established in 1996 through an MOU signed between the Minister of AANDC and the IRC. Six of the nine board members are selected by the IRC and three by the Crown. Two board members serve as co-chairs: the chairman of the IRC and the Assistant Deputy Minister of Lands and Economic Development, AANDC. The offices of IOGC are located on the Tsuu T'ina Nation reserve just west of Calgary. The mandate of IOGC is to:

- fulfill the Crown's fiduciary and statutory obligations related to the management of oil and gas resources on First Nations lands; and
- further First Nations' initiatives to manage and control their oil and gas resources (i.e., governance).

With respect to the first half of the mandate, IOGC currently manages the oil and gas resources of 50 First Nations with active oil and gas agreements. IOGC is responsible for the following activities:

- negotiation, issuance and administration of agreements between the Crown, First Nations and oil and gas companies;
- conduct of environmental screenings and other environmental stewardship activities;
- monitoring and verification of oil and gas production and sales prices;
- verification, assessment, and collection of monies such as bonuses, royalties and rents; and
- ensuring that all legislative and contract requirements are met.

Where this remit includes collecting oil and gas moneys on behalf of First Nations, these moneys are deposited into the respective Nations trust accounts.

IOGC'S general responsibilities are to:
• identify and evaluate oil and gas resource potential on Indian reserve lands;
• encourage companies to explore for, drill, and produce these resources through leasing activity;
• ensure equitable production, fair prices and proper collection of royalties on behalf of First Nations; and
• secure compliance with and administer the regulatory framework in a fair manner.

In short, IOGC carries out the fiduciary relationship between the Crown and the First Nations for oil and gas resources on-reserve. Having said that, IOGC still works closely with First Nations and the governing bodies of *Indian Act* bands, which, while not self-governing, are still involved in decision-making that affects the Nations. As a matter of policy, band council approval is required for all oil and gas deals. With respect to the second half of its mandate to facilitate greater self-regulation and self-government over oil and gas, IOGC has supported First Nations-led sectoral governance initiatives.

A group of First Nations and Canada developed an alternative to the *Indian Oil and Gas Act* (R.S.C., 1985, c. I-7) to enable First Nations to assume management and control over oil and gas on their reserves. The result was the *First Nations Oil and Gas and Moneys Management Act* (S.C. 2005, c. 48) in 2005. This is optional legislation that recognizes a First Nation's jurisdiction over oil and gas exploration and on-reserve exploitation. In addition to jurisdiction, the First Nation has all the rights of an owner of the resource and can develop that resource either by granting a lease or permit to a

third party or by carrying out the exploitation activity itself. To use this legislation, a First Nation must develop its own governance code that meets the criteria in the act. Whether this is an option for a Nation to consider will, of course, depend on whether the Nation has any oil and gas resources on-reserve lands. Interestingly, this approach runs counter to the general federal model for First Nations' governance, which looks for uniformity and does not favour creating separate governance regimes for each First Nation. Furthermore, Canada would like First Nations to adopt provincial practices of oil and gas development and, under the *First Nations Oil and Gas and Moneys Management Act*, some aspects of provincial rules need to be considered as part of the criteria.

First Nations Business Opportunities

In addition to First Nation efforts at reconciliation with other levels of government over oil and gas ownership and jurisdiction, many Nations are putting increased reliance on negotiated agreements with industry. Those opportunities include impact benefit agreements and equity participation in controlling development. The intention here is often to put conditions on the development in terms of scale and of oversight role, including First Nation involvement in the environmental management of the project. Another objective is to ensure reasonable benefits from the project reach the First Nation community in question. These types of contracts with third parties permit the latter access to First Nations' broader ancestral lands, while providing greater certainty that Aboriginal title and rights have been addressed appropriately.

Today there are, in addition to benefits agreements, many opportunities for First Nation to participate in the business side of all the oil and gas operations sectors (upstream, midstream and downstream). Notable, in fact, is how this involvement has moved beyond initial start-ups and enterprises created to meet industry and government "need" to consult, engage and accommodate First Nations, to the realization that First Nation enterprise and involvement brings added value to projects. Increased First Nations involvement in projects, whether as equity partners, subcontractors or employees, can bring new perspectives to management practices and sustainable development, and better focus on the so-called "triple bottom line." Also, geographically, the distribution of First Nations' communities is very attractive, providing local and stable resident populations often near oil and gas project sites. First Nations are not just "passing through."

First Nation Pacific Trails (gas) Pipeline Group

A critical component of the Kitimat LNG project is the transmission of natural gas from the Horn and Liard River Basins in northeastern BC to the liquefaction facilities on the North Coast. The Pacific Trails Pipeline (PTP) is a 463-kilometre natural gas pipeline that will connect the terminal near Kitimat to natural gas supplies in BC and Alberta.

The pipeline will travel through the traditional territories of 15 First Nations: Haisla Nation, Kitselas First Nation, Lax Kw'alaams Band, Lheidli T'enneh First Nation, McLeod Lake Indian Band, Metlakatla First Nation, Nadleh Whut'en First Nation, Nak'azdli Band, Nee Tahi Buhn Indian Band, Saik'uz First Nation, Skin Tyee Nation, Stellat'en First Nation, Ts'il Kaz Koh First Nation, West Moberly First Nations and Wet'suwet'en First Nation.

These 15 First Nations came together to form the First Nations (PTP) Group Limited Partnership (FNLP). In February 2013, the Province of BC, PTP and FNLP signed a benefits agreement that will provide the First Nations with $200 million in financial benefits over the life of the project. The agreement is also expected to provide the First Nations with business and training opportunities, along with an option for FNLP to acquire an equity interest in the project. Further, the Province of BC announced a benefits agreement that will provide the FNLP with an additional $32 million for non-equity investment in the pipeline.

First Nation involvement in the petroleum industry can be through First Nation community-owned enterprises, joint ventures or individual entrepreneurism. In BC, however, most of the active First Nation business endeavours in this sector are for natural gas and not oil. First Nations are now running or supplying camps, working on earth moving and site preparation (including the building of roads), and drilling. They are also taking equity positions in major projects and finding their way, slowly, into the boardroom and affecting decision-making in that way. Notably, the Haisla, in Kitimat, are planning for LNG production and storage facilities on their reserves.

Assessing the Options

Given the continuum of governance options — moving from the *Indian Act* and governance on-reserve to sectoral governance initiatives and comprehensive governance arrangements — it is clear that Nations with oil and gas resources will need to consider the most appropriate way to regulate and manage their exploration and development, and to engage in the question of who owns the resources. All First Nations, whether they have oil and gas resources on their reserves or not, will want to consider their options for regulation of oil and gas development within their Aboriginal title lands and ancestral lands and the Nation's role in multi-level governance. Interestingly, to date, only one First Nation in Canada (not in BC) has actually used the *First Nations Oil and Gas and Moneys Management Act*. Furthermore, under all the comprehensive governance arrangements as part of modern treaty-making in BC, control and regulation of the oil and gas industry primarily rest with the provincial Crown post-treaty. It therefore appears that, given the complexity, cost and associated liability of governing this sector, some First Nations may not wish to take on governance and management responsibilities and perhaps control approvals or influence decision-making, or indeed benefit from, the resources in other ways.

INDIAN ACT AND *INDIAN OIL AND GAS ACT* GOVERNANCE

There is no specific authority for First Nations with respect to oil and gas governance on-reserve under the *Indian Oil and Gas Act* (R.S.C., 1985, c. I-7). As described above, IOAG manages and administers gas and oil production on reserve lands. However, as a matter of policy, IOGC works closely with the governing bodies of First Nations to confirm decisions, and band council approval is required for all deals. Where development does take place on-reserve, some of First Nations bylaws made under section 81 of the *Indian Act* could apply (where not inconsistent or in conflict with the *Indian Oil and Gas Act*). As discussed above, the act was amended in 2012 and these changes are not yet in force because regulations are still being developed. It is anticipated that these regulations will ensure greater involvement of First Nations governments in the administration of oil and gas, but stop short of any recognition of jurisdiction. As noted above, a joint process is now underway between IOGC, IRC and AANDC to finalize regulations, with a target date for completion of April 2015.

SECTORAL GOVERNANCE INITIATIVES

Sectoral Initiatives On-Reserve

The First Nations Oil and Gas and Moneys Management Act

First Nations Oil and Gas and Moneys Management Act (FNOGMMA) is federal legislation that provides First Nations with the option to govern, to a limited degree, oil and gas exploration and development on their lands; and to manage a Nation's on-reserve oil and gas resources, which are currently governed and managed through IOGC (which is responsible for administering the program). This act also provides First Nations with the option to manage moneys currently held in trust for them by Canada. First Nations can choose to opt into either part of FNOGMMA or both. After a favourable vote in June 2013, the Kawacatoose First Nation in Saskatchewan became the first to officially opt into the FNOGMMA program and was put on the Schedule to the Act on March 20, 2014.

FNOGMMA was developed as a result of a collaborative effort by the federal government, Siksika Nation, Blood Tribe and White Bear First Nations. FNOGMMA allows a First Nation to opt out of the provisions of the *Indian Oil and Gas Act* (R.S.C., 1985, c. 1-7). A Nation must develop an oil and gas code and a financial management code, and must enter into a transfer agreement with Canada. Jurisdiction is transferred when the oil and gas code is ratified by the First Nation's electors. Management and administration are transferred when the transfer agreement with Canada is completed. Under the act, the

First Nation has all the powers, rights and privileges of an owner in relation to oil and gas. These powers can be delegated by council to any person, body or government the First Nation chooses.

Furthermore, and in addition to its ownership rights and the ability to make decisions in respect of these interests, under FNOGMMA the First Nation has the following law-making powers regarding oil and gas exploration and exploitation. Section 35 of the act reads:

> Subject to sections 36 to 41 and 45, the council of a First Nation named in Schedule 1 has the power, in accordance with its oil and gas code, to make laws respecting oil and gas exploration and exploitation in the First Nation's managed area, to the extent that those laws are not in relation to matters coming within the exclusive jurisdiction of a provincial legislature and may, in particular, make laws
>
> (a) respecting the issuance and the terms and conditions of contracts, including:
> (i) any fees, rates, rents and royalties, including royalties in kind, to be reserved to the First Nation by contract holders,
> (ii) the interest payable on amounts owing to the First Nation under a contract, and
> (iii) administrative monetary penalties that may be assessed for failure to comply with the terms of a contract;
> (b) respecting environmental assessments of projects in the managed area, and specifying circumstances in which an order may be made prohibiting the proponent of a project from undertaking work before the completion of an environmental assessment;
> (c) respecting the protection of the environment from the effects of oil and gas exploration and exploitation in the managed area;
> (d) respecting the conservation of oil and gas in the managed area;
> (e) establishing offences punishable on summary conviction and imposing fines, imprisonment, restitution and community service for the contravention of oil and gas laws and orders referred to in paragraph (b);
> (f) respecting the inspection, search, seizure and detention of property within or outside the managed area for the purpose of ensuring compliance with oil and gas laws and for the enforcement of those laws; and
> (g) respecting the auditing of records of contract holders within or outside the managed area for the purposes of contract administration.
>
> For greater certainty, the power of a First Nation to make oil and gas laws does not extend to laws in relation to:
>
> (a) criminal law and criminal procedure;
> (b) labour relations, working conditions and occupational health and safety;
> (c) fish and fish habitat, within the meaning of the *Fisheries Act*, migratory birds, within the meaning of the *Migratory Birds Convention Act*, 1994, and species at risk, within the meaning of the *Species at Risk Act*; or
> (d) international and interprovincial trade, including customs tariffs and export and import controls.

Interesting to note is that while FNOGMMA deals primarily with jurisdiction over oil and gas development, it also recognizes First Nation jurisdiction over related matters such as environmental assessment and protection in areas where oil and gas development is contemplated.

Steps to assume oil and gas jurisdiction and management under FNOGMMA:

1. First Nation sends a council resolution to the Minister requesting the transfer of jurisdiction and management over oil and gas exploitation on its reserve lands.

2. Upon receipt of the council resolution, the Minister will send to the First Nation copies of all oil and gas contracts pertaining to that First Nation's reserves and related information.

3. The First Nation will review these contracts because it will take over administration of existing contracts if it adopts an oil and gas code.

4. The First Nation prepares an oil and gas code that:
   a. prescribes the procedure to be followed by the council of the First Nation in the making, amending and publishing its oil and gas laws;
   b. provides for the accountability of the council to First Nation members for the management and regulation of oil and gas exploration and exploitation;
   c. establishes procedures for disclosing and addressing conflicts of interest involving members of the council and employees of the First Nation in the management and regulation of oil and gas exploration and exploitation;
   d. if the First Nation shares a reserve with another First Nation, provides for the coordination of the management and regulation of oil and gas exploration and exploitation by the two First Nations; and
   e. provides for the amendment of the code by the First Nation.

5. The First Nation will also need to develop a financial management code that meets the criteria in the act. This code must deal with oil and gas revenues, but can be broader and deal with all First Nation revenues. Creating a Financial Administration Law (FAL) under the *First Nations Fiscal Management Act* (FMA) should suffice. However, a review is necessary, as the FAL must be consistent with FNOGMMA-specific requirements, which require a code to:
   a. specify the mode of holding oil and gas moneys, either by their deposit in an account with a financial institution or their payment to a trust of which the First Nation is settler and sole beneficiary, and prescribing the conditions governing subsequent changes from one mode to the other;
   b. provide for the manner of collecting oil and gas moneys and the manner of expending moneys held in the account or received by the First Nation from the trust;
   c. provide for the accountability of the council to First Nation members for the management of oil and gas moneys;
   d. establish procedures for disclosing and addressing conflicts of interest involving members of the council and employees of the First Nation in the expenditure of those moneys; and
   e. provide for the amendment of the code by the First Nation.

6. The First Nation will conclude a transfer agreement with the Minister through which the oil and gas revenues held by the Crown are transferred to the First Nation. This essentially sets out the arrangements for the transfer of the management of oil and gas.

7. If the First Nation wants to assume control over revenues other than those from oil and gas, it will need to develop a financial management code that addresses all monies held by Canada on its behalf (see Section 3.11 — Financial Administration).

8. Once a transfer agreement is concluded, the First Nation will vote on the financial management code, the oil and gas code and the transfer agreement. The vote must be conducted in accordance with regulations under FNOGMMA. If the First Nation has also chosen to develop a code addressing management of all moneys, that code can be voted on at the same time as the oil and gas transfer documents are put forward for ratification.

9. If the vote is positive, then the Governor in Council (cabinet) may add the name of the First Nation to the Schedule under the FNOGMMA formally transferring management and jurisdiction to the First Nation and transferring the moneys held by Canada to the Nation.

10. The First Nation can then make laws under the FNOGMMA (s. 35(1) (a)–(d)) and assume management of its moneys.

***The* First Nations Commercial and Industrial Development Act**

The *First Nations Commercial and Industrial Development Act* (S.C. 2005, c. 53) (FNCIDA) was developed on the initiative of the Squamish First Nation and others who saw the need for more comprehensive regulation of major commercial and industrial development on their reserves. This act allows the federal government to produce regulations for complex commercial and industrial development projects on reserves. It essentially provides for the adoption of regulations on-reserve that are compatible with provincial rules off-reserve. This compatibility minimizes developer costs and increases certainty for the public. The Act specifically provides for regulations to designate a particular "undertaking" or class of undertakings to which the FNCIDA will apply (section 3 (2) (a)).The regulation power includes the ability to exclude the application of the *Indian Oil and Gas Act* (R.S.C., 1985, c. I-7).

Federal regulations are only made under FNCIDA at the request of participating First Nations. The regulations are project-specific, developed in cooperation with the First Nation and the relevant province and they apply only to the particular lands described in the project. The regulations will be specific to the First Nation involved. An example of a FNCIDA regulation dealing with oil and gas is the *Fort McKay First Nation Oil Sands Regulations* (SOR/2007-79), which makes Alberta's oil and gas regulatory framework apply on Fort McKay's reserve lands.

In BC, the act has been used to develop a regulation for the Haisla First Nation to create the appropriate regulatory environment for the proposed LNG facilities to be located on their lands. A description of this regulation and its history, as well as further details on other aspects of the FNCIDA, is provided in Section 3.20 — Lands and Land Management.

Sectoral Initiatives within Ancestral Lands

With respect to oil and gas exploration and development off-reserve, but within their broader ancestral lands, some First Nations have negotiated a Reconciliation Agreement or Strategic Engagement Agreement (SEA) with BC. These include a commitment to consult and potentially accommodate the Nation's interests where resource development is proposed. These agreements can provide for shared decision-making. For example, the *Kunst'aa guu — Kunst'aayah Reconciliation Protocol* and associated legislation provide for the creation of the Haida Gwaii Management Council, a joint BC/Haida statutory decision-making body that can make resource use decision (see Section 3.20 — Lands and Land Management). While there is no specific treatment of oil and gas activities in this arrangement, it is contemplated that the Haida Nation would be involved in any strategic or land use planning decisions that could include oil and gas development — particularly in light of the sensitive issue of potential offshore oil drilling off Haida Gwaii.

SEAs and reconciliation agreements, such as the 2013 SEA with the Ktunaxa Nation looks to foster coordinated collaborative management relationships on topics of common interest to the parties, such as energy, subsurface and petroleum resources.

The SEAs and Reconciliation Agreements negotiated to date typically provide for a shared decision-making framework and corresponding matrix that most often has four "shared decision levels" and a fifth "strategic shared decisions" level (information about the province's shared decision-making

matrix is provided in Section 3.20 — Lands and Land Management). Essentially, the matrix scales decision-making with a corresponding description of the First Nation's involvement in the land and resource use decisions made by the Province. The matrix makes specific reference to the involvement of the Aboriginal group with respect to "Petroleum and Natural Gas Titles," regarding land sales for subsurface resources petroleum and natural gas permitting. The SEAs/Reconciliation Agreements typically contemplate resource revenue sharing and socio-economic opportunities being negotiated, including agreements with respect to oil and gas. In these agreements, interestingly, the Oil and Gas Commission and the provincial Environmental Assessment Office are both identified as "Non-Participatory Provincial Agencies," meaning they are not subject to the terms of the agreement although both, of course, have a role to play in oil and gas project regulation and approval.

It should be noted that shared decision-making mechanisms are still in the early stages of being developed and tested for their efficiency and effectiveness. Other options may be developed either as sectoral initiatives or as part of comprehensive arrangements. These arrangements should reflect the developments in the law of Aboriginal title and rights, including treaty rights. Moreover, the mechanisms should typically not be restricted to a single matter, such as oil and gas. Shared decision-making over ancestral lands involves all other renewable and non-renewable resources too — forests, minerals, alternative energy, water, fish, wildlife and more — and the need for land and marine use planning, environmental management and protection, and so on.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

Under the Sechelt self-government arrangements, the *Indian Oil and Gas Act* (R.S.C., 1985, c. I-7) continues to apply. Presumably so do the FNCIDA and FNOGMMA. Therefore, while the *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27) does not provide a way to exclude the *Indian Oil and Gas Act*, there may be a mechanism for Sechelt to do this through the FNCIDA or FNOGMMA. Under the *Westbank First Nation Self-Government Agreement*, Westbank has comprehensive jurisdiction over oil and gas. Therefore, the *Indian Oil and Gas Act* (R.S.C., 1985, c. I-7) does not apply and there is, as a result, no need to look to the FNCIDA or FNOGMMA.

In both of these cases, however, the subject is mostly academic, as neither Nation has any known oil and gas reserves on their lands but could conceivably have a role to play with respect to midstream or upstream projects located on their lands.

Under the Tsawwassen and Maa-nulth treaty models, even though provincial jurisdiction over aspects of the management and administration of oil and gas continues (i.e., on "spacing and target areas"), because the Nations are the owners of subsurface resources (including oil and gas, and notwithstanding any pre-existing interests recorded), the Nation has jurisdiction to set fees, royalties or charges other than taxes related to the exploration and exploitation of the resources. Where the subsurface interest may not be owned by the respective Nation, they keep whatever fees, royalties or charges are provided. In Nisga'a, this is exclusive, while in Tsawwassen and Maa-nulth this jurisdiction over fees and royalties is shared with the Province. Yale and Tla'amin will also own their subsurface resources when their agreements are enacted and will be able to set fees and collect royalties and rent but not taxes.

Nisga'a powers are, as for the other treaty Nations, derived from the Nisga'a ownership of the subsurface resources and are an aspect of land management law-making powers.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	*Indian Oil and Gas Act* applies. (s. 39)	N/A
Westbank	Westbank First Nation has jurisdiction on Westbank Lands in relation to non-renewable resources including oil, oil shales and gas and has authority over management, exploration, exploitation, development and disposition of those resources; issuance of permits and leases for development and disposition of those resources and regulation of conditions, including suspension and revocation of those permits or leases; and control of administrative functions including revenue collection in relation to permits or leases for exploration, development and disposition of resources. The *Indian Oil and Gas Act* does not apply. (Part XII, s. 138–139)	Westbank law prevails. (Part XII, s. 140)
Nisga'a	Nisga'a Lands includes all minerals which includes petroleum and gas. The Nisga'a Lisims Government has the exclusive authority to determine, collect, and administer any fees, rents, royalties, or other charges with respect to mineral resources on or under Nisga'a Lands. (includes oil and gas). (Ch. 3, s. 19–20) Agreement can be entered into with BC for continuation of administrative aspects by BC and for collection of fees by BC on behalf of Nisga'a. (Ch. 3, s. 21)	No provision.
Tsawwassen	Tsawwassen First Nation owns subsurface resources (including oil and gas) on or under Tsawwassen Lands. Tsawwassen First Nation may set fees, rents, royalties or charges other than taxes, related to the exploration, development, extraction or production of those subsurface resources. Does not limit BC from determining, collecting and receiving administrative fees, charges or other payments, relating to the exploration, development, extraction or production of subsurface resources from Tsawwassen Lands or other Tsawwassen Lands, as applicable. (Ch. 4, s. 22–23)	No provision.
Maa-nulth	Each Maa-nulth First Nation owns subsurface resources on or under its Maa-nulth First Nation Lands, (except for those described in Appendix G, Part 2 of the Maa-nulth Agreement). Each Maa-nulth First Nation has the authority to set fees, rents, royalties and other charges, except taxes, for exploration, development, extraction and production of subsurface resources owned by that Maa-nulth First Nation. (s. 4.1.1) Provincial jurisdiction over spacing and target areas continues. (s. 4.1.4)	Federal and provincial law prevails. (s. 4.1.5)
Yale	Yale First Nation owns the Subsurface Resources (including petroleum and natural gas) on or under Yale First Nation Land. Yale First Nation, as owner of the Subsurface Resources on or under Yale First Nation Land, has the authority to set fees, rents, royalties and other charges, except taxes, for exploration, development, extraction and production of those Subsurface Resources. (s. 12.3.1–12.3.2)	Federal or provincial law prevails. (s. 12.12.4)
Tla'amin	The Tla'amin Nation owns Subsurface Resources (including petroleum and natural gas) on or under Tla'amin Lands. As owner of the Subsurface Resources, the Tla'amin Nation has exclusive authority to set, collect and receive fees, rents, royalties and charges other than taxes for the exploration, development, extraction and production of Subsurface Resources. (Ch. 3, s. 67 and 69)	Federal or provincial law prevails. (Ch. 3, s. 74)

Table — BC Oil and Gas Commission Consultation Process Agreements

BC OIL AND GAS COMMISSION CONSULTATION PROCESS AGREEMENTS
• Interim Consultation Procedure With Treaty 8 First Nations (2011)
• Treaty 8 First Nations Long Term Oil And Gas Agreement (Doig River, Prophet River, West Moberly) (2011)
• Halfway River First Nation Oil And Gas Consultation Agreement (2013)
• McLeod Lake Indian Band Oil And Gas Consultation Agreement (2014)
• Fort Nelson First Nation Oil And Gas Consultation Agreement (2012)

RESOURCES

First Nations

BC First Nations Energy and Mining Council
Suite 1764 – 1959 Marine Drive
North Vancouver, BC V7P 3G1
Phone: 604-924-3844
Email: www.fnemc.ca/contact-us/
www.fnemc.ca/

Haida Gwaii Management Council
504 Nanii Street Box 157
Masset, BC V0T 1M0
Phone: 250-626-5133
www.haidagwaiimanagementcouncil.ca

- The *Kunst'aa guu — Kunst'aayah Reconciliation Protocol*

Haisla Nation Council
500 Gitksan Avenue
Haisla PO Box 1101
Kitamaat Village, BC V0T 2B0
Phone: 250-639-9361
Fax: 250-632-2840
www.haisla.ca

Indian Resource Council
235 – 9911 Chilla Boulevard
Tsuu T'ina Nation, AB T2W 6H6
Phone: 403-281-8308
Fax: 403-281-8351
www.irccanada.ca

Treaty 8 First Nations
Santa Fe Plaza 18178 – 102 Avenue
Edmonton, AB T5S 1S7
Phone: 780-444-9366
Fax: 780-484-1465
www.treaty8.ca

Provincial

BC Oil and Gas Commission (BCOGC)
100, 10003 – 110 Avenue
Fort St. John, BC V1J 6M7
Phone: 250-794-5200
Fax: 250-794-5390
www.bcogc.ca

Ministry of Natural Gas Development
(responsible for Housing)
PO Box 9052 STN PROV GOV
Victoria, BC V8W 9E2
Phone: 250-953-0900
Fax: 250-953-0927
www.gov.bc.ca/mngd/

- *Liquefied Natural Gas: A Strategy for B.C.'s Newest Industry (February 2012).* www.gov.bc.ca/ener/popt/down/liquefied_natural_gas_strategy.pdf
- *British Columbia's Liquefied Natural Gas Strategy: One year update (February 2013).* www.gov.bc.ca/com/attachments/LNGreport_update2013_web130207.pdf
- *Requirements for British Columbia to Consider Support for Heavy Oil Pipelines (July 2012).* www.env.gov.bc.ca/main/docs/2012/TechnicalAnalysis-HeavyOilPipeline_120723.pdf

Ministry of Energy and Mines
(responsible for Core Review)
PO Box 9053 STN PROV GOVT
Victoria, BC V8W 9E2
Phone: 250-387-5896
Fax: 250-356-2965
www.gov.bc.ca/ener/

Federal

Aboriginal Affairs and Northern
Development Canada
British Columbia Region
Suite 600, 1138 Melville Street
Vancouver, BC V6E 4S3
Phone: 604-775-7114 or 604-775-5100
Fax: 604-775-7149

Canadian Association of Petroleum
Producers (upstream)
2100, 350 – 7 Avenue SW
Calgary, Alberta T2P 3N9
Phone: 403-267-1100
Fax: 403-261-4622
www.capp.ca

Canadian Coast Guard —
Pacific Region
25 Hurron Street
Victoria, BC V8V 4V9
Phone: 250-413-2800
Fax: 250-413-2810
www.ccg-gcc.gc.ca

Canadian Energy Pipeline Association
(Midstream/Downstream)
Suite 200, 505 – 3rd St. SW
Calgary, Alberta T2P 3E6
Phone: 403-221-8777
Fax: 403-221-8760
www.cepa.com

Indian Oil and Gas Canada (IOGC)
Suite 100, 9911 Chiila Boulevard
Tsuu T'ina, AB T2W 6H6
Phone: 403-292-5625
Fax: 403-292-5618
Email: ContactIOGC@inac-ainc.gc.ca
www.pgic-iogc.gc.ca

- *Quarterly Newsletters and other documents*: www.pgic-iogc.gc.ca/eng/1100110010446/1100110010447

National Energy Board
517 Tenth Avenue SW
Calgary, Alberta T2R 0A8
Phone: 403-292-4800
Fax: 403-292-5503
www.neb-one.gc.ca

- *Memorandum of Understanding between the National Energy Board and the Canadian Transportation Accident Investigation and Safety Board:* www.neb-one.gc.ca/bts/ctrg/mmrndm/2011cndtrnsprttnccdnt-eng.html

Natural Resources Canada
580 Booth Street
Ottawa, ON K1A 0E4
Phone : 613-955-0947
www.nrcan.gc.ca

Transportation Safety Board
200 Promenade du Portage
Place Centre, 4th Floor
Gatineau, Quebec K1A 1K8
Phone: 1-800-387-3557
Fax: 819-953-7287
www.tsb.gc.ca

Transport Canada
330 Sparks Street
Ottawa, ON K1A 0N5
Phone : 613-990-2309
Fax: 613-954-4731
www.tc.gc.ca

SELECT LEGISLATION

Provincial

- *Oil and Gas Activities Act* (S.B.C. 2008, c.36)
- *Petroleum and Natural Gas Act* (R.S.B.C. 1996, c.361)
- *Forest Act* (R.S.BC. 1996, c. 157)
- *Heritage Conservation Act* (R.S.B.C. 1996, c. 187)
- *Land Act* (R.S.B.C. 1996, c. 245)
- *Environmental Management Act* (S.B.C. 2003, c. 53)
- *Emergency Management Act* (S.C. 2007, c.15)
- *Water Act* (R.S.B.C. 1996, c.483)

Federal

- *Canadian Oil and Gas Operations Act* (R.S.C. 1985, c. 0-7)
- *Canadian Environmental Assessment Act* (S.C. 2012, c. 19, s. 52)
- *Northern Pipeline Act* (R.S.C. 1985, c. N-26)
- *Canada Transportation Act* (S.C. 1996, c. 10)
- *Canada Petroleum Resources Act* (R.S.C. 1985, c. 36 2nd Supp.)
- *Indian Oil and Gas Act* (R.S.C. 1985, Chapter I-7)
- *Indian Oil and Gas Regulations* (S.O.R./94-753)
- *First Nations Oil and Gas and Moneys Management Act* (S.C. 2005, c. 48)
- *Fort McKay First Nation Oil Sands Regulations* (S.O.R./2007-79)
- *First Nations Commercial and Industrial Development Act* (S.C. 2005, c. 53)
- *Haisla Nation Liquefied Natural Gas Facility Regulations* (S.O.R./2012-293)
- *National Energy Board Act* (R.S.C. 1985, c. N-7)

PART 1 /// SECTION 3.25

Public Order, Safety and Security

3.25

PUBLIC ORDER, SAFETY AND SECURITY

3.25

PUBLIC ORDER, SAFETY AND SECURITY

BACKGROUND

Historically, First Nations had rules respecting public order safety and security, reflecting the traditions and customs of the various tribes and their differing institutions used to maintain social order. Indeed, ensuring order is essential to any society. Today, as a question of jurisdiction, public order, safety and security is a broad subject area and open for interpretation. It includes those fundamental powers required by any governing body to maintain peace and order and to ensure the safety of its citizens and others living or conducting business on the lands and waters under its control.

The power can also be exercised to maintain a Nation's broader societal interests, as described in the far-reaching and catch-all federal power that is referred to as "peace, order and good government" in section 91 of the *Constitution Act, 1867*. Under the auspices of peace, order and good government, a government can take the necessary steps to fill gaps in more specific law-making powers to ensure social order. It is also a power that can be used in extraordinary circumstances to maintain order when required. First Nations jurisdiction over public order, safety and security is in many ways also an ancillary or residual power to cover what has not been specified elsewhere in a law, and can be relied upon when the situation dictates more drastic measures. Accordingly, this power is linked to all other jurisdictions, but most specifically with respect to the enforcement of laws, policing and justice, and emergency preparedness.

The extent of potential First Nation's jurisdiction over public order, safety and security has been of some concern to Canada and British Columbia when negotiating self-government arrangements with First Nations. Consequently, in comprehensive governance arrangements, Canada insists on provisions that ensure that Canada's peace, order and good government laws prevail in the event of a conflict with First Nations laws and that First Nations jurisdiction does not extend to matters of national importance, such as criminal law, national protection of health and safety of all Canadians, national defence, and so on. Modern treaty arrangements have similar limitations on First Nation public order, safety and security powers. Regardless of whether it is as far-reaching as federal jurisdiction over peace, order and good government, jurisdiction over public order, safety and security is powerful and a jurisdiction that First Nation governments will need in order to round out their authority over their lands and peoples.

INDIAN ACT GOVERNANCE

The *Indian Act* does not provide any direct authority for a Nation to make bylaws regarding "peace, order and good government" or "public order, safety and security," as the jurisdiction is described here. The *Indian Act* was simply not established to support the range of jurisdictions now considered essential for a self-governing Nation. However, the bylaw-making powers under section 81 and 85.1 (intoxicants) of the *Indian Act* are used by First Nations to regulate public order, safety and security and to fill gaps in a First Nation's jurisdiction under the *Indian Act*. Used in combination, BC First Nations have made a significant number of bylaws that seek to ensure public order, safety and security, which have been relied upon with some success. In fact, the majority of BC First Nations have made bylaws of one type or other under one or a combination of these powers.

For example, under section 81(1)(a), regarding the "health of residents," eight First Nations have made bylaws regarding fire and fire safety. A number of First Nations have service agreements

with municipalities that require a fire protection bylaw. According to CivicInfo BC, 11 BC First Nations currently have specific fire protection agreements, and others have wider agreements that may include fire protection/prevention. Six BC First Nations have also passed firearms restrictions, and one attempted to establish a nuclear-free zone. However, the majority of bylaws are made under sub-section 81(1)(c) powers, which enable a "band" to make bylaws with respect to "the observance of law and order," and sub-section 81(1)(d), which relates to "the prevention of disorderly conduct and nuisances." Section 81(1)(q) relates generally to "any matter arising out of or ancillary to the exercise of powers" and is used as a catch-all power. Nations also use the bylaw-making power under sub-section 81(1)(p), "the removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prohibited purposes" as a means to regulate public order, safety and security.

Trespass bylaws made under sub-section 81(1)(p) may be considered related to lands and land management, in the sense that trespass powers are used by the "band" council on behalf of all citizens to exclude people from entering the reserve. This is different from private trespass matters, where governments enact trespass laws that individual citizens can rely upon to protect their private property and their acquired rights to land. It is worth noting that a number of these bylaws deal with establishing curfews on-reserve as well as regulating the discharge of firearms. All bylaws made under the *Indian Act* are, of course, subject to being disallowed by the Minister.

SECTORAL GOVERNANCE INITIATIVES

There are no sectoral governance initiatives dealing with public order, safety and security.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All comprehensive governance arrangements provide for jurisdiction over public order, safety and security. The language used to describe the power does vary, but essentially the same range of powers is exercised in all circumstances. Of note is Westbank's *WFN Community Protection Law*, which is essentially a modern banishment law.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	The council has, to the extent that it is authorized by the constitution of the Band to do so, the power to make laws in relation to public order and safety on Sechelt Lands. (s. 14(1)(l)) Sechelt Band Council has the right to make fair and reasonable laws for the protection of public order and safety on Sechelt Lands, including those for the control of noise, animals, waste disposal and places of amusement. (Sechelt Constitution, Part III, Div (1), s. 9)	Sechelt law prevails. (s. 37 and 38) Provisions and laws shall include and contain standards and rights at least equivalent to those prevailing in the Province of BC. (Sechelt Constitution, Part III, Div (1), s. 9)
Westbank	Westbank First Nation has jurisdiction in relation to public order, peace, safety, or a danger to public health on Westbank Lands. (Part XXII, s. 217(a)) The application of laws provisions (Part V) have "carve-outs" and conflict rules to protect Canada's national public order and safety interests.	Federal or provincial law prevails. (Part XXII, s. 217(b)) In the event of a conflict between provincial laws in relation to public order, peace, safety or a danger to public health and a Westbank law enacted pursuant to Part XXIII (prohibition of intoxicants), the Westbank law prevails. (Part XXII, s. 217(c))

Table — Comprehensive Governance Arrangements... *continued*

	GENERAL JURISDICTION	CONFLICT OF LAWS
Nisga'a	Nisga'a Lisims Government may make laws with respect to the regulation, control, or prohibition of any actions, activities, or undertakings on Nisga'a Lands, or on submerged lands within Nisga'a Lands, other than actions, activities, or undertakings on submerged lands that are authorized by the Crown, that constitute, or may constitute, a nuisance, a trespass, a danger to public health, or a threat to public order, peace, or safety. A Nisga'a Village Government has the same jurisdiction to make these laws on the Nisga'a Village Lands or submerged lands of that Nisga'a village. (Ch. 11, s. 59–60)	Federal or provincial law prevails. (Ch. 11, s. 62)
Tsawwassen	Tsawwassen Government may make laws with respect to the regulation, control or prohibition of any actions, activities or undertakings on Tsawwassen Lands that constitute, or may constitute, a nuisance, a trespass, a danger to public health, or a threat to public order, peace or safety including: (a) with respect to animals; (b) requirements regarding the discharge of firearms, the use of bows and arrows, knives and other weapons, firecrackers, fireworks, explosives; and (c) public games, sports, races and athletic contests. (Ch. 16, s. 130) Tsawwassen First Nation may temporarily close Tsawwassen roads for reasons of safety or public order, or for cultural reasons. (Ch. 7, s. 6)	Federal or provincial law prevails. (Ch. 16, s. 131)
Maa-nulth	Each Maa-nulth First Nation Government may make laws with respect to the regulation, control, or prohibition of any actions, activities or undertakings on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation, or on submerged lands wholly contained within those Maa-nulth First Nation Lands that constitute, or may constitute, a nuisance, a trespass, a danger to public health, or a threat to public order, peace or safety, except for activities on submerged lands that are authorized by the Crown. (s. 13.25.1 and 13.25.2)	Federal or provincial law prevails. (s. 13.25.3)
Yale	Yale First Nation Government may make laws with respect to the regulation, control or prohibition of any actions, activities or undertakings on Yale First Nation Land that constitute, or may constitute, a nuisance, a trespass, a danger to public health, or a threat to public order, peace or safety. (s. 3.28.1)	Federal or provincial law prevails. (s. 3.28.2)
Tla'amin	The Tla'amin Nation may make laws in relation to the regulation, control or prohibition of any actions, activities or undertakings on Tla'amin Lands, or on submerged lands within Tla'amin Lands, that constitute, or may constitute, a nuisance, a trespass, a danger to public health or a threat to public order, peace or safety. (Ch. 15, s. 139) The Tla'amin Nation law-making authority under paragraph 139 does not include the authority to make laws with respect to the regulation, control or prohibition of any actions, activities or undertakings on submerged lands within Tla'amin Lands that are authorized by the Crown. (Ch. 15, s. 140)	Federal or provincial law prevails (Ch. 15, s. 141)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(a) Health			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Seabird Island	2008	HEALTH	Bylaw Respecting Community Wellness
Bylaws — Section 81(1)(c) Observance of Law and Order			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Ahousaht	3	LAW AND ORDER	Bylaw
Cowichan	2009-01	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting The Ban Of Sale, Possession And Use Of Fireworks
Cowichan		OBSERVANCE OF LAW AND ORDER	Bylaw Regulating Noise
Dzawada'enuxw	6	OBSERVANCE OF LAW AND ORDER	To Provide For The Regulation And Activities Of Boys And Girls Under 16 Years Of Age (Curfew)
Nisga'a Village Of Gingolx	11-88	LAW AND ORDER	Bylaw Respecting Public MeetingsBylaw
Nisga'a Village Of Gingolx	3-88	LAW AND ORDER	Bylaw Respecting CurfewBylaw
Gitanyow	3	LAW AND ORDER	Bylaw Respecting Curfew
Gitsegukla	90-4	LAW AND ORDER	Bylaw Respecting Law And Order
Gitsegukla	90-8	LAW AND ORDER	Bylaw Respecting Discharge Of Firearms
Gitga'at	4	LAW AND ORDER	Bylaw Respecting Curfew
Gitwangak	2	LAW AND ORDER	Bylaw Respecting Curfew
Nisga'a Village Of Gitwinksihlkw	3-1980	LAW AND ORDER	Bylaw To Regulate Curfew
Gwa'sala-Nakwaxda'xw	1994.03	LAW AND ORDER	Bylaw Respecting Curfew
Haisla Nation	1A	LAW AND ORDER	Bylaw Respecting Curfew
Haisla Nation	UNNUM-BERED	TRAFFIC, ANIMAL, NOISE, NUISANCE, FIREARMS, FIRE	Bylaw Respecting Traffic, Animal Control, Nuisance, Noise, Firearms, Fire Protection, Emergency Program, Smoke Alarms (General Provisions That Include All These Subjects) Amendments
Heiltsuk	13-74	LAW AND ORDER	To Prohibit The Discharging Of Firearms, Air Guns And Spring Guns
Heiltsuk	5	LAW AND ORDER	Bylaw Respecting Curfew
Iskut	2-74	LAW AND ORDER	Bylaw Respecting Curfew
Iskut	6-74	LAW AND ORDER	To Regulate The Discharge Of Firearms.
Kispiox	1997-02	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Curfew
Kitasoo	1993-01	LAW AND ORDER	Bylaw Respecting Band Constables
Kitasoo	5.74	LAW AND ORDER	Bylaw To Regulate Curfew
Leq'a:mel First Nation	1997.01	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Nuisance (Illegal Burning)
Nisga'a Village Of Laxgalt'sap	1997.1	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Curfew
Lax-Kw'alaams	1983-1	LAW AND ORDER	Bylaw Respecting Curfew
Lower Kootenay	6	LAW AND ORDER	BylawBylaw Concerning The Banning Of Alcohol And Drugs On The Lower Kootenay Indian Reserve Lands
Lower Kootenay	7	LAW AND ORDER	Bylaw Concerning The Banning Of Alcohol And Drugs On The Lower Kootenay Indian Reserve LandsBylaw
Lower Nicola	2012-1	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting The Maintenance Of Law And Order, And The Administration And Management Of The Affairs Of The Lower Nicola
Lytton	1	LAW AND ORDER	Bylaw Respecting Curfew
Metlakatla	2	LAW AND ORDER	Bylaw Respecting Curfew
Musqueam	CH-1	LAW AND ORDER	Bylaw Respecting Law And Order

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Musqueam	CH-2	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Curfew
Musqueam		TRESSPASSING	Bylaw Respecting Dangerous Persons
Nisga'a Village Of New Aiyansh	2-1978	LAW AND ORDER	Bylaw Respecting Curfew
Nuxalk Nation	7	LAW AND ORDER	Bylaw Respecting Curfew
Old Massett Village Council	4	LAW AND ORDER	Bylaw Respecting Curfew
Oweekeno/Wuikinuxv Nation	1	LAW AND ORDER	Bylaw Regarding Discharge Of Firearms On The Reserve
Penticton		LAW AND ORDER	Bylaw Respecting Law And Order
Seton Lake	1	LAW AND ORDER	Bylaw Respecting Curfew
Squamish	13	LAW AND ORDER	Bylaw Respecting Curfew — 1979
Tahltan	2-75	LAW AND ORDER	To Provide For Regulation Of Curfew
Tk'emlups Te Secwepemc	1996-2	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting The Governing Of Band Meetings
Tk'emlups Te Secwepemc	2010-02	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Control Of Graffiti Bylaw
Tk'emlups Te Secwepemc	UNNUM-BERED	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Heritage Conservation
Tla'amin	1	LAW AND ORDER	Bylaw Respecting Curfew
Tl'azt'en Nation	2005.01	A OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Curfew
Tlowitsis Tribe	2004-001	OBSERVATION OF LAW AND ORDER	Bylaw Respecting Disorderly Conduct And Nuisance
Tsawwassen	96/12/05.2	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Noise
Tsawwassen	96/12/05.3	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Tsawwassen	UNNUM-BERED	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Weapons
Tsawataineuk	6	LAW AND ORDER	To Provide For The Regulation And Activities Of Boys And Girls Under 16 Years Of Age (Curfew)
Tseshaht		LAW AND ORDER	Bylaw To Provide For The Observance Of Peace And Order And To Regulate Noise
Tsleil-Waututh Nation	2002	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting The Regulation Of Band Meetings
Ulkatcho	1-1981	LAW AND ORDER	Bylaw For The Control Of Drugs And Alcohol
Westbank	2005-12	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Storage, Sale And Discharge Of Incendiary Devices
West Moberly First Nations	2002-6	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Curfew For Children
We Wai Kai (f. Cape Mudge)	12-1978	LAW AND ORDER	To Provide A Bylaw To Regulate The Discharge Of Firearms
We Wai Kai (f. Cape Mudge)	7	LAW AND ORDER	Bylaw Respecting Curfew
Xaxli'p	1	LAW AND ORDER	Bylaw Respecting Curfew
Yekooche	2002-2	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Disorderly Conduct And Nuisances

Table — BC First Nations' Laws/Bylaws in Force... *continued*

Bylaws — Section 81(1)(d) Prevention of disorderly conduct and nuisances			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Blueberry River First Nations	1	DISORDERLY CONDUCT & NUISANCE	A Pollution Control Bylaw
Chawathil	1	DISORDERLY CONDUCT & NUISANCE	Bylaw Concerning The Control Of Pesticides
Cheslatta Carrier Nation	1	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Noise
Cowichan		PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Regulation Of Nuisance And Disturbance
Doig River	1	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Noise
Doig River	2	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Nuisance
Ehattesaht	2005-U	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Disorderly Conduct
Fort Nelson First Nation	UNNUM-BERED	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Gitsegukla	1990-5	DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Gitwangak	1991-16	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Nuisance
Nisga'a Village Of Gitwinksihikw	UNNUM-BERED	DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Fire Safety
Gwa'sala-Nakwaxda'xw	1994.04	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Haisla Nation	UNNUM-BERED	TRAFFIC, ANIMAL, NOISE, NUISANCE, FIREARMS FIRE	Bylaw Respecting Traffic, Animal Control, Nuisance, Noise, Firearms, Fire Protection, Emergency Program, Smoke Alarms (General Provisions That Include All These Subjects)
Heiltsuk	19	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Homalco	1995-001	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Homalco	1995-002	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Signs
Ka:'Yu:'K't'h'/ Che:K:Tles7et'h' First Nations	4	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Noise
Kitsumkalum	2004-01	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting The Prevention Of Noise
K'omoks	8	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Noise (Construction, Demolition, Land Clearing, Grading, Earth Moving Etc.)
Kwakiutl	1	DISORDERLY CONDUCT & NUISANCE	To Provide For The Observance Of Law And Order And For The Prevention Of Disorderly Conduct And Nuisances On The Tsulquate Res.
Kwantlen First Nation	102	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Kwikwetlem First Nation	102	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Disorderly Conduct And Nuisances
Lax-Kw'alaams	1983-2	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Noise Control
Lax-Kw'alaams	1989-2	DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Fire Safety
Leq' A: Mel First Nation	1992-02	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Noise

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Little Shuswap Lake	1997.01	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Nuisances
Lower Kootenay	UNNUM-BERED	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance And Trespass
Mount Currie	1	DISORDERLY CONDUCT & NUISANCE	Bylaw Concerning The Control Of Pesticides
Mowachaht/Muchalaht	1	DISORDERLY CONDUCT & NUISANCE	Pollution Control (Within Village)
Mowachaht/Muchalaht	2	DISORDERLY CONDUCT & NUISANCE	Pollution Control (Leased Land)
Mowachaht/Muchalaht	3	DISORDERLY CONDUCT & NUISANCE	Pollution Control (Source Off Reserve)
Musqueam	2008	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Nuisances
Musqueam	UNNUM-BERED	CONSTRUCTION	Bylaw Respecting Health And Safety Of Rented Residential Property
Nadleh Whuten	1998-1	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Namgis First Nation	24-82	DISORDERLY CONDUCT & NUISANCE	To Provide Control And Regulation Of Excessive Noise
Nisga'a Village Of New Aiyansh	1997-08-13	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Oweekeno/Wuikinuxv Nation	2007-01-02	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting The Prevention Of Disorderly Conduct Of The Katit Indian Reserve No. 1
Quatsino	1992.2	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Sechelt	1982-02	DISORDERLY CONDUCT & NUISANCE	Bylaw Concerning Noise
Seton Lake	UNNUM-BERED	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Skawahlook First Nation	1	DISORDERLY CONDUCT & NUISANCE	Bylaw Concerning The Control Of Pesticides
Skwah	2013.1	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting The Prevention Of Nuisances
Skwah	2013.2	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting The Prevention Of Disorderly
Snuneymuxw First Nation	92-01	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Soda Creek	2010.02	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Open Air Fires
Songhees First Nation	01-1998	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Prevention Of Fire And The Protection Of Persons And Property
Songhees First Nation	2001-08	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Nuisance And Disturbance
Spallumcheen	5	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Protection Of Elderly People
Spallumcheen	7	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Squamish	1,2006	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Noise
Squamish	14	DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Noise — 1979
Squiala First Nation	2003-01	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting The Prevention Of Disorderly Conduct And Nuisances

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Stellat'en First Nation	1992.1	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Tk'emlups te Secwepemc	1977-1	DISORDERLY CONDUCT AND NUISANCE	To Provide For The Prevention Of Fires, The Spread Of Fires, And For The Preservation Of Life And Property
Tk'emlups te Secwepemc	1987-1	DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Fire Prevention
Tk'emlups te Secwepemc	1993-1	DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Noise
Tk'emlups te Secwepemc	2010-01	DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting The Control Of Graffiti
Tla'amin	UNNUM-BERED	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Tl'azt'en Nation	99.03	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Nuisance
Tl'azt'en Nation	99.07	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct
Tsawwassen	1997/10/07	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Fire Prevention
Tseshaht	UNNUM-BERED	DISORDERLY CONDUCT & NUISANCE	Bylaw Respecting Noise
Tsleil-Waututh Nation	2002	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
T'sou-Ke First Nation	01	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Noise
T'sou-Ke First Nation	03	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Ucluelet First Nation	2005-001	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Disorderly Conduct And Nuisances
Ucluelet First Nation	2005-002	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Noise And Disturbances
Westbank	1995-05	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Storage, Sale And Discharge Of Incendiary Devices
Westbank	2005-08	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Noise And Disturbance
West Moberly First Nations	2002-2	PREVENTION OF DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Wei Wai Kum (f. Campbell River)	1992.1	DISORDERLY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Wei Wai Kum (f. Campbell River)	1996.8	PREVENTION OF DISORDER-LY CONDUCT AND NUISANCE	Bylaw Respecting Disorderly Conduct And Nuisance
Williams Lake	2005-001	PREVENTION OF DISORDERLY CONDUCT AND NUISANCES	Bylaw Respecting Disorderly Conduct And Nuisance
Bylaws — Section 81(1)(E) Animal Control			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Campbell River	5	ANIMAL CONTROL	Bylaw Respecting Animal Control
Cowichan	1991-1	HEALTH	Bylaw Respecting Animal Control 1992 Amendments
Ditidaht	2006-002	ANIMAL CONTROL	Bylaw Respecting Animal Control
Doig River	3	ANIMAL CONTROL	Bylaw Respecting Animal Control
Fort Nelson First Nation	2006-01	ANIMAL CONTROL	Bylaw Respecting The Control Of Animals
Gitanyow	1997-D02	ANIMAL CONTROL	Bylaw Respecting Animal Control
Gitwangak	1991-13	CONTROL OF ANIMALS	Bylaw Respecting Animal Control

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
(Nisga'a Village Of) Gitwinksihlkw	1994-1	ANIMAL CONTROL	Bylaw Respecting Animal Control
Glen Vowell	2001.001	ANIMAL CONTROL	Bylaw Respecting Care And Control Of Animals
Kanaka Bar	Unnumbered	ANIMAL CONTROL	Bylaw Respecting To Regulate The Care And Control Of Dogs And Animals On The Reserve
K'omoks First Nation	7-2000	ANIMAL CONTROL	Bylaw Respecting Animal Control
Kwikwetlem First Nation	–	AMIMAL CONTROL	Bylaw Respecting Animal Control
Lax-Kw'alaams	2010-02	ANIMAL CONTROL	Bylaw Respecting Animal Control
Lower Nicola	10	ANIMAL CONTROL	Bylaw Respecting Animal Control
Moricetown	2004-01	ANIMAL CONTROL	Bylaw Respecting Animal Control
Musqueam	2011	ANIMAL CONTROL	Bylaw Respecting Animal Control Bylaw 2011
Penelakut	2011-1	ANIMAL CONTROL	Bylaw Respecting The Care And Control Of Animals On The Reserve
Penticton	2007-03	ANIMAL CONTROL	Bylaw Respecting Animal Control
Shxwhá:Y Village	2001-01	ANIMAL CONTROL	Bylaw Respecting Care And Control Of Animals
Skidegate	7	ANIMAL CONTROL	Bylaw Respecting The Control Of Animals
Skwah	2013-3	ANIMAL CONTROL	Bylaw Respecting The Care And Control Of Animals On The Reserve
Soda Creek	2010.01	ANIMAL CONTROL	Bylaw Respecting The Care And Control Of Animals
Soda Creek	Unnumbered	ANIMAL CONTROL	Bylaw Respecting Animal Control
Songhees First Nation	2001-03	ANIMAL CONTROL	Bylaw Respecting Animal Control
Squamish	1,2012	ANIMAL CONTROL	Bylaw Respecting Squamish Nation Animal Control And Licensing
Stellat'en First Nation	1992.2	CONTROL OF ANIMALS	Bylaw Respecting Animal Control
Stz'uminus	2102.03	ANIMAL CONTROL	Bylaw Respecting The Control Of Animals On The Reserve
Tk'emlups Te Secwepemc	1998-01	ANIMAL CONTROL	Bylaw Respecting Care And Control Of Animals
Tk'emlups Te Secwepemc	–	ANIMAL CONTROL	Bylaw Respecting The Protection Against And The Prevention Of Trespass By Animals
Tsawout First Nation	2006-01	ANIMAL CONTROL	Bylaw Respecting Animal Control
T'sou-Ke First Nation	04	ANIMAL CONTROL	Bylaw Respecting Control And Care Of Animals
Tl'azt'en Nation	99.02	ANIMAL CONTROL	Bylaw Respecting Care And Control Of Animals
Tsawout First Nation	2006-01	ANIMAL CONTROL	Bylaw Respecting Animal Control — Amendment
Tsawwassen	1996/05/03	ANIMAL CONTROL	Bylaw Respecting The Care And Control Of Animals
West Moberly First Nations	2002-5	ANIMAL CONTROL	Bylaw Respecting Control Of Animals
Xaxli'p	2-74	CONTROL OF ANIMALS	Bylaw Respecting Trespass By Cattle And Other Domestic Animals
Yekooche	2002-1	ANIMAL CONTROL	Bylaw Respecting Animal Control
Yunesit'in Government	Unnumbered	ANIMAL CONTROL	Bylaw Respecting The Care And Control Of Animals On The Reserve
Bylaws — Section 81(1)(p) Trespassing			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
?Akisq'nuk First Nation	2008-01	TRESPASSING	Bylaw Respecting Trespass
Adams Lake	2010-1	TRESPASSING	Bylaw Respecting Removal And Punishment Of Persons Trespassing And Engaging In Prohibited Activities
Gitsegukla	90-1	TRESPASS	Bylaw Respecting Trespass
Gitwangak	1991-15	TRESPASS	Bylaw Respecting Trespass

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Gwa'sala-Nakwaxda'xw	1994.02	TRESPASS	Bylaw Respecting Trespass
Huu-Ay-Aht First Nations	1998-1	TRESPASSING	Bylaw Respecting Punishment Of Trespassers
Iskut	1986-1	TRESPASS	Bylaw Respecting The Removal And Punishment Of Persons Who Trespass
Kispiox	1998-01	TRESPASSING	Bylaw Respecting Trespass
Kwantlen First Nation	101	TRESPASSING	Bylaw Respecting Trespass
Kwikwetlem First Nation	101	TRESPASSING	Bylaw Respecting Removal Of Trespassers
Lake Babine Nation	UNNUM-BERED	TRESPASS	Bylaw Respecting Trespass
Lower Kootenay	5	TRESPASS	To Establish The Eviction Of Undesirables From The Reserve
Lower Kootenay	6	TRESPASS	Bylaw Respecting Trespass
Metlakatla	1997-01	TRESPASSING	Bylaw Respecting Trespassing
Nadleh Whuten	1998-3	TRESPASSING	Bylaw Respecting Removal Of Trespassers
Qualicum First Nation	1995-1	TRESPASSING	Bylaw Respecting Trespass
Seabird Island	2008	HEALTH	Bylaw Respecting Community Wellness
Skeetchestn	1997-1	TRESPASSING	Bylaw Respecting Trespass
Snuneymuxw First Nation	1981-1	TRESPASS	Being A Bylaw Respecting The Removal And Punish-ment Of Persons Trespassing Upon The Reserve Bylaw
Songhees First Nation	2001-10	TRESPASSING	Bylaw Respecting Removal Of Trespassers
St. Mary's	2A	TRESPASS	Bylaw Respecting Trespass
Tlowitsis Tribe	2004-002	TRESPASSING	Bylaw Respecting Trespassing
Tsawwassen	1996/12/05	TRESPASSING	Bylaw Respecting Trespassing
West Moberly First Nations	0001	TRESPASSING	Bylaw Respecting The Removal Of Trespassers
Williams Lake	UNNUM-BERED	TRESPASSING	Bylaw Respecting The Removal And Punishment Of Trespassers
Yale First Nation	2002-1	TRESPASSING	A Bylaw Respecting The Removal And Punishment Of Persons Trespassing Or Frequenting The Reserve For Prohibited Purposes
Yekooche	2002-4	TRESPASSING	Bylaw Respecting The Removal And Punishment Of Persons Trespassing Or Frequenting The Reserve For Prohibited Purposes
Yunesit'in Government	UNNUM-BERED	TRESPASS	Bylaw Respecting Trespass
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Sechelt (Shíshálh) First Nation	1988-08	SIGD Law To Regulate Or Prohibit Noise	
Sechelt (Shíshálh) First Nation	2010-03	SIGD Unsightly Premises Law	
Tsawwassen First Nation	082/2009	Animal Control Regulation	
Tsawwassen First Nation	041-2010	TFN Good Neighbour (Posted January 12, 2011)	
Tsawwassen First Nation	APR 3, 2009	TFN Community Safety And Security (Land Use And Prohibited Substances) Act	
Westbank First Nation	2005-07	WFN Unsightly Premises Law	
Westbank First Nation	2005-08	WFN Noise And Disturbance Control Law	
Westbank First Nation	2005-10	WFN Discharge Of Firearms Law	
Westbank First Nation	2008-06	WFN Disorderly Conduct And Nuisances Law	
Westbank First Nation	2010-03	WFN Safe Premises Law	
Westbank First Nation	2008-06	WFN Disorderly Conduct And Nuisances Law	

RESOURCES

Provincial

Justice Institute of British Columbia (JIBC)
715 McBride Boulevard
New Westminster, BC V3L 5T4
Phone: 604-525-5422
Toll-free: 1-888-865-7764
Fax: 604-528-5518
Email: infodesk@jibc.ca
www.jibc.ca

Federal

Public Safety Canada
269 Laurier Avenue West
Ottawa, ON K1A 0P8
Phone: 613-944-4875 or 1-800-830-3118
www.publicsafety.gc.ca

- 2009–2010 Evaluation of the First Nations Policing Program: www.publicsafety.gc.ca/cnt/rsrcs/pblctns/vltn-frst-ntns-plcng-2009-10/index-eng.aspx

SELECTED LEGISLATION

Federal

- Bill C-428: *An Act to Amend the Indian Act and to Provide for Its Replacement*

PART 1 /// SECTION 3.26

Public Works

3.26

PUBLIC WORKS

3.26

PUBLIC WORKS

BACKGROUND

Public works is a broad subject matter. All levels of government in Canada exercise authority or jurisdiction over public works to some degree. Senior governments may undertake major infrastructure projects (e.g., roads, bridges, airports, public buildings, museums), often in partnership with other levels of government. Governments need to build and maintain the infrastructure required to deliver government and the programs and services they are legally responsible or expected by citizens or others to provide (e.g., government buildings and administration offices, fire halls, hospitals, waterworks, sewage collection and disposal systems, schools). However, in Canada, local governments are usually responsible for public works that provide services directly to citizens — that is, building and maintaining local public works and infrastructure to maintain transportation networks, support the local economy, provide government functions and deliver local services such as water and wastewater management.

Public works are a broad category of infrastructure projects, financed and constructed by the government, for recreational, employment, and health and safety uses in the greater community. They include public buildings (municipal buildings, schools, hospitals), transport infrastructure (roads, railroads, bridges, pipelines, canals, ports, airports), public spaces (public squares, parks, beaches), public services (water supply, sewage, electrical grid, dams), and other, usually long-term, physical assets and facilities.

Wikipedia, 2014

This subject matter is linked to many other jurisdictions or authorities, including lands and land management; land and marine use planning; environment; water; health; traffic and transportation; education; heritage and culture; emergency preparedness; public order, safety and security; administration of justice; and financial management. In reality, public works is linked to any matter where the exercise of jurisdiction involves building capital infrastructure or acquiring machinery and maintaining it. All First Nations governments will have some need to regulate the construction and maintenance of public works within their geographical boundaries, including declared Aboriginal title lands.

A Legacy of Inadequate Public Works

Poor infrastructure on reserves has been identified as a serious problem across Canada. Historically, there has been significantly less investment in infrastructure on reserves than in other communities in Canada, but also, and equally troubling, there has been less consideration of how public works are actually regulated and governed on-reserve.

In many cases, providing services in reserve communities is expensive and is done within a deficient planning and regulatory framework. Hence investments that have been made have not always provided value for money or considered the future needs of the community, or have simply been ineffective — for example, fire hydrants that do not work or are not connected to a water supply; roads that go nowhere or are built to the wrong standards, if any, and fail; water and wastewater pipes that were too small to accommodate growth and need to be relocated and sized up; and use of inappropriate or untested technology. And when public works facilities are built, often there are no, or limited, systems in place for operations and maintenance, and if there are systems in place, there is no money or local capacity to run them.

Consequently, public works and local services on-reserve are generally well below the standards considered acceptable for Canadian society a whole. The legacy of this lack of investment and inadequate governance has created a troubling situation that will take considerable financial resources and capacity development to rectify and allow First Nations to “catch up.” In particular, there are basic infrastructure needs, such as for the provision of clean drinking water.

Without proper governance over public works, not only will the health and quality of life of citizens living on First Nation lands suffer or be diminished, but the prospects for economic development where opportunities may exist will also be diminished, as access and proximity to infrastructure is a key factor in adding value to lands and attracting private investment. Thankfully, while many BC reserves still suffer from infrastructure deficiencies, the situation is improving and is generally not as dire as it is for reserves in other parts of the country. A lot of this has to do with the sectoral governance initiatives and comprehensive governance arrangements that BC First Nations have been leading.

The Regulation and Administration of Public Works

With the exception of the *Indian Act* and its limited provisions and the *Safe Drinking Water for First Nations Act* (S.C. 2013, c. 21), Canada has not enacted specific legislation or regulations dealing with the provision of public works on-reserve. For the most part, and in the absence of a First Nation making its own bylaws or laws in this area, public works on-reserve are regulated through federal policies and implemented through funding arrangements or agreements with First Nations.

While First Nations do administer the federally available moneys for citizens and certain but limited "band" purposes, there is very little First Nations input into federal program design or policy. First Nations, particularly those seeking economic development on their lands and generating their own revenues, require a robust regulatory framework for the provision of public works and delivery of local services, commensurate with their needs as growing communities. Accordingly, First Nations are increasingly looking to make laws or bylaws (depending on their source of jurisdiction and/or authority) regarding aspects of public works to fill the infrastructure gaps that exist between First Nations and non-First Nations communities. There is therefore a need for clear recognition of First Nations jurisdiction over this important subject matter.

Many First Nations have established public works departments within their on-reserve administrations, funded partly by Canada and also through own-source revenues — often property taxes collected from non-citizens and used to provide services to those citizens. First Nations may also be involved in constructing and operating public works off-reserve within their ancestral lands where those works provide services to the First Nation. First Nations may also be involved in cases where public works, including major works, are being built by other governments (e.g., highways and other roads, bridges, dams) and where there is a need to involve First Nations because of the existence of Aboriginal title and rights (whether recognized or presumed to exist). First Nations may participate in the construction and building of major public works through their governments or related entities.

Elements of jurisdiction over public works can be found in most of the sectoral self-government initiatives (for instance, roads as part of land management or schools as part of the education sectoral initiative). To date, the only self-government arrangement that deals directly with public works as a specific head of power is Westbank, although all self-governing First Nations have these powers scattered throughout their arrangements with Canada and, where provincial jurisdiction is involved, British Columbia.

As discussed in Section 3.20 — Lands and Land Management, the "municipal-type" land management powers provided in the *Framework Agreement on First Nation Land Management* can be viewed as an exercise in jurisdiction over public works in relation to land. While powers over on-reserve buildings and local infrastructure may be considered in a discussion of land management, carving out the municipal aspects of control over public works can be a helpful way to separate the functions and responsibilities of land management in a First Nations government. Such analysis is also beneficial, as it will provide the Nation's government with a clearer sense of the subject matters that need to be addressed from a local, pragmatic or technical perspective and those subjects (i.e., methods of

holding or transferring interests in First Nation lands) of larger consequence and involving community values and traditions. This may affect not only the content of a particular law but also the mechanism (e.g., community meeting or referendum) that may be used to adopt the law.

Applicable Standards

When considering public works, it is also necessary to consider which government's standards apply and for what services. It is not entirely clear when it comes to health and safety standards whether provincial or federal standards apply on-reserve. Whether a First Nation's jurisdiction over public works extends to setting standards is also a subject for governance negotiations with Canada and/or British Columbia. For the most part, First Nations have not negotiated jurisdiction over the setting of standards and have agreed that it is appropriate and in their own interest to meet federal or provincial standards (e.g., standards for safe drinking water, building codes). Water standards were the subject of ongoing discussion in the development of the *Safe Drinking Water for First Nations Act* to establish rules for the purveying of water on reserve and the standards for maintaining and running on-reserve water systems.

Financing Public Works

Building public works can be very expensive. Far too often than not, there is still poor or no infrastructure on many reserves, and limited public works. While the situation is improving with increased access to capital (see Section 4 — Financing First Nations Governance) it is unlikely that most First Nations are going to meet their infrastructure needs to provide comparable levels of public service by themselves. To catch up to non-First Nation communities, First Nations need increased investment by other governments.

Infrastructure and Economic Development

Servicing lands with infrastructure increases land values and provides opportunities for economic development. In order for economic development to occur, First Nations must be able to provide infrastructure. While Canada provides some resources to assist First Nations in building capital infrastructure and public buildings for providing local services to citizens living on-reserve, these funds generally do not cover the costs of building infrastructure to support economic development. There is a compelling argument for greater federal and provincial investment in infrastructure to support First Nations in developing their economies. However, in the absence of significant investments being made by other levels of government, First Nations look to other sources of funds and mechanisms to fill the gaps and meet their needs to the extent that they can, legally. For example, see the *First Nations Fiscal Management Act* sectoral governance initiative (below).

***INDIAN ACT* GOVERNANCE**

The *Indian Act* contains a number of specific sections that address infrastructure and public works: section 18(2) deals with the use of schools and so on, section 19 deals with surveys and subdivisions, and section 34 deals with roads and bridges. In addition, section 73(1)(i), (j), (l) and (m) sets out the regulation-making powers of the governor in council. Finally, the bylaw powers of the "band" include section 81(1)(f), (g), (h), (i), (j), (k) and (l). Many First Nations are using the bylaw-making powers of the *Indian Act* to create the regulatory framework for the construction, operation and maintenance of public works facilities and for the provision of local services on-reserve. Eighty-three BC First Nations have made bylaws under the *Indian Act*.

SECTORAL GOVERNANCE INITIATIVES

There is no specific sectoral governance initiative dealing with public works per se, although aspects of jurisdiction over public works and infrastructure are included in a number of the sectoral governance initiatives.

For instance, under the *Framework Agreement on First Nation Land Management*, operational First Nations with land codes can make laws respecting "the provision of local services in relation to First Nation land and the imposition of equitable user charges" (18.2.(d)). (For a more comprehensive discussion of the Framework Agreement, see Section 3.20 — Lands and Land Management.)

Under the *First Nations Fiscal Management Act* (S.C. 2005, c. 9) (FNFMA), a First Nation can raise taxes for the provision of local services with respect to reserve lands and exercise law-making authority to impose development cost charges that are used to build infrastructure. These powers can address paying for and building public works and, in particular, supporting economic development where the services are being provided to non-citizens and citizens alike and where there is typically little or no financial assistance provided by other levels of government. The First Nations Tax Commission has developed standards and policies for the raising of property taxes and development cost charges and the use of these funds for capital infrastructure projects.

Further, under the FNFMA, a First Nation can raise funds through the First Nations Finance Authority for constructing capital infrastructure for 1) the provision of local services that benefit reserve lands (although the actual infrastructure may be located off-reserve), using local revenues (i.e., property taxes), and 2) building capital infrastructure anywhere and for any purpose, using "other revenues." Standards established by the First Nations Tax Commission must be satisfied before the commission will approve a First Nation's "borrowing law" using local revenues to raise financing from the First Nations Finance Authority for the building of capital infrastructure (Standards Establishing Criteria for Approval of Borrowing Laws [Consolidated to 2014-06-25]). (For a more detailed discussion of how this legislation works, see Section 3.11 — Financial Administration and Section 3.29 — Taxation.)

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All comprehensive governance arrangements address public works in some way, sometimes in different chapters. Public works is not always set out as a distinct head of power, but sometimes as an aspect of others. An exception is Westbank, where the *Westbank First Nation Self-Government Agreement* goes into considerable detail about the jurisdiction over public works dealing with sewage and waste disposal, supply and distribution of water, community parks and buildings, pollution, fire prevention, building inspection, and so on.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	Sechelt council has the power to make laws with respect to aspects of public works including zoning and land-use planning, use and construction of buildings, administration and management of property and roads. (s. 14(1)(a), (b), (c), (d), (f), and (m))	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the act (37, 38 of the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27)
Westbank	Westbank First Nation has jurisdiction in relation to Westbank public works, community infrastructure and local services on Westbank Lands. (Part XXI, s. 212) Westbank First Nation has jurisdiction in relation to the levying and collection of development cost charges, user fees and development permit fees to provide for public works, community infrastructure and local services on Westbank Lands Westbank First Nation has jurisdiction in relation to the levying and collection of development cost charges, user fees and development permit fees to provide for public works, community infrastructure and local services on Westbank Lands. (Part XXI, s. 214)	Westbank law prevails. (Part XXI, s. 216)
Nisga'a	Subject to the Roads and Rights of Way Chapter, Nisga'a Lisims Government may make laws with respect to public works on Nisga'a Lands. (Ch. 11, s. 69)	Federal or provincial law prevails. (Ch. 11, s. 71)
Tsawwassen	Tsawwassen Government may make laws with respect to public works and related services on Tsawwassen Lands. (Ch. 16, s. 126) Tsawwassen Government may make laws with respect to buildings and structures on Tsawwassen Lands, but Tsawwassen Laws must not establish standards for buildings or structures to which the British Columbia Building Code applies that are additional to or different from the standards established by the British Columbia Building Code. (Ch. 16, s. 123)	Federal or provincial law prevails. (Ch. 16, s. 125 and 127)
Maa-nulth	Each Maa-nulth First Nation Government may make laws with respect to public works and related services on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation. (s. 13.27.1) Each Maa-nulth First Nation Government may make laws with respect to buildings and structures on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation. The British Columbia Building Code applies on Maa-nulth First Nation Lands. (s. 13.30.1 and 13.30.2)	Federal or provincial law prevails. (s. 13.27.2 and 13.30.5)
Yale	Yale First Nation Government may make laws with respect to public works and related services on Yale First Nation Land. (s. 3.30.1) Yale First Nation Government may make laws with respect to buildings and structures on Yale First Nation Land. (s. 3.29.1)	Federal or provincial law prevails. (s. 3.30.2)
Tla'amin	The Tla'amin Nation may make laws in relation to public works and related services on Tla'amin Lands. (Ch. 15, s. 146) The Tla'amin Nation may make laws in relation to the design, construction, maintenance, repair and demolition of buildings and structures on Tla'amin Lands. (Ch. 15, s. 142)	Federal or provincial law prevails. (Ch. 15, s. 145 and 147)

Table — BC First Nations' Laws/ByLaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(a) Health			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Cowichan	1.1997	HEALTH	Bylaw Respecting Waste Management
Gitsegukla	90-3	HEALTH	Bylaw Respecting Unsightly Lands
Kwantlen First Nation	100	HEALTH	Bylaw Respecting Waste Disposal
Lax Kw'alaams	2013-01	HEALTH	Bylaw Respecting The Regulation Of Derelict Premises On Lax Kw'alaams Lands
Musqueam		CONSTRUCTION	Bylaw Respecting Health And Safety Of Rented Residential Property
Okanagan	3	HEALTH	Bylaw Respecting Disposal Of Garbage And Waste
Tl'azt'en Nation	99.10	HEALTH	Bylaw Respecting Solvent And Gasoline Abuse
Tsawout First Nation	2001-02	HEALTH	Bylaw Respecting To Regulate The Discharge Of Waste Into The Sanitary Sewer System On Reserve
Bylaws — Section 81(1)(f) Local works			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
?Akisq'nuk First Nation	1	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste On The Reserve
Ahousaht	1	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste On The Marktosis Reserve No. 15
Ahousaht	2	LOCAL WORKS	To Provide For The Erection And Control Of Toilets Or Privies On The Marktosis Reserve No. 15
Cowichan	2	LOCAL WORKS	To Provide For The Disposal Of Garbage, Rubbish And Waste Matter On The Cowichan Reserve
Dzawada'enuxw First Nation	2	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
Dzawada'enuxw First Nation	3	LOCAL WORKS	To Provide For The Erection And Control Of Toilets And Priview
Gingolx (Nisga'a Village Of)	1-88	LOCAL WORKS	Bylaw Respecting Garbage Disposal
Gingolx (Nisga'a Village Of)	5	LOCAL WORKS	Disposal Of Garbage And Waste
Gingolx (Nisga'a Village Of)	6	LOCAL WORKS	Erection And Control Of Toilets And Privies
Gingolx (Nisga'a Village Of)	6-88	LOCAL WORKS	Bylaw Respecting Governing Roads And Maintenance
Gitanyow	2	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste In The Kitwancool Reserve
Gitanyow	5	LOCAL WORKS	To Provide For The Erection And Control Of Toilets And Privies In The Kitwancool Reserve
Gitga'at First Nation	10	LOCAL WORKS	Hartley Bay Electric Power System
Gitga'at First Nation	5	LOCAL WORKS	Erection And Control Of Toilets And Privies
Gitga'at First Nation	6	LOCAL WORKS	Disposal Of Garbage And Waste
Gitxaala Nation	3	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
Gitxaala Nation	4	LOCAL WORKS	To Provide For The Erection And Control Of Toilets And Privies
Haisla Nation	2A	LOCAL WORKS	Disposal Of Garbage And Waste
Haisla Nation	3	LOCAL WORKS	In Connection With The Kitimaat Electric Power Plant
Haisla Nation	4	LOCAL WORKS	The Expenditure Of Moneys Raised Under Bylaw No. 3 (Electric Power Plant)
Heiltsuk	12	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
Iskut	5-74	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
Kispiox	10	LOCAL WORKS	To Provide For The Raising Of Money To Defray The Cost Of Street Lighting On The Kispiox Reserve
Kispiox	9	LOCAL WORKS	To Provide For The Removal Of Garbage And Waste On The Kispiox Reserve

Table — BC First Nations' Laws/ByLaws in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Kispiox	8	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste On The Kispiox Reserve
K'omoks	3	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
K'omoks	4	LOCAL WORKS	To Provide For The Erection And Control Of Toilets And Privies
Kwakiutl	2	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
Kwakiutl	3	LOCAL WORKS	To Provide For The Erection And Control Of Toilets And Privies
Lax-Kw'alaams	1983-4	LOCAL WORKS	Bylaw Respecting Garbage Disposal
Lax-Kw'alaams	4	LOCAL WORKS	To Provide For The Erection And Control Of Toilets And Privies
Metlakatla	1	LOCAL WORKS	In Connection With The Metlakatla Electric Power System Within The Metlakatla Reserve
Namgis First Nation	16-82	LOCAL WORKS	To Provide For Disposal Of Garbage And Waste
Namgis First Nation	3	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
New Aiyansh (Nisga'a Village Of)	3	LOCAL WORKS	Disposal Of Garbage And Waste
New Aiyansh (Nisga'a Village Of)	4	LOCAL WORKS	Erection And Control Of Toilets And Privies
Nuxalk Nation	4	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
Okanagan	3	LOCAL WORKS	To Provide For Disposal Of Garbage And Waste On The Okanagan Reserve
Quatsino	3	LOCAL WORKS	To Provide For The Erection And Control Of Toilets And Privies
Quatsino	2	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
Skidegate	5	LOCAL WORKS	Construction And Maintenance Of The Sewer System
Songhees First Nation	2	LOCAL WORKS	Bylaw Respecting A Licence For Sewer Service
Squamish	1	LOCAL WORKS	To Provide For Disposal Of Garbage And Waste On The Squamish Reserve
Tahltan	5-75	LOCAL WORKS	Disposal Of Garbage And Waste
Tk'emlups te Secwepemc	1995-05	LOCAL WORKS	Bylaw Respecting Construction - Building
Tk'emlups te Secwepemc	1995-06	LOCAL WORKS	Bylaw Respecting Sanitary Sewage System
Tlowitsis Tribe	3	LOCAL WORKS	To Provide For The Disposal Garbage And Waste.
Tsawout First Nation	2005-01	LOCAL WORKS	Bylaw Respecting Sewer System
Tsawwassen First Nation	1995-10-2	LOCAL WORKS	Bylaw Respecting Local Works And Water Suply
Tsawwassen First Nation	2004/03/16	LOCAL WORKS	Bylaw Respecting Sewer System
Tsleil-Waututh Nation	1989-03	LOCAL WORKS	Bylaw Respecting Waste Removal
Tsleil-Waututh Nation	DRAFT	LOCAL WORKS	Draft Bylaw Respecting Sewer
Tsleil-Waututh Nation	UNNUM-BERED	LOCAL WORKS	Bylaw Respecting Storm Sewer And A Sanitary Sewer System On The Reserve
Westbank First Nation	1	LOCAL WORKS	Bylaw To Provide For The Disposal Of Garbage And Waste On The Westbank Reserve No. 9
Westbank First Nation	1986-02	LOCAL WORKS	Bylaw Respecting Garbage Collection
We Wai Kai (f. Cape Mudge)	3	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
We Wai Kai (f. Cape Mudge)	4	LOCAL WORKS	To Provide For The Erection And Control Of Toilets And Privies
Wei Wai Kum (f. Campbell River)	1996.2	LOCAL WORKS	Bylaw Respecting The Installation Of Utilities
Wei Wai Kum (f. Campbell River)	1996.3	LOCAL WORKS	Bylaw Respecting Waterworks System
Wei Wai Kum (f. Campbell River)	1996.4	LOCAL WORKS	Bylaw Respecting Sewers
Wei Wai Kum (f. Campbell River)	1996.5	LOCAL WORKS	Bylaw Respecting Charges For Use Of Sanitary Water System
Wei Wai Kum (f. Campbell River)	1996.6	LOCAL WORKS	Bylaw Respecting Storm Drain Connections
Wei Wai Kum (f. Campbell River)	1996.9	LOCAL WORKS	Bylaw Respecting Signs Of All Kinds
Wei Wai Kum (f. Campbell River)	3	LOCAL WORKS	To Provide For The Disposal Of Garbage And Waste
Wei Wai Kum (f. Campbell River)	4	LOCAL WORKS	To Provide For The Erection And Control Of Toilets And Privies

Table — BC First Nations' Laws/ByLaws in Force... *continued*

Bylaws — Section 81(1)(h) Construction			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Aitchelitz		BUILDING	Bylaw July 9, 1979 - Re Housing Standards
Ashcroft	1980-1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Boston Bar First Nation	1980-1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Canim Lake	1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Chawathil	01080-197	BUILDING	Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
Cheam	1-1979	BUILDING	Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
Coldwater	1-1979	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards
Dzawada'enuxw First Nation	5	BUILDING	Regulation Of Construction Repair And Use Of Buildings
Gitga'at First Nation	9	BUILDING	To Provide For The Regulation Of The Construction And Repair Of Buildings Whether Owned By The Band Or By Individual Members Of The Band
Halalt	93-1	BUILDING	Bylaw Respecting Housing
Heiltsuk	16-1980	BUILDING	To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Katzie	1-1980	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Ka:'Yu:'K't'h'/Che:K:Tles7et'h' First Nations	01/80	BUILDING	Being A Bylaw To Provide Regulations For Occupancy And Buildings Maintenance Standards (R.R.A.P.)
Kitasoo	1-1979	BUILDING	Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
K'omoks First Nation	6-1980	BUILDING	Being A Bylaw To Provide Regulation For Occupancy And Building Maintenance Standards
Kwaw-Kwaw-Apilt		BUILDING	Bylaw Re Housing Standards
Lax-Kw'alaams	UNNUM-BERED	CONSTRUCTION	Bylaw Respecting Derelict Premises
Little Shuswap Lake	1981-1	BUILDING	Bylaw Re Housing Regulations, The Construction Of Buildings, Etc.
Lower Nicola	1-1979	BUILDING	Bylaw To Provide For Occupancy And Building Maintenance Standards. (R.R.A.P. Standards)
Matsqui		BUILDING	Bylaw Dated July 9, 1979 Re Housing Standards
Musqueam	UNNUM-BERED	CONSTRUCTION	Bylaw Respecting Construction Of Buildings
Musqueam	UNNUM-BERED	CONSTRUCTION	Bylaw Respecting Health And Safety Of Rented Residential Property
Musqueam	UNNUM-BERED	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards. (R.R.A.P.) (September 11/79)
Nak'azdli	1	BUILDING	Housing Bylaw No.1 — To Provide For Occupancy And Building Maintenance Standards (R.R.A.P.)
Namgis First Nation	11	BUILDING	Being A Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
New Aiyansh (Nisga'a Village Of)	1-1979	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Nooaitch	1-1979	BUILDING	To Provide For Occupancy And Building Standards (R.R.A.P.) Bylaw
Old Massett Village Council	6-1980	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Osoyoos	2001-002	CONSTRUCTION	Bylaw Respecting Construction, Maintenance And Regulating Of Waterworks Systems

Table — BC First Nations' Laws/ByLaws in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Penelakut Tribe	NO. 2	WATER SUPPLIES	Bylaw Respecting The Zoning And Land Use Regulation
Penticton	2	BUILDING	To Provide For Raising Of Money To Improve Repair And Maintain Any Buildings Owned By The Band
Peters	1-79	BUILDING	Bylaw To Provide Regulations For Occupancy And Buildings Maintenance Standards (R.R.A.P.)
Popkum	0	BUILDING	Re Housing Standards
Qualicum First Nation	1985-1	BUILDING	Bylaw Concerning Building
Qualicum First Nation	2-1980	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Seabird Island	1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards
Sechelt	1982-01	BUILDING	Concerning Building
Semiahmoo	2	BUILDING	Bylaw Respecting Building
Seton Lake	2	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Shackan	1-1979	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Shxw'ow'hamel First Nation	0	BUILDING	Re Housing Standards. 589 - Yale First Nation 1-1980 Building Bylaw To Provide For The Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Shxwhá:Y Village		BUILDING	July 9, 1979 - Re Housing Standards
Simpcw First Nation	H-1-80	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Skeetchestn	1986-2	BUILDING	Bylaw To Establish Rrap Building Standards
Skowkale	1-1979	BUILDING	Being A Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
Snuneymuxw First Nation	001-1979	BUILDING	To Provide For Occupancy And Building Standards (R.R.A.P) Bylaw
Songhees	1	BUILDING	To Provide For Provisions Of Mobile Home Parks Or Mobile Home Subdivisions On The Songhees Indian Res.
Soowahlie		BUILDING	By- Law Dated July 9, 1979 Re Housing Standards
Squamish	2-2006	ZONING	Bylaw Respecting Signage Control
Squamish	4	BUILDING	Band Housing Authority And City Municipal Services Bylaw, 1971
Stswecem'c Xgat'tem First Nation	1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Sumas First Nation	1-1979	BUILDING	Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
Tk'emlups te Secwepemc	1980-1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Standards (R.R.A.P.)
Tk'emlups te Secwepemc	2004-05	CONSTRUCTION	Bylaw Respecting Band Development Approval Process — Development And Construction Projects On Reserve
Tk'emlups te Secwepemc	N/A	CONSTRUCTION	Bylaw Respecting Band Development Approval Process — Development, Prevention Of Nuisances, Construction And Regulation Of Land Use And Ancillary Matters On The Reserve
Tk'emlups te Secwepemc	UNNUM-BERED	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting Heritage Conservation
Tk'emlups te Secwepemc	2010-01	OBSERVANCE OF LAW AND ORDER	Bylaw Respecting The Control Of Graffiti
Tla'amin	1-1979	BUILDING	Being A Bylaw Re Occupancy And Building Maintenance Standards (R.R.A.P.)
Ts'kw'aylaxw First Nation	1-1979	BUILDING	Bylaw To Provide For Occupancy And Building Standards (R.R.A.P.)

Table — BC First Nations' Laws/ByLaws in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Tsawwassen First Nation	1995-10-1	CONSTRUCTION	Bylaw Respecting Construction Of Buildings
Tsawwassen First Nation	2-1980	BUILDING	Being A Bylaw For The Regulation For Occupancy And Building Maintenance Standards (R.R.A.P.)
Tsawwassen First Nation	3	BUILDING	Bylaw To Regulate Construction And Repair Of Buildings And Standards To Maintain Buildings And Lands
Tsleil-Waututh Nation		CONSTRUCTION	Bylaw Respecting Building
Tsleil-Waututh Nation		CONSTRUCTION	Bylaw Respecting Sewer
Tzeachten		BUILDING	Bylaw On The Construction Or Maintenance Of A Longhouse Or Any Building Or Structure In Which Spirit Dancing Takes Place
Tzeachten		BUILDING	Bylaw Re: Housing Standards
Tzeachten	1-1980	BUILDING	Bylaw To Provide For Occupancy And Building Maintenance Standards (R.R.A.P. Standards)
Upper Nicola	1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Westbank	1979-1	BUILDING	Bylaw No. 1979 Re Housing Standards
Westbank	1998-01	CONSTRUCTION/ RESIDENCE	Bylaw Respecting Residential Premises On Reserve
Wei Wai Kum (f. Campbell River)	6-79	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards
Wei Wai Kum (f. Campbell River)	UNNUM-BERED	CONSTRUCTION	Bylaw Respecting Administration Of A Building Code
Wei Wai Kum (f. Campbell River)	UNNUM-BERED	BUILDING	Bylaw Respecting Building
Williams Lake	1	BUILDING	Bylaw To Provide Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Yakweakwioose		BUILDING	Bylaw Re Housing Standards
Yale First Nation	1-1980	BUILDING	Bylaw To Provide For The Regulations For Occupancy And Building Maintenance Standards (R.R.A.P.)
Bylaws — Section 81(1)(q) Ancillary Powers			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Gingolx (Nisga'a Village Of)	7	ANCILLARY POWERS	Raising Of Money To Provide Community Services — Lot Owners Community Services Bylaw 1974
Kwakiutl	3-90	ANCILLARY POWERS	Bylaw Respecting Upkeep Of Anglican Church
Musqueam	UNNUM-BERED	CONSTRUCTION BYLAW	Respecting Health And Safety Of Rented Residential Property
SECTORAL GOVERNANCE INITIATIVES			
FNLMA - FRAMEWORK AGREEMENT - OPERATIONAL	**LAW NO.**	**DESCRIPTION**	
Tsawout First Nation	Mar 21, 2007	Tsawout Soil Deposit & Removal BCR	
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Huu-ay-Aht First Nations		Infrastructure Policy Regulation	
Huu-ay-Aht First Nations		Zoning Regulation	
Ka:'Yu:'K't'h'/Che:K:Tles7et'h' First Nations	13/2011	Planning and Land Use Management Act	
Nisga'a Nation	2009/02	Community Planning And Zoning Enabling Act	
Nisga'a Nation	2010/09	Nisga'a Highway Construction Act	
Nisga'a Nation	2011	Nisga'a Highway Construction Regulation	

Table — BC First Nations' Laws/ByLaws in Force... *continued*

CGA	LAW NO.	DESCRIPTION
Sechelt Indian Band (SIGD)	1988-18	Building Law
Sechelt Indian Band (SIGD)	1989-06	Traffic Signs
Sechelt Indian Band (SIGD)	1989-08	Street Naming
Sechelt Indian Band (SIGD)	1990-01	Sewer System — Authorization To Charge Rates
Sechelt Indian Band (SIGD)	1990-05	Appoint Sewer Inspector
Sechelt Indian Band (SIGD)	1991-01	Sewer Parcel Tax Establishment
Sechelt Indian Band (SIGD)	1991-05	Sewer Parcel Tax Amendment
Sechelt Indian Band (SIGD)	1992-03	Amend Sewer & Water
Sechelt Indian Band (SIGD)	1993-03	Sewer Parcel Tax Amendment
Sechelt Indian Band (SIGD)	1994-03	Sewer Parcel Tax Amendment
Sechelt Indian Band (SIGD)	1995-03	Sewer Parcel Tax Amendment
Sechelt Indian Band (SIGD)	1996-04	Sewer Parcel Tax Amendment
Sechelt Indian Band (SIGD)	1997-03	Building Bylaw Amendment
Sechelt Indian Band (SIGD)	2000-03	Sewer Parcel Tax Amendment
Sechelt Indian Band (SIGD)	2002-01	Sewer Parcel Tax Amendment
Sechelt Indian Band (SIGD)	2003-01	Sewer Parcel Tax Amendment
Sechelt Indian Band (SIGD)	2009-06	Administration & Regulation Of Public Sewers
Toquaht Nation	2/2013	Building And Development Authorization Act
Toquaht Nation	13/2011	Planning And Land Use Management Act
Tsawwassen First Nation	052-2009	Tfn Drainage And Sewer Regulation
Tsawwassen First Nation	062-2009	Tfn Soil Transport, Deposit And Removal Regulation
Uchucklesaht Tribe	13/2011	Planning And Land Use Management Act
Ucluelet First Nation	36/2014	Construction And Infrastructure 2014-2015 Capital Borrowing Act
Ucluelet First Nation	13/2011	Planning And Land Use Management Act
Westbank First Nation	2010-03	WFN Safe Premises Law
Westbank First Nation	NO. 2005-06	WFN Garbage Collection Law
Westbank First Nation	NO. 2005-14	WFN Building Law
Westbank First Nation	NO. 2005-15	WFN Subdivision, Development And Servicing Law
Westbank First Nation	NO. 2005-18	WFN Sanitary Sewer Systems Law

Table — Capital Infrastructure Categories

CAPITAL INFRASTRUCTURE CATEGORIES		
General Government		
• Administrative Building Design • Administrative Building Construction • Legislative Building Design • Legislative Building Construction		
Protection Services		
• Police • Police Station Design • Police Station Construction	• Fire • Fire Hall Design • Fire Hall Construction	• Other Protection Services • Animal Control Building Construction
Health Services		
Community Health Buildings and related infrastructure		

Table — Capital Infrastructure Categories… ***continued***

Transportation and Communication			
• Roads and Streets • Ferries • Road Design • Road Construction • Bridge Design • Bridge Construction • Boulevard Construction • Boulevard Design • Overpass Design • Overpass Construction • Sidewalks and Curb Construction • Street Light Installation • Traffic Island Construction • Traffic Signal Installation	• Parking • Parkade Design • Parkade Construction • Parking Lot Design • Parking Lot Construction • Parking Meter Installation	• Communications • Telephone Services • Internet Access Services • Equipment used to move signals electronically over wires or through the air	• Other Transportation and Communication • Supply of Electricity or Natural Gas to area of land development
Recreation and Culture			
• Recreation • Arena Design • Arena Construction • Ballpark Design • Ballpark Construction • Recreation Building Design • Recreation Building Construction • Park Design • Park Construction • Playground Design • Playground Construction • Swimming Pool Design • Swimming Pool Construction		• Culture • Museum Facility Design • Museum Facility Construction • Library Design • Library Construction • Community Hall Design • Community Hall Construction • Art Gallery Design • Art Gallery Construction	
Environment			
• Water Purification and Supply • Intake Facilities Design • Intake Facilities Construction • Storage Facilities Design • Storage Facilities Construction • Treatment Plant Design • Treatment Plant Construction • Pipe System Construction • Pump Stations Design • Pump Stations Construction • Pressure Reducing Stations Design • Pressure Reducing Stations Operation	• Sewage Collection and Disposal • Liquid Waste Disposal Planning • Sewage Collection System Design • Sewage Collection System Construction • Trunk Sewer System Design • Trunk Sewer System Construction • Treatment Plants Design • Treatment Plants Construction • Sewage Discharge Facilities Design • Sewage Discharge Facilities Construction	• Other Environmental Services • Dike Design • Dike Construction • Erosion Control Structures Design • Erosion Control Structures Construction • Retaining Walls Design • Retaining Walls Construction • Drainage Ditches Design • Drainage Ditches Construction • Flood Boxes Design • Flood Boxes Construction • Sea and Harbour Walls Design • Sea and Harbour Walls Construction • Waterfront Walkways Design • Waterfront Walkways Construction • Wharves and Floats Design • Wharves and Floats Construction	
Acquisition of Interests in Land			
• The acquisition of interests in land required to complete a capital infrastructure project within any of the above categories			

RESOURCES

First Nations

First Nations' Emergency Services Society of BC
102 – 70 Orwell Street
North Vancouver, BC V7J 3R5
Phone: 604-669-7305
Fax: 604-669-9832
Toll-free: 1-888-822-3388
Email: info@fness.bc.ca
www.fness.bc.ca

First Nations Finance Authority
202 – 3500 Carrington Road
Westbank, BC V4T 3C1
Phone: 250-768-5253
Toll-free: 866-575-3632
Fax: 250-768-5258
Email: info@fnfa.ca

First Nations Land Management Resource Centre
22250 Island Road
Port Perry, Ontario L9L 1B6
Phone: (888) 985-5711
Fax: (866) 817-2394
Email: webadmin@labrc.com
www.labrc.com

First Nations Tax Commission
321 – 345 Chief Alex Thomas Way
Kamloops, BC V2H 1H1
Phone: 250-828-9857
Fax: 250-828-9858
Email: mail@fntc.ca

Provincial

BC Water and Waste Association (BCWWA)
620 – 1090 Pender Street
Vancouver, BC V6E 2N7
Phone: 604-433-4389
Toll-free: 1-877-433-4389
Fax: 604-433-9859
Email: contact@bcwwa.org
www.bcwwa.org

CivicInfo BC
7th Floor – 620 View Street
Victoria, BC V8W 1J6
Phone: 250-383-4898
Fax: 250-383-4879
Email: info@civicinfo.bc.ca
www.civicinfo.bc.ca

Public Works Association of British Columbia
102 – 211 Columbia Street
Vancouver, BC V6A 2R5
Phone: 1-877-356-0699
http://www.pwabc.ca/

Federal

Aboriginal Affairs and Northern Development Canada
Terrasses de la Chaudière
10 Wellington, North Tower
Ottawa, ON K1A 0H4
Toll-free: 1-800-567-9604
Fax: 1-866-817-3977
Toll-free fax: 1-866-553-0554
Email: InfoPubs@aadnc-aandc.gc.ca

- Aboriginal Affairs and Northern Development Canada: www.aadnc-aandc.gc.ca/eng/1100100010002/1100100010021
- *National First Nations Infrastructure Investment Plan 2010–2011:* www.aadnc-aandc.gc.ca/eng/1311090145412/1311090252117
- *First Nations Water and Wastewater Action Plan Progress Report 2009–2010:* www.aadnc-aandc.gc.ca/eng/1100100034932/1100100034943
- First Nations Water Infrastructure: http://actionplan.gc.ca/en/initiative/first-nations-water-infrastructure

Canada Mortgage and Housing Corporation
700 Montreal Road
Ottawa, ON K1A 0P7
Phone: 613-748-2000
Fax: 613-748-2098
www.cmhc.ca

SELECT LEGISLATION

- *Safe Drinking Water for First Nations Act* (S.C. 2013, c. 21)

PART 1 /// SECTION 3.27

Social Services

3.27

SOCIAL SERVICES

3.27

SOCIAL SERVICES

BACKGROUND

Social services is a broad subject matter encompassing many aspects of program and service delivery provision to ensure people's welfare. Social services are typically provided by First Nations governments to their citizens, but can also be provided to others who fall within the service group of a First Nation (e.g., registered "Indians" or non-Aboriginal residents). Social services, sometimes called "community services," can be provided as either an exercise of jurisdiction or First Nation policy, or on behalf of other governments under the terms and conditions of a service delivery contract (e.g., a contribution funding agreements with AANDC). This subject matter is often seen as an aspect of health jurisdiction and crosses a number of topic areas, including Aboriginal healers and traditional medicine; health; child and family; adoption; education; intoxicants; lands and land management; matrimonial property; heritage and culture; public order, safety and security; administration of justice; and wills and estates. Conceptually, it may be easier to understand social services as the exercise of multiple jurisdictions that when exercised collectively provide for programs and services to support the well-being of citizens, as opposed to thinking of it as a distinct category of jurisdiction. For example, a program of social housing touches upon many jurisdictions, from lands and land management, to child and family, to health, and so on. Accordingly, it is often not so much a question of who has jurisdiction with respect to a defined service or program, but whether there is sufficient funding to pay for a particular program or service and a government willing to pay it. The present system for providing social services on reserve operates predominantly under federal authorities, but relies on provincial norms as the basis for federal programming and funding (even if the funding is actually well below what the provinces provide).

Indigenous Support Mechanisms

Traditionally, in accordance with a tribe's customs and traditions, people lived communally and individuals relied on the group for their welfare and survival. There were mechanisms within the society to ensure the fair distribution of collectively held resources, and people supported one another through a division of labour that was well understood and supported by Indigenous legal traditions and community institutions (e.g., the Potlatch among coastal societies). While the situation should not be over-romanticized, as life was not always easy, it is fair to say that unless the same were true for the whole group, members of the group did not go hungry, were never homeless and were looked after if they became ill or could not look after themselves. With the arrival of modern industrial society, this changed, for both Indigenous peoples and others.

The History of Modern Welfare Systems

Welfare programs in Canada, as people understand them today, began in response to the terrible human suffering during the Great Depression of the 1930s. Today, social services provided by governments in most societies play an important role in looking after those needing state assistance. It should be noted, though, that not all of these programs are aimed at alleviating social problems (i.e., they are not necessarily aimed at helping only those who are unemployed or disadvantaged in some way); many can be aimed at improving the quality of life of all. Social programs across Canada have become highly developed, and citizens expect them to continue or to be enhanced. Not surprisingly, the cost of the social safety net has risen along with with the range of programs and services available to Canadians.

Division of Powers

In Canada, provincial governments have primary responsibility for providing social services off-reserve. In accordance with section 91(24) of the *Constitution Act, 1867*, primary responsibility for Indians on-reserve rests with the federal government. The *Indian Act* does not directly address the provision of federal programs and services with respect to social welfare, and there is no other federal legislation dealing with social development or the provision of welfare or social services in general to Aboriginal people. Initially, Canada became involved in delivering social programs and services to First Nations because the provinces were reluctant or refused to do so. In some cases, First Nations also have responsibility, to the extent that they have assumed administrative responsibility for delivering social services. No First Nation governing under the *Indian Act* has exercised jurisdiction over social services (i.e., no bylaws have been made). British Columbia is, for the most part, responsible for the provision of social services to non-Indians living on-reserve. To a much lesser extent, the Province may have assumed some program and service responsibility under its legislation or policy authority for Indians living on-reserve — for example, where no comparable federal or First Nation program or service exists (e.g., in-home care for adults with severe disabilities). This is by no means certain, though, and is often proved on a case-by-case basis.

Off-reserve, the Province provides services to "Indians" in the same manner as they are provided to anyone else. In practice, therefore, jurisdiction is normally split. For example, Income Assistance in BC is split between on- and off-reserve. On-reserve, subject to any self-government arrangements, it is a federal jurisdiction and is administered by Aboriginal Affairs and Northern Development Canada (AANDC), and potentially under the authority of section 81 of the *Indian Act* bylaws. Off-reserve, it is a provincial jurisdiction and is administered by the Ministry of Social Development and Social Innovation under BC's *Employment and Assistance Act* (S.B.C. 2002, c. 40).

Social Services Provided by First Nations

Most First Nations today administer social services in their communities under programs established by AANDC, as set out in its Social Development Manual. These services are provided under contract through financial transfer agreements entered into by "band" councils. First Nations jurisdiction is not recognized or involved here, although there may be some administrative discretion for a First Nation in administering the services. In many cases, this funding, along with education, constitutes a significant percentage of a community's budget.

Over the years, many First Nations–related services and agencies have been created under the policy of federal, provincial and First Nations governments. Provincially, the not-for-profit First Nations Social Development Society (FNSDS) provides support services to the social development workers that are employed by First Nations. "Band Social Development Workers" administer income assistance on-reserve under contract with AANDC. The FNSDC provides training, policy interpretation and essential services as they relate to the provision of social development programs, including income assistance.

From Dependency to Self-Sufficiency

For First Nations people, social programs and services are critically important, given that First Nations people are among the poorest in Canada. The crippling legacy of dependency left by the *Indian Act* system (see Section 1.1 — A Brief History of Evolving First Nations Governance within Canada) means that these programs and services provide essential support for communities during the difficult transition from the *Indian Act* reality to a post-colonial world. Because so many First Nations people, and in some cases almost whole communities, rely on social service programs and benefits to survive, any changes to these programs affect these communities more profoundly than they would in other similarly sized Canadian communities. First Nations citizens might also fear that their Nations, by taking on more

governance responsibilities as self-governing entities, may not be able to provide the same level of programs and services, adequate to meet their needs. Indeed, they may be worried that given their reliance on the "system," they may not be ready for self-government, or worse, not even desire it. Conversely, the federal government is unlikely to negotiate sectoral or comprehensive governance arrangements that leave them with the financial responsibility for an expanding range of services beyond those normally provided by the province. The federal government is more likely to expect that social service costs will go down because either the community is "healthier" and the costs of providing the social safety-net are lower, or because the transfer amount to the First Nation is less as a result of own-source revenue (OSR) offsets (see Section 4.3 — Own-Source Revenue Impact on Transfer Payments).

Notwithstanding these challenges from within and with government, for many First Nations, taking over responsibility for social services is seen as a way to be creative with policy and to design programs and services that are geared to the First Nation and are more relevant to its priorities, needs and long-term vision. Federal or provincial social policy may sometimes in fact be at odds with the vision of the community, and simply administering the other government's policy may be at odds with the community's vision as being not empowering or conducive to change. Simply put, exercising jurisdiction in this area allows First Nations to things differently.

However, First Nations should be mindful of the pros and cons of assuming responsibility for social programs and services as an exercise of jurisdiction. If a First Nation does exercise its jurisdiction or authority by expanding the social services and programs beyond those normally provided in the province and currently usually paid for by Canada, it would typically have to find its own resources to do so. However, this should not stop First Nations from pressuring Canada and/or the provinces to enhance programs and services and to address the social challenges facing First Nations as a result of the colonial legacy and existing levels of poverty and social needs.

INDIAN ACT GOVERNANCE

There are no explicit bylaw-making powers for social services under the *Indian Act*. However, First Nations have used section 81 bylaw-making powers regarding community wellness. Also, all federal programming for social services is provided under policy. For the most part, First Nations that provide their own programs and services to their citizens, in addition to those provided under funding arrangements with Canada or, in some cases, British Columbia, deliver them under policies that they themselves have developed and that use their own revenues.

AANDC funds five social development programs on reserve: Income Assistance Program, National Child Benefit Reinvestment, Assisted Living Program, First Nations Child and Family Services Program, and Family Violence Prevention Program.

AANDC's Income Assistance (IA) Program serves a broad client base on-reserve and has the primary purpose of providing basic social assistance to individuals and families in need. Since AANDC's 2007 evaluation of the Income Assistance Program resulted in a recommendation to move toward an "Active Measures approach" to ensure that the IA program is relevant to clients' needs and keeps pace with provincial and territorial changes to IA programs, AANDC has been working to support active measures initiatives in First Nations communities. In a recent development, building on the federal government's Economic Action Plan 2013, AANDC has again reformed its IA program. The IA program has two initiatives to provide youth who are able to work with the support, skills and training required to gain employment: the First Nations Job Fund and Enhanced Service Delivery.

Through the First Nations Job Fund, the federal government is investing $109 million over four years to support a number of activities that the government feels will lead directly to jobs, including skills assessment, personalized training, and coaching and "other supports" for young IA recipients on-reserve.

The First Nations Job Fund is administered by Employment and Social Development Canada (ESDC) and is being implemented in First Nations communities across the country through a phased-in approach until 2016. The Job Fund is separate from the Aboriginal Skills and Employment Training Strategy (ASETS), but will be implemented using the ASETS infrastructure. ASETS programs are being run by over 80 Aboriginal organizations throughout the country to increase workforce participation and assist Aboriginal people in preparing for, finding and maintaining jobs. ASETS agreement holders design and deliver employment programs and services that they feel are best suited to the unique needs of their clients and communities.

The federal government has committed to providing $132 million over four years for Enhanced Service Delivery, which is intended to support First Nations in identifying individuals' employment readiness and overcoming current barriers to employment. The Enhanced Service Delivery program, until 2016/17 will focus on First Nations youth aged 18–24 and considered "employable," as per the guidelines in their province or territory. Eligible costs for this program, include case management, client supports (clients' assessments and basic pre-employment training costs), and service delivery infrastructure. In addition, ESDC will provide $109 million of complementary support to IA service providers, primarily through the network of ASETS agreement holders. The funding will be available through the First Nations Job Fund for ASETS agreement holders partnering with IA providers. To date, in BC only Seabird Island, Okanagan Indian Band, and Nuu-chah-nulth Tribal Council have elected to move ahead with Enhanced Service Delivery.

In BC, the Ministry of Advanced Education will deliver the Aboriginal Community-Based Delivery Partnership Program. This program is designed to support First Nations individuals, located on-reserve, in transitioning from IA to employment within the provincial/territorial framework. As part of its social program and policy reform, AANDC is working with willing provinces and First Nations in a tripartite process unique to each region. More specifically, AANDC is working with provincial governments to develop and implement approaches for active measures. These approaches will take into account the need to coordinate and integrate related programming, as well as supports necessary for individuals to pursue training, education and employment. Program redesign and authority renewal will be based on best practices and will be rolled out nationally. In 2011, AANDC signed a memorandum of understanding with the province of Saskatchewan and five Tribal Councils (Memorandum of Understanding Concerning Collaboration to increase labour force participation of First Nations through Active Measures in Saskatchewan). No similar agreements have yet been signed in other provinces.

SECTORAL GOVERNANCE INITIATIVES

There is no sectoral governance initiative currently addressing or considering addressing First Nations jurisdiction over social services.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All of the treaty agreements provide for First Nation jurisdiction over social services. In the *Westbank First Nation Self-Government Agreement*, Westbank does not seek recognition of First Nation jurisdiction in this area, and the agreement provides that it is a matter for future negotiations with Canada and British Columbia. The *Sechelt Indian Band Self-Government Act* recognizes Sechelt jurisdiction over this subject to the extent that it is authorized under the Sechelt Constitution (which has to be approved by the governor in council under section 12 of the *Sechelt Indian Band Self-Government Act* and similarly for any amendments to the constitution as per section 13 of the act). Social services are not addressed in the Sechelt Constitution, and accordingly Sechelt has not enacted any laws in this area.

All comprehensive arrangements as part of modern treaty-making include jurisdiction over social services, although the way in which the powers are described can vary.

Tsawwassen First Nation has dealt with matters concerning education, health and social development in one law (*Education, Health and Social Development Act*, 2009) and regulations made thereunder. The Tsawwassen government views progressive social services and social programs as being fundamental to the well-being of its members. Under part 2 of the act, the Executive Council must develop and adopt a Community Health Plan, which provides the framework for delivery of health services and programs to Tsawwassen First Nation Members who live on Tsawwassen Lands. Tsawwassen Government must provide a range of health programs and services, including immunization, environmental health, community health and health prevention, in-home and community care, home-care nursing, and an Aboriginal Head-Start program. Executive Council must also prepare a report on the results of these health programs every five years, and provide the report to Members and the federal and provincial governments. Under Part 3 — Social Development, Tsawwassen First Nation Members ordinarily resident on Tsawwassen Lands are eligible for:

(a) income assistance and services intended to meet basic human needs
(b) financial assistance for those caring for or having custody of Tsawwassen children
(c) assistance for those with special needs
(d) non-insured health benefits for recipients of income assistance
(e) training, education and support services to reduce reliance on income assistance
(f) local community programs that contribute to physical, emotional and social well-being, including adult in-home care, family violence prevention and children's programs
(g) social housing.

Eligibility criteria for these programs and services are set out in regulations, as well as the procedure to appeal decisions to deny, reduce or suspend services. Part 4 of the act provides Executive Council with the authority to negotiate financing agreements with Canada and/or British Columbia, for the provision of the programs and services outlined in the act.

In 2000, the Nisga'a Lisims Government enacted its *Nisga'a Programs and Services Delivery Act* (consolidated in November 2013). Part Six provides for the establishment and maintenance of programs or services commonly known as social services. As part of these programs, the Nisga'a executive must:

(a) Establish and publish a formally defined statement of eligibility criteria;
(b) Provide equality of access for all persons normally resident on Nisga'a Lands;
(c) Provide an impartial process for the appeal of an administrative decision
    i. Refusing to provide,
    ii. To discontinue, or
    iii. To reduce Services or benefits to any person; and,
(d) Require periodic financial and compliance audits of management practices and systems, financial management and control, and evaluation as to economy, efficiency and effectiveness, in respect of the program and persons administering or delivering the program, in a Nisga'a Village.

The Huu-ay-aht First Nation have developed a Social Housing Regulation enacted under its *Financial Administration Act* (HFNA 2011). The purpose of this regulation is to establish a fair and effective framework to provide quality, affordable housing to Huu-ay-aht citizens in need.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	Sechelt has legislative powers to make laws related to "social and welfare services with respect to band members" to the extent that it is authorized under the Sechelt Constitution. (s. 14(h))	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (37, 38 of *Sechelt Indian Band Self-Government Act*, S.C.1986, c. 27)
Westbank	Westbank does not currently have jurisdiction over social services but may seek further negotiations on jurisdiction over social services and family and child welfare law. (Part XXIV, s. 222(d))	N/A
Nisga'a	Nisga'a may make laws with respect to the provision of social services by Nisga'a Lisims Government to Nisga'a citizens, other than the licensing and regulation of facility-based services off Nisga'a Lands. (Ch. 11, s. 78)	Federal or provincial law prevails. (Ch. 11, s. 79)
Tsawwassen	Tsawwassen Government may make laws with respect to social services provided by a Tsawwassen Institution, including income assistance, services related to family and community life, and housing. Does not include the authority to make laws with respect to the licensing and regulation of facility-based services provided off Tsawwassen Lands. (Ch. 16, s. 93, 95)	Federal or provincial law prevails. (Ch. 16, s. 94)
Maa-nulth	Each Maa-nulth First Nation Government may make laws with respect to social development, including family development services, provided by that Maa-nulth First Nation Government or its Maa-nulth First Nation public institutions on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation. (s. 13.23.1)	Federal or provincial law prevails. (s. 13.23.2)
Yale	Yale First Nation Government may make laws with respect to family and social services, including income assistance and housing, provided by a Yale First Nation Institution. (s. 3.19.1) Yale First Nation Law under 3.19.1 may require individuals collecting income assistance from Yale First Nation to participate in back-to-work programs or other similar programs. (s. 3.19.3)	Federal or provincial law prevails. (s. 3.19.2)
Tla'amin	The Tla'amin Nation may make laws in relation to family and social services provided by a Tla'amin Institution, including income assistance, social development, housing, and family and community services. (Ch. 15, s. 93) Tla'amin Law under paragraph 93 may require individuals collecting income assistance from the Tla'amin Nation to participate in back-to-work programs or other similar programs. (Ch. 15, s. 94)	Federal or provincial law prevails. (Ch. 15, s. 95)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(a) Health			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Gwa'sala-Nakwaxda'xw	1994.09	HEALTH	Bylaw Respecting Mental Health Commission
Nadleh Whuten	1999-2	HEALTH	Bylaw Respecting Healthcare
Seabird Island	2008	HEALTH	Bylaw Respecting Community Wellness
Tzeachten	1-1990	HEALTH	Bylaw Respecting Health
Communities Participating in the First Nations Job Fund			
PROVINCE	**PARTICIPATING FIRST NATIONS**		**FIRST NATIONS JOB FUND PROPONENT**
Prince Edward Island	Mi'kmaq Confederacy Of Prince Edward Island (Abegweit, Lennox Island)		Mi'kmaq Confederacy Of Prince Edward Island
Quebec	Listuguj Mi'gmaq Government, Innu Takuaikan Uashat Mak Mani-Utenam, Mohawk Council of Kahnawake, Atikamedkw De Manawan, Conseil De Montagnais Du Lac-St-Jean-Mashteuiatsh		Commission De Developpement Des Ressources Humaines Des Premieres Nations Du Quebec
Manitoba	Dakota Ojibway Tribal Council (Sandy Bay, Long Plain), Broken Head, Fort Alexander/Sagkeeng		First Peoples Development Inc.
Saskatchewan	Battleford Agency Tribal Chiefs (Moosomin, Red Pheasant, Saulteaux, Sweetgrass, Ahtahkakooop), Saskatoon Tribal Council (Muskoday, Whitecap, One Arrow, Mistawasis, Muskeg Lake, Yellow Quill, Kinistin), Meadow Lake Tribal Council (Canoe Lake, Ministikwan, Buffalo River, English River, Waterhen Lake, Birch Narrows, Makwa Sahgaiehcan, Flying Dust, Clearwater River), Yorkton Tribal Council (Kahkewistahaw, Keeseekoose, Sakimay, Cote, The Key, Ocean Man), Lac La Ronge First Nation		Saskatchewan Indian Training Assessment Group Inc.
Alberta	Maskwacis Employment Centre (Ermineskin Cree Nation, Samson Cree Nation, Louis Bull Tribe), Tribal Ventures Inc. (Beaver Lake, Cold Lake, Frog Lake, Heart Lake, Whitefish Lake No. 128, Kehewin), Blood Tribe, Paul First Nation		Six Independent Alberta First Nations Of Hobbema, Tribal Chiefs Employment And Training Services Association, Community Futures Treaty Seven
BC	Okanagan Indian Band (Osoyoos, Westbank, Princeton, Okanagan, Upper Similkameen, Lower Similkameen), Seabird Island (Seabird, Chawathil, Shxw'owhamel, Squiala, Cheam, Union Bar), Nuu-Chah-Nulth Tribal Council (Dididaht, Ehattesaht/Chinehkint, Hupacasath, Ka:'Yu:'K't'h'/Che:K:Tles7et'h, Mowachaht/ Muchalaht, Tla-O-Qui-Aht, Yuulu'il'ath)		Okanagan Training And Development Council, Sto:lo Aboriginal Skills And Development Training, Nuu-Chah-Nulth Tribal Council
Yukon			Partnership Between Council Of Yukon First Nations And First Nations Clients In The Whitehorse Area
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Huu-ay-aht		Social Housing Regulation	
Nisga'a Lisims Government	2000/06	Nisga'a Programs and Services Delivery Act	
Tsawwassen First Nation	Apr 3, 2009	TFN Education, Health And Social Development Act	
Tsawwassen First Nation	034-2009	Income and Social Assistance Regulation	
Tsawwassen First Nation	035-2009	Health And Social Housing Regulation	
Tsawwassen First Nation	038-2009	TFN Education, Health And Social Development Appeal Regulation	
Tsawwassen First Nation	036-2009	TFN Effective Day Benefit Eligibility Regulation	

Table — Communities Participating in the First Nations Job Fund

COMMUNITIES PARTICIPATING IN THE FIRST NATIONS JOB FUND		
PROVINCE	**PARTICIPATING FIRST NATIONS**	**FIRST NATIONS JOB FUND PROPONENT**
Prince Edward Island	Mi'kmaq Confederacy Of Prince Edward Island (Abegweit, Lennox Island)	Mi'kmaq Confederacy Of Prince Edward Island
Quebec	Listuguj Mi'gmaq Government, Innu Takuaikan Uashat Mak Mani-Utenam, Mohawk Council of Kahnawake, Atikamedkw De Manawan, Conseil De Montagnais Du Lac-St-Jean-Mashteuiatsh	Commission De Developpement Des Ressources Humaines Des Premieres Nations Du Quebec
Manitoba	Dakota Ojibway Tribal Council (Sandy Bay, Long Plain), Broken Head, Fort Alexander/ Sagkeeng	First Peoples Development Inc.
Saskatchewan	Battleford Agency Tribal Chiefs (Moosomin, Red Pheasant, Saulteaux, Sweetgrass, Ahtahkakooop), Saskatoon Tribal Council (Muskoday, Whitecap, One Arrow, Mistawasis, Muskeg Lake, Yellow Quill, Kinistin), Meadow Lake Tribal Council (Canoe Lake, Ministikwan, Buffalo River, English River, Waterhen Lake, Birch Narrows, Makwa Sahgaiehcan, Flying Dust, Clearwater River), Yorkton Tribal Council (Kahkewistahaw, Keeseekoose, Sakimay, Cote, The Key, Ocean Man), Lac La Ronge First Nation	Saskatchewan Indian Training Assessment Group Inc.
Alberta	Maskwacis Employment Centre (Ermineskin Cree Nation, Samson Cree Nation, Louis Bull Tribe), Tribal Ventures Inc. (Beaver Lake, Cold Lake, Frog Lake, Heart Lake, Whitefish Lake No. 128, Kehewin), Blood Tribe, Paul First Nation	Six Independent Alberta First Nations Of Hobbema, Tribal Chiefs Employment And Training Services Association, Community Futures Treaty Seven
BC	Okanagan Indian Band (Osoyoos, Westbank, Princeton, Okanagan, Upper Similkameen, Lower Similkameen), Seabird Island (Seabird, Chawathil, Shxw'owhamel, Squiala, Cheam, Union Bar), Nuu-Chah-Nulth Tribal Council (Dididaht, Ehattesaht/Chinehkint, Hupacasath, Ka:'Yu:'K't'h'/Che:K:Tles7et'h, Mowachaht/ Muchalaht, Tla-O-Qui-Aht, Yuulu'il'ath)	Okanagan Training And Development Council, Sto:lo Aboriginal Skills And Development Training, Nuu-Chah-Nulth Tribal Council
Yukon		Partnership Between Council Of Yukon First Nations And First Nations Clients In The Whitehorse Area

RESOURCES

First Nations

First Nations Social Development Society (FNSDS)
102 – 70 Orwell Street
North Vancouver, BC V7R 3R5
Phone: 604-983-9820
Toll-free: 1-800-991-7099
Fax: 604-983-9822
Email: www.fnsds.org/contact-us/ia-policy-queries/
www.fnsds.org

Federal

Aboriginal Affairs and Northern Development Canada
Terrasses de la Chaudière
10 Wellington, North Tower
Ottawa, ON K1A 0H4
Toll-free: 1-800-567-9604
TTY: 1-866-553-0554
Fax: 1-866-817-3977
Email: Infopubs@aadnc-aandc.gc.ca

- Memorandum of Understanding Concerning Collaboration to increase labour force participation of First Nations through Active Measures in Saskatchewan: http://ae.gov.sk.ca/mou-first-nations-labour-force-participation
- AANDC Income Assistance (IA) program: www.aadnc-aandc.gc.ca/eng/1100100035256/1100100035257
- Social Development Programs: www.aadnc-aandc.gc.ca/eng/1100100035072/1100100035076
- National Social Programs Manual: www.aadnc-aandc.gc.ca/eng/1335464419148/1335464467186

SELECT LEGISLATION

Provincial

- *Employment and Assistance Act* (S.B.C. 2002, c. 40)

PART 1 /// SECTION 3.28

Solemnization of Marriages

3.28

SOLEMNIZATION OF MARRIAGES

3.28

SOLEMNIZATION OF MARRIAGES

BACKGROUND

All societies regulate marriage, one of the most basic institutions in the social order. Historically, First Nations had their own ways of recognizing the marital union between two people, based on their respective cultures, religions and traditional practices. Marriage was viewed from the perspective of alliances, the communal relationship, required social order and the descent and control of property. In many First Nations cultures, marriage was strictly controlled, with arranged marriages not uncommon. In some cases, an individual was forbidden to marry a person from the same clan or moiety. In modern times, the state now for the most part determines the legal rights, obligations and responsibilities of those who are married, either solemnized or under common law, and at times these imposed rules have conflicted with First Nations' own laws and social norms.

Despite the imposition of new rules regarding marriage, many First Nations continue to practise their customs and traditions with respect to the institution of marriage, although these ways have generally become overshadowed by provincial and federal laws. These laws do not, in the absence of an agreement with the Crown, recognize First Nations jurisdiction in this area.

Today, in practice, traditional unions are for the most part treated as "common law" where they meet provincial tests. Consequently, the lack of recognition of First Nation jurisdiction over the solemnization (the performance of formal ceremonies) of marriage has not, in recent times, caused too many practical problems, although the rights of spouses in common-law unions are different from those in solemnized marriages. In principle, though, some First Nations view the ability to determine what constitutes a culturally appropriate and/or solemnized marriage as an important subject matter. While there is no court case establishing that law-making powers over marriage and/or the solemnization of marriage are part of the inherent right of self-government, presumably they would be, as this is a subject matter that could quite easily be proven to be integral to the distinctive culture of a particular First Nation. A number of First Nations' comprehensive governance arrangements do address jurisdiction over the solemnization of marriage, including the Nisga'a, Tsawwassen, Maa-nulth, Yale and Tla'amin agreements. However, none of these agreements goes as far as to recognize broader First Nations jurisdiction to determine what constitutes a marriage (e.g., who a person may or may not marry). While the Tla'amin agreement does go further than others in making note of the Nation's rights within the document, it does not provide additional rights. For instance, all agreements require a valid marriage licence in order for the union to be considered legal under provincial law.

In Canada, the federal government has exclusive authority over marriage and divorce under section 91(26) of the *Constitution Act, 1867*. However, section 92(12) also gives provinces the power to pass laws regulating the solemnization of marriage. The federal *Marriage (Prohibited Degrees) Act* (S.C. 1990, c. 46) prevents certain people from getting married if they are related (a) lineally by consanguinity (blood) or adoption; (b) as brother and sister by consanguinity, whether by the whole blood or by the half-blood; or (c) as brother and sister by adoption. Canada has also passed the *Civil Marriage Act* (S.C. 2005, c.33), recognizing same-sex marriages. The provinces have set additional rules governing marriage under BC's *Marriage Act* (R.S.B.C. 1996, c. 282). In BC, anyone 19 or over can get married. A person between the ages of 16 and 18 can get married with the consent of both of their parents. Under the age of 16, a person needs the consent of a court. There is no requirement for residency. Marriages in Canada are either civil or religious. They may be solemnized by members of the clergy, marriage commissioners, judges, justices of the peace or clerks of the court, or now by a person designated under a First Nation law where the Nation's law-making authority in this area is recognized by the Crown.

INDIAN ACT GOVERNANCE

There is no power under the *Indian Act* respecting marriage or the solemnization of marriages.

SECTORAL GOVERNANCE INITIATIVES

There are no sectoral governance initiatives dealing with marriages or the solemnization of marriages.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All of the treaty agreements provide for the solemnization of marriages and have similar provisions. The Westbank and Sechelt arrangements do not address marriage or the solemnization of marriage.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	No provisions.	N/A
Westbank	No provisions.	N/A
Nisga'a	Nisga'a Lisims Government may make laws with respect to solemnization of marriages within British Columbia, including prescribing conditions under which individuals appointed by Nisga'a Lisims government may solemnize marriages. (Ch. 11, s. 75 and 77)	Federal or provincial laws prevail. (Ch. 11, s. 76)
Tsawwassen	Tsawwassen Government may make laws with respect to solemnization of marriages within British Columbia by individuals designated by Tsawwassen First Nation to solemnize marriages. (Ch. 16, s. 106)	Federal or provincial laws prevail. (Ch. 16 s. 108)
Maa-nulth	Each Maa-nulth First Nation Government may make laws with respect to solemnization of marriages, including solemnization of marriages by traditional practices, within British Columbia by individuals designated by that Maa-nulth First Nation Government. (s. 13.24.1)	Federal or provincial laws prevail. (s. 13.24.3)
Yale	Yale First Nation Government may make laws with respect to solemnization of marriages, including solemnization of marriages by traditional practices, within British Columbia by individuals designated by Yale First Nation. (s. 3.21.1)	Federal or provincial laws prevail. (s. 3.21.3)
Tla'amin	The Tla'amin Nation may make laws in relation to the marriage rites and ceremonies of the Tla'amin culture and the designation of Tla'amin Citizens to solemnize marriages. (Ch. 15, s. 121) The law-making authority is subject to rules set out in the agreement around marriage licences and registration of marriages. (Ch. 15, s. 122–128)	Tla'amin laws prevail subject to the rules set out in Ch. 15, s. 122–128. (Ch. 15, s. 129)

RESOURCES

Provincial

Family Law in British Columbia
Legal Services Society
400 – 510 Burrard Street
Vancouver, BC V6C 3A8
www.familylaw.lss.bc.ca

SELECT LEGISLATION

Provincial

- BC *Marriage Act* (R.S.B.C. 1996, c. 282)

Federal

- *Marriage (Prohibited Degrees) Act* (S.C. 1990, c. 46)
- *Civil Marriage Act* (S.C. 2005, c.33)

PART 1 /// SECTION 3.29

Taxation

3.29

TAXATION

3.29

TAXATION

BACKGROUND

The ability to raise revenue through taxation is an essential power for any government and one of the most important requirements for Nation building/rebuilding. No exercise of self-government by First Nations will be taken seriously unless taxation powers are recognized and implemented. At the same time, for many First Nations, taxation is also one of the most challenging and complex areas to be addressed when moving beyond the *Indian Act* system.

Traditionally, Indigenous societies had mechanisms to redistribute wealth and to look after their people — for example, through the division of labour and the sharing of food and other resources among the group. These can be described as forms of "taxation." Today, all governments require revenue to redistribute wealth and to provide programs and services to citizens as well as to manage or "govern" the society and to protect that society. Governments have designed many forms of contemporary taxation, and it is the most common way to generate revenues to pay for all aspects of governance, including the exercise of jurisdictions.

Today, there are a number of *Indian Act* and sectoral governance initiatives that address taxation in a First Nations context, and all comprehensive governance arrangements deal with this politically charged subject matter. This subject matter is linked to all other subject matters, but it is considered specifically in Section 3.11 — Financial Administration, and its importance as a source of revenue and with respect to developing a new fiscal relationship is considered in Section 4 — Financing First Nations Governance.

Division of Powers

Through the Act of Union in 1867, the powers of the federal and provincial governments to raise taxes were divided up in large part on the basis of what the framers of the Constitution determined that the respective levels governments needed to govern. At the time of confederation, the federal government had responsibility for all of the high-cost programs, most notably defence and building railways. Consequently, under section 91(3) of the *Constitution Act, 1867*, the federal government has virtually unlimited revenue-raising power, and can raise money by any mode or system of taxation. This includes all "direct" and "indirect" taxes. A direct tax generally means a tax that is paid directly to the government by the persons on whom it is being imposed; an indirect tax is not paid directly. The provinces were given less revenue-raising powers, as it was believed that they had adequate sources of revenue for what they needed, given their ability to benefit directly from their lands and resources. The major areas of provincial government spending today (e.g., social assistance and health care) were generally not funded by the government in 1867. Consequently, under section 92(2) of the *Constitution Act, 1867*, the provinces have only direct taxation powers to raise revenues for provincial purposes. However, these powers were amended by the *Constitution Act, 1982*, and under section 92(a) a province may now also make laws in relation to raising money by any mode of taxation on non-renewable natural resources, forestry resources, and sites and facilities that generate electrical energy. Federal and provincial taxation powers (to the extent that provinces have jurisdiction) are concurrent — that is, both can raise taxes from the same persons (individuals, corporations, etc.). First Nations were, of course, not included in the 1867 or 1982 division of powers discussions, which included revenue-raising powers, and although arguably there is an inherent right of self-government to levy taxes, securing recognition of tax jurisdiction and "tax-room" has been a challenge for First Nations governments.

Determining Tax Policy

In setting tax policy, governments consider many issues, not the least of which is how much money they need to meet their legal and financial obligations as well as to carry out their policies and priorities. Tax policy is also politically tied to the ability and willingness of the taxpayer to pay. In Canada, not all citizens pay the same amount or rate of tax, depending on various factors (e.g., income levels, age, geographical location, services received, special exemptions).

It is no secret that all levels of governments closely guard their ability to raise taxes and their "tax-room" in the face of other levels of government taxing in the same area (e.g., income taxes and sales taxes). At the same time, governments seek to avoid over-burdening taxpayers, for both economic and political reasons. There is only so much people can or are prepared to pay. In Canada, there are regional and local variations in the total amounts of tax collected by all jurisdictions, both among provinces and within them. Provincial income tax levels vary, as do taxes raised by local governments to provide local services.

To the extent that the federal government has the power and the influence to affect public policy between governments, it seeks to harmonize tax systems in Canada in an attempt to ensure a degree of consistency in taxes payable by Canadians living in different jurisdictions. As well as issues of equity, federal government officials may cite reasons of administrative efficiency as a rationale for harmonization, where the collection of taxes by all levels of governments with concurrent jurisdiction is cheaper and easier to administer and the federal government assumes a greater administrative role and collects the tax (e.g., the Harmonized Sales Tax (HST) instead of the Goods and Services Tax (GST) and the Provincial Sales Tax (PST)).

First Nations Tax Immunity and Exemptions

Source of the Exemption

First Nations governments and their citizens maintain that they are immune from the taxes levied by other governments as result of Aboriginal and treaty rights, and that the current statutory exemptions found under the *Indian Act* are a reflection of that deeper right. In Canada and the United States, this position is supported when one understands the history of colonization and how that history is reflected in the principles embodied in instruments such as the Two-Row Wampum (see Section 1.1 — A Brief History of Evolving First Nations Governance within Canada) — namely, that the settler governments recognized that they could not and would not simply impose their laws on the Indigenous peoples, including the right to tax or conscript persons into military service, and that treaties needed to be entered into.

From the time of the Royal Proclamation (1763) to American Independence in 1776 and the drafting of the first United States Constitution (1787), and for some time thereafter, questions of self-government and taxation were the major questions of the day for both the settler and colonial governments throughout North America and on both sides of the eventual border between America and what was to become Canada. The status of the various Tribes or Nations of Indians was a central part of the political discourse of the day. Section 2 of the Constitution specifically refers to "excluding Indians not taxed" with respect to federal taxes, and the 14th amendment, made in 1868, did not alter the Indian immunity provisions. This is of note because it was during this time that, as treaties were being negotiated in Canada, taxation policy with respect to Indians was being considered by law-makers, and the various laws concerning Indians were enacted leading up to the 1876 *Indian Act*, which included early provisions respecting the treatment of Indian property and taxation.

Notwithstanding this history, an alternative argument that is sometimes used for the exemption provisions in the *Indian Act* is that Indians were not taxed because they were not full citizens and

that once enfranchised, the Indian would be taxed, and further, that the tax exemption, similar to providing prohibitions against the seizure of property, were intended to protect the Indian from himself or herself as a "ward" of the state. Nevertheless, from the perspective of First Nations, section 87 of the *Indian Act* is a statutory interpretation of the longstanding proposition reflecting the historical relationship between "the various nations and tribes of Indians" and the Crown — that the Crown has no jurisdiction to tax Indians, who are immune from taxation when on their lands. This view is not shared by Canada or the provinces.

While the immunity from taxation as an Aboriginal right has yet to be found by a Canadian court, and regardless of the position one may take as to the origin of the exemption, today section 87 of the *Indian Act* provides for the following with respect to "Indians" and "bands":

> ***Property exempt from taxation***
>
> 87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (b) the personal property of an Indian or a band situated on a reserve.
>
> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

Personal Exemptions

Under section 87 of the *Indian Act*, a person registered as an Indian and not a beneficiary of a modern treaty is exempt from paying taxes to outside governments (Canada, provinces or local governments) on their real and personal property located on-reserve. Personal property includes income and purchase transactions. Thus, section 87 contains an exemption on income and sales taxes in relation to such earnings or transactions on-reserve. Generally, the section 87 exemption does not apply to off-reserve transactions or earnings unless these meet the legal tests the courts have established to "connect" such income or transactions to a reserve. Some provinces, such as Ontario, do not collect sales tax from Indians residing on-reserve even if the purchase is made off-reserve, as a matter of policy. This is not the case in BC. Unless the "connecting factors to a reserve" test is met, First Nations people in BC who generate income off-reserve pay all taxes to all orders of government on the same basis and in the same way as other persons. The situation is different for First Nations that are self-governing in accordance with a modern treaty, where they pay taxes to their own governments.

In 1994, the Canada Revenue Agency (CRA) established guidelines to deal with the section 87 exemptions. These guidelines are amended from time to time and interpreted on the basis of developments in the law and political direction. Over the past two decade, as a result of a series of court decisions taking a narrower interpretation of the section 87 exemptions and in effect limiting the extent of their application (e.g., *Argol Recalma v. Her Majesty the Queen* [98 DTC 6238][F.C.A.], *Southwind v. Canada* [98 DTC 6084][F.C.A.] and *Shilling v. Canada* [2006 FCA 254]), CRA support for the guidelines appeared to have been narrowing, with the scope and extent of the income considered exempt under the *Indian Act* coming under increased CRA scrutiny.

However, this situation appears to be changing again following two more recent decisions respecting individual tax exemptions (*Estate of Rolland Bastien v. The Queen* [2011 SCC 38] and *Alexandre Dubé v. The Queen* [2011 SCC 39]). The question in both *Bastien* and *Dubé* was whether the interest income earned by two status Indians who invested in term deposits at on-reserve financial institutions were

exempt from taxation under section 87 of the *Indian Act*. The income had been assessed as taxable by the CRA. Both the Tax Court of Canada and the Federal Court of Appeal agreed with the CRA. The Supreme Court of Canada, however, did not agree and allowed the appeals, finding that the income was tax-exempt. In doing so, the Supreme Court swept aside the earlier cases that the CRA had been relying on. Importantly, the court has now clarified that property that is of a so-called "commercial" nature remains protected from taxation if it is located on-reserve. The court also set aside the atavistic notion, expressed in the lower court decisions for over 20 years, that property owned by Indians that is exempt must help "preserve the traditional way of life in Indian communities" for the *Indian Act* tax exemption to apply. This requirement, which is not found in the *Indian Act*, had repeatedly frustrated claims of tax exemption by First Nations people and was a significant departure from any understanding of the exemption, on its face, as being an Aboriginal right of immunity.

Tax Treatment of a First Nation's Government

An additional question is the taxation treatment of the First Nation's government itself. In Canada, the *Constitution Act, 1867* provides broad exemption to the Crown from all forms of taxation (both federal and provincial). This means the federal government cannot tax the provinces and vice versa, including all Crown corporations and related entities. These exemptions shield the Crown from First Nations taxation as well, a matter that has been considered by the Supreme Court of Canada (*Westbank v. BC Hydro*). However, the Crown does in certain circumstances pay grants in lieu of taxes to taxing authorities (e.g., some local governments receive grants in lieu of property taxes from Canada).

First Nations governments do not currently enjoy such a broad and legally enforceable exemption as that enjoyed by the Crown under the *Constitution Act*, notwithstanding the statutory exemption for "bands" under section 87 of the *Indian Act*. It is not yet known how the courts will interpret First Nations government tax immunity or exemption in the context of Aboriginal rights.

Another recognition of a tax exemption for First Nations governments exists under section 149(1)(c) of the *Income Tax Act* (R.S.C. 1985, c. 1 [5th Supp.]), when a First Nation (whether governing under the *Indian Act* or not) can meet the test of a "public body performing the function of a government" or is deemed to be a "municipality" under section 149(1)(d) or 149(1.1) of the *Income Tax Act*. However, these exemptions have many criteria that do not always fit a First Nation government's circumstances. Consequently, the tax treatment of a First Nation's government and appropriate exemptions must be considered in any arrangements for moving beyond the *Indian Act*. This includes the tax treatment of the government itself; its associated entities, such as boards, commissions and tribunals; and any corporations controlled by the First Nation government or other business structures, including limited partnerships and related trusts. Taxation law is a specialized field, and companies and individuals spend much time and money planning their affairs to minimize their tax liability.

Under the *Indian Act*, the "band" council and governance structures are exempt from taxation by virtue of section 87 of the *Indian Act*. In moving beyond the *Indian Act*, a First Nation will need to consider the tax implications under any new arrangements. All of the self-government arrangements within or outside modern treaties address the tax treatment of First Nations government institutions. This can be accomplished by using the exemption for local governments in sections 149(1)(c) and (d) and (1.1) in the *Income Tax Act* or any future amendment to that act that might clarify how the exemption applies to First Nations governments. As section 87 is limited to property "situated on a reserve," it may not be broad enough in all situations, so it is useful to consider using language that specifically refers to the First Nation as a "public body performing the function of a government" in agreements.

Today, for both First Nations people individually and for their governments, exemptions from taxation under the *Indian Act* are part of any discussion about building or rebuilding a First Nation. These matters are now complicated further with respect to declared Aboriginal title lands and what degree

of protection Nations or their citizens enjoy with respect to income derived from Aboriginal title lands. First Nations are assuming that income generated from Aboriginal title lands will be beyond the reach of other governments' taxation powers, although this is unlikely a position that the Crown would ever support, given the substantial land base that can be presumed to be Aboriginal title lands, if not yet so declared, and the amount of revenues that may be generated from these lands. In any case, First Nations' ability to raise taxes from Aboriginal title lands will be seen as part of the jurisdictional component of that Aboriginal title (i.e., as an aspect of the inherent right to govern.)

The Inherent Right to Raise Taxes

In addition to the full extent of the exemption and whether it can be established as an Aboriginal right, the right of First Nations to raise their own revenues through tax measures has yet to be fully determined by the courts. First Nations presume that their governments have the inherent right to raise taxes by various means (both direct and indirect), of which there is a concomitant right to exempt their citizens or others subject to the First Nation's jurisdiction from taxation in accordance with the rules set out in or through a First Nation's government institutions. Many legal scholars believe that "taxation" in its many forms (both ancient and modern) is of such profound importance and is so fundamental to the functioning of any society, indeed a necessary power for any self-government, that the inherent right would have be found to generally exist if argued properly. Further, they believe that with respect to Aboriginal title lands, taxation is included in the jurisdictional aspect of title, even if it does not result in fully displacing the taxation powers of other levels of government. To date, however, and including the most recent Aboriginal title cases, the power to tax as an aspect of the inherent right of self-government has yet to be asked directly of a Canadian court — despite that fact that some believe it to be one of the most obvious subject matters to ask the court to consider, along with perhaps the right to determine the core institutions of governance.

The Taxation of Citizens

Notwithstanding whether an inherent right to tax is ultimately found to exist, in approaching the complex issue of taxation First Nations face a number of challenging issues related to the current exemptions under the *Indian Act* and the necessity to raise revenues to support Nation building or rebuilding. These are perhaps among the hardest issues First Nations will face in moving beyond the *Indian Act* and becoming self-governing. The application of taxes to the citizens of First Nations is, to say the least, highly controversial within communities, as it represents a departure from the section 87 *Indian Act* tax exemption, certainly with respect to their own government's powers and most certainly with respect to concurrent jurisdiction of other governments. As discussed above, First Nations people view the exemption from outside government taxation as a constitutionally protected Aboriginal right reflecting the historical relationship between the Crown and First Nations. They are also not thrilled about the prospect of their own governments taxing them.

Canada and the provinces have a different perspective. Canada, in particular, as discussed above, views the tax exemptions under the *Indian Act* as only a statutory provision put in place to protect the assets of First Nations people during the colonial period of expansion, a paternalistic protection of the "Indian." In exchange for recognizing some limited powers of First Nation taxation, both Canada and British Columbia seek to end the exemption and to establish concurrent jurisdiction with respect to citizens and with certain delegated powers over non-Indians. This position reflects more entrenched difficulties in the fiscal relationship between the Crown and Aboriginal governments, which are discussed and analyzed at some length in Section 4 — Financing First Nations Governance.

In negotiating self-government as part of a modern treaty, the removal of the tax exemption is one of the biggest trade-offs being considered by the citizens of a First Nation when deciding whether or not to support entering into a contemporary form of self-government under the treaty. No citizens

like being taxed, but tax (e.g., to pay for government services) helps to ensure the accountability of a government to its citizens. While this accountability argument is valid for the citizens of First Nations and their governments, the application of tax in this context is much more difficult, and not simply because of the exemption questions. First Nations governments are introducing taxation in its modern forms for the first time, and consequently are reluctant to do so. Further, revenues from taxation powers over their citizens raise (or will raise, when applied) very insignificant levels of funds. Citizens of First Nations living on the lands governed by their First Nations, whether self-governing or not, are typically among the poorest and most economically depressed demographic in Canada. When an entire population is economically depressed, the small amount of taxes that can be collected will simply not have the social benefits they might ordinarily carry when collected from a less depressed population. For example, imposing a sales tax on a depressed population creates a disproportionate and additional hardship on those paying it, while average incomes will be so low that income tax collection will be negligible. Given the above, while the taxation of citizens may be important in principle with respect to accountability and important for the Crown making a political statement, from a practical and financial perspective, in most cases today it is hardly worth the effort. Politically as well, it might not be worth the effort if trying to comprehensively get past the "to tax or not to tax" debate results in a First Nation remaining locked into poor governance under the *Indian Act*.

In moving beyond the *Indian Act* and regardless of the legal positions of the Crown and First Nations with respect to the rights of First Nations people to exemption from taxation by outside governments and the right of First Nation governments to raise taxes, these issues must be addressed and resolved as First Nations move to re-establish institutions of government and implement broad jurisdictional authorities that will need to be paid for.

The Taxation of Non-Citizens

Clearly, the major source of tax growth in First Nations jurisdictions, at least in the short-term, will be through non-citizen taxpayers. However, in all sectoral governance initiatives and in all comprehensive arrangements, taxing non-citizens remains a delegated authority from the federal or provincial government. This means that the federal or provincial government maintains a degree of control over, or can place parameters around, the revenue-raising power of the First Nation government. This control and parameters placed on the First Nation can be counter-productive to the long-term success of self-government. One example of this delegated transfer is in the BC modern treaties, where the ability to administer property tax over non-citizens living within the taxing jurisdiction of the First Nation government is delegated from the Province. British Columbia has chosen to transfer this important revenue source through a side agreement" that sets parameters and requirements around funding. That agreement could terminate on non-performance by an Aboriginal government. Another example is where the federal government has applied restrictive rules to its tax-sharing agreements that provide disincentives to economic development that some have gone so far as to call perverse. For instance, the current Department of Finance templates for income and sales tax agreements (discussed below), such as the First Nations Goods and Services Tax (FNGST), reimburse smaller amounts of tax to a First Nation's government as the level of non–First Nation investment or consumption increases relative to the First Nation's population.

The tax arrangements to support First Nations self-government should encourage real economic development efforts within a First Nation. To increase any tax base, a government must attract investment to its lands. In almost any other jurisdiction, increased investment is rewarded. In some cases, it appears that First Nation communities are in fact being penalized by current federal and provincial policy. In these cases, First Nations' efforts to improve governance through self-government is not acknowledged and rewarded, and the other levels of government are simply taking the lion's share of the new revenues created from the larger "tax pie" created by the First Nation. Among First Nations where self-government has been the most successful economically, and ironically where the

Indian tax exemption has been kept, it is the federal and provincial governments that have directly benefited the most from governance reform and enjoyed the greatest "tax" windfall — not to mention the savings they have gained from the reduced transfers needed to cover the cost of providing social services to a now healthier population. In considering the Westbank First Nation, economists estimate that where Westbank generates approximately $15 million a year in taxes from Westbank lands, other governments combined now raise close to $80 million.

The Emergence and Negotiation of First Nations Tax Powers

Notwithstanding the political and legal issues with respect to perspectives on the source of authority to tax and the control of moneys raised, the tax-generation powers of First Nations are important and an emerging area of evolving contemporary First Nations governance.

***Section 83 of the* Indian Act**

Under the *Indian Act*, there are some powers for a "band" government to raise revenues from both citizens and non-citizens, including taxation powers (section 83 — property taxes and additional power to "raise revenue from band members for projects"), as discussed below. These limited powers are not subject to the section 87 exemption and citizens are not automatically shielded from taxes levied by their own governments. Apart from property taxes, which most First Nations do not levy on their own citizens, no First Nation is currently using the broader revenue-generating powers under section 83. Today, there are a number of sectoral governance initiatives developed by First Nations to enable the raising of revenue through taxation of both non-citizens living on or conducting business on their lands and their own citizens. These are discussed below. In addition, all of the modern treaty arrangements provide jurisdiction over taxation of citizens and the authority under tax agreements to raise taxes from non-citizens.

The Role of Finance Canada

Although it is outwardly the face of self-government negotiations with First Nations, AANDC in reality has a minimal role to play in federal policy development with respect to this subject matter, given the federal Department of Finance Canada's central role in taxation matters. For the purposes of negotiating governance beyond the *Indian Act*, while there is some collaboration with AANDC, Finance Canada takes the lead in developing and influencing policy and developing federal negotiating mandates.

During the 1990s, Finance Canada established an Aboriginal Policy Section and undertook considerable policy work to advance First Nations' ability to raise revenues from taxation. In 1993, Finance Canada released a policy statement on First Nations taxation that provided a framework for the expansion of First Nations taxation authority and/or jurisdiction and that also considered the section 87 tax exemptions. At that time, Finance Canada did not appear overly concerned with the policy implications of maintaining the tax exemption under the *Indian Act* and was more focused on the revenue-raising powers of First Nations. This focus appears to have changed in recent years, and Finance Canada's approach to First Nations taxation issues today appears to be more directed at ending the section 87 tax exemptions in the context of seeking the harmonization of tax systems across Canada.

Federal and Provincial Policy

The tax exemption is seen by Finance Canada as a tax anomaly in Canada that needs to be removed. It argues that the exemption creates an imbalance in the overall tax system, creating on-reserve advantages including, in some cases, business advantages, for First Nations. Finance Canada thus wants First Nations to agree explicitly to end the section 87 tax exemptions before it will recognize a First Nation's broader authority/jurisdiction to tax its own people or the authority under federal tax

room to tax non-citizens. This has been made a precondition for settling land claims through modern treaty-making. Finance Canada assumes that if a First Nation exercises expanded tax jurisdiction or authority, it may continue the exemptions for its own people and raise revenues only from non-citizens or corporations that are not controlled by the First Nation. First Nations take the view that it is their prerogative as governments to set tax policy, including determining who pays taxes, tax rates and appropriate exemptions and other matters that governments decide in exercising their tax jurisdiction.

As raised above, Canada and British Columbia also do not view taxation as being an exclusive First Nations jurisdiction. As with federal and provincial taxation powers, they believe that taxation powers on-reserve and over First Nations peoples should be held concurrently — that is, by the federal, provincial and First Nation governments (to the extent that First Nations authority and/or jurisdiction is recognized through agreements). With concurrent jurisdiction, if the First Nation does not take up the tax room available under its agreements, then Canada and/or British Columbia would step in using their concurrent jurisdiction and fill the tax room.

Within their respective policy frameworks, Finance Canada and British Columbia are both prepared to recognize a First Nation's jurisdiction over direct taxation of its own citizens and the authority under the applicable federal or provincial jurisdiction to raise revenues from non-citizens. In this approach, neither the federal nor provincial governments have diminished their jurisdiction to raise taxes from all persons, but they are prepared to provide some tax room within this jurisdiction for First Nations under tax agreements. In essence, then, the tax revenue powers in First Nations self-government are split in two: the power to tax citizens of the community itself, which in the case of modern treaties is a constitutionally protected power, and the power to tax non-First Nations living within First Nation jurisdiction, which is never constitutionally protected.

Before either government will recognize a First Nation's jurisdiction over its own people or vacate tax room over other persons, the First Nation must agree to will levy taxes on its own people at comparable rates. All of the modern taxation arrangements moving beyond the *Indian Act* follow this approach, with the exception of the sectoral governance initiative over local revenue-raising powers under the *First Nations Fiscal Management Act* and the two non-treaty self-government agreements (Sechelt and Westbank).

Taxation and Other Revenues

This subject matter, however, should be considered in relation to the other revenue-generating jurisdictions that contribute to the First Nation's potential gross revenues. These include collection of fees and charges that are not taxes in the exercise of jurisdictions relating to licensing, regulation and operation of businesses, land management and natural resource development, and transfers from other governments (covered under Section 4.2 — First Nations Revenues). The impact of AANDC's offsetting federal transfers based on revenue generated by the First Nation government or its "capacity" to raise revenue should also be considered. Revenues generated by the First Nation are considered by Canada as "own-source revenues" (OSR), and Canada has developed a policy on how OSR feeds into the calculation and negotiation of funding arrangements. (OSR considerations are more fully discussed in Section 4.3 — Own-Source Revenue Impact on Transfer Payments). On this note, it is important to distinguish between what is and what is not a tax, and what is tax capacity.

Taxes, as opposed to fees and charges, are often levied for general purposes, and as such the government has greater discretion on how to spend them. Fees and charges are almost always collected to pay for a particular service or cost to the person paying the fee or charge. In looking at the revenue-raising capacity of a government, economists typically look at the taxation capacity of the government in terms of the ability of that government to raise taxes and provide programs and services at levels comparable to other governments. A First Nation's capacity to raise taxes, combined with its ability to levy fees and charges and raise other revenues, will be considered by Canada

when negotiating financial transfer agreements with the First Nation. This can result in the Financial Transfer Agreement amounts being reduced by OSR offsets for the taxes or other revenues collected by the First Nation to run its government or provide programs or services under its own jurisdiction. Consequently, First Nations should guard against the unintended "downloading" of financial responsibility in cases where the federal and/or provincial government has ongoing jurisdictional and legal responsibility. The current federal policy for providing financial assistance to First Nations to implement governance assumes that the starting point for determining the cost of running a First Nation government (both its institutions and programs and services) is the amount of the federal transfer and that all other sources of revenue can be deducted from that transfer. This is unrealistic, as it ignores the true cost of running a First Nation government and the ways in which a First Nation is already directly or indirectly contributing to the cost of its government. These issues are more fully considered in Section 4.1 — Costing First Nations Governance.

Types of Taxes

When considering what tax powers a Nation's government may need, there are many different types of taxes that could be levied (property, income — both personal and corporate — consumption, business, etc.). BC First Nations will primarily be looking at direct tax jurisdiction rather than indirect taxation, which at this point Canada will not recognize as a First Nations jurisdiction. The general approach taken in comprehensive governance arrangements is to provide for broad First Nations (direct) taxation jurisdiction over citizens and to leave the door open for future tax agreements with Canada and British Columbia with respect to the authority to raise revenues over non-citizens. There are also a number of sectoral or comprehensive governance initiatives addressing particular types of taxation. These are identified below.

Consumption Taxes: Consumption tax is tax on spending on goods and services. The tax base of such a tax is the money spent on consumption. Examples of consumption taxes include "sales tax" or a "value-added" tax. A sales tax is charged when a product or service is purchased and an amount is added to the posted price of that product or service. Sales taxes are levied by Canada (the Goods and Services Tax) and the provinces (Provincial Sales Tax) or jointly (as a Harmonized Sales Tax). Some First Nations now collect sales taxes in place of the federal Goods and Services Tax (GST) (under the *First Nations Goods and Services Tax Act/Budget Implementation Act*, discussed below). A government normally has significant discretion as to how to use revenues raised from consumption taxes.

Income Taxes: Income taxes are charged on individuals and corporations and are levied by both provincial and federal governments. First Nations with modern treaties have the jurisdiction to collect this tax from their citizens concurrently with the federal and provincial governments, and from non-citizens in accordance with tax agreements, where Canada and British Columbia vacate tax room in favour of the Nation. A government normally has significant discretion as to how to use revenues raised from income taxes.

Property Taxation: Property taxes are collected to provide local services, typically by local governments under provincial jurisdiction. In BC, the Province or local governments have been collecting property taxes from reserve lands from non-citizens where lands have been leased and there is an interest that can be registered, or where lands are otherwise being "occupied" by a non-Indian. Considerable sums of money have been raised from on-reserve leaseholders and occupiers of reserve lands without local services and in particular hard services (e.g., infrastructure such as water and wastewater systems, roads, public buildings, parks.) being provided to the reserves. In BC, until such time as a First Nation has established its own taxation system under section 83 of the *Indian Act* or under the *First Nations Fiscal Management Act* or some other arrangement (i.e., through a modern treaty) this remains the case. A local government normally has less discretion as to how to use revenues raised from property taxation than a senior government does with respect to consumption and income taxes.

BC First Nations have been at the forefront in developing property taxation on-reserve, and most BC First Nations with significant non-citizen populations (e.g., leaseholders living on their lands) do now collect property tax from them. In these cases, the Province vacates the field in accordance with the somewhat misleadingly entitled *Indian Self Government Enabling Act* (R.S.B.C. 1996, c. 219). Since 1989, First Nations across Canada have collected more than $800 million in property taxes (under the FNFMA and the *Indian Act*) and, as the number of First Nations participating and their populations have increased, the annual intake has surpassed $70 million. However, the gross amount is a bit misleading, as much of that is collected by a handful of First Nations, most of which are in BC, reflecting the scale of economic development on their respective reserve lands. Nevertheless, property taxation has become a key source of revenue for many First Nations that are developing a local economy. This is because Canada does not provide financial support to First Nations through its funding arrangements for services on leased lands and to non-citizens living on-reserve. Consequently, a Nation that is willing and able to develop its lands will need to collect property taxes in order to provide basic local services to those non-citizens living or leasing its lands. If the First Nation develops those lands without collecting property taxes, the Province will do so, without an assurance that any of the money collected will be spent on-reserve to provide both hard and soft services.

It is particularly important to consider property tax collection in conjunction with the issues of licensing, regulation and operation of business; land management; and public works, and to understand the relationship between the different revenue-raising powers. This is to avoid legal and political confusion between the power to raise revenues through property taxation and the raising of revenues through fees and charges — for example, fees or charges for the provision of other local services, such as water and wastewater fees, as well as development cost charges (sometimes call off-site levies).

Taxation and Representation

While there is no direct correlation between the right to representation and the responsibility to pay taxes, this is nevertheless a highly sensitive political issue. People do not like to pay taxes to governments they have no way of controlling. The example that people are most familiar with, of course, is the Boston Tea Party, which led to the American War of Independence and was ostensibly all about the settlers not wanting to pay taxes to England. However, despite the notable footnotes to history, there are many examples of persons being subject to taxes when they are not truly "represented" — that is, they do not elect the governing body or cannot participate in the decision-making of the body that is taxing them.

In any discussion of First Nations' exercise of taxation authority, whether under the *Indian Act* or comprehensive governance arrangements or other arrangements, questions of taxation and representation will inevitably be raised by either other governments or non-citizens who have property interests on First Nation lands or are living on First Nation lands. This is because First Nations are highly unlikely to open up their citizenship to any resident living on their reserves or settlement lands and allow these individuals to vote for their central governing body and their core institutions of governance, particularly where the numbers of non-citizens could potentially be far higher than the number of citizens. The same will be true for declared Aboriginal title lands. In fact, this is the case with all First Nations governments along the governance continuum. Nevertheless, how the governing body considers the interests of non-citizens when deciding on issues that significantly or directly affect them will need to be addressed. This issue is perhaps most evident when it comes to raising revenues through taxation. Mechanisms have been developed under the *Indian Act* and the *First Nations Fiscal Management Act* with respect to property taxation. Mechanisms have also been included in comprehensive governance arrangements to provide for taxpayer input in addition to or as an aspect of general provisions respecting non-citizens.

INDIAN ACT GOVERNANCE

Section 83 of the *Indian Act* establishes that a "band" has the power to levy property taxes on any interest in reserve lands (including lands designated for leasing). First Nations wishing to levy property taxes under section 83 must establish their property taxation system by passing property taxation and assessment bylaws, as well as bylaws dealing with the setting of annual tax rates and the expenditure of property tax revenue. These bylaws come into force once approved by the Minister. To assist the Minister in this task, the Minister has entered into a memorandum of understanding with the First Nations Tax Commission (FNTC), which first reviews a First Nation's bylaws made under section 83 and recommends approval or rejection. The process for section 83 bylaws is different from section 81 bylaws, as there is a positive requirement for the Minister to approve as opposed to having the power to disallow a bylaw under section 81 within 40 days of receiving it.

First Nations Tax Commission
Commission de la fiscalité des premières nations

The FNTC has well-established policies and procedures for the making of bylaws under section 83 and for how it considers them. The latter steps are for the most part the same as for reviewing a law made under the *First Nations Fiscal Management Act* (FNFMA) discussed below. The FNFMA is an alternative to the *Indian Act*, allowing First Nations to raise local revenues, including property taxes, and is overseen by the FNTC. The FNTC was itself established under the FNFMA, as was a First Nations-led initiative. Sample section 83 bylaws specifically for BC can be found on the FNTC website, along with other helpful information. The sample section 83 bylaws include property assessment, property taxation, annual tax rates, annual expenditure, and financial administration. They have been prepared to comply with the *Indian Act* as well as FNTC policy to ensure an effective, fair and equitable property taxation system. The sample bylaws continue the practice established by the Indian Taxation Advisory Board, FNTC's precursor, to help reduce the time and costs associated with the legal drafting, review and approval of bylaws.

The FNFMA was originally conceived as a replacement for section 83 of the *Indian Act* and to provide a more robust and comprehensive system of property taxation for all First Nations. However, this did not transpire, as the then Minister of Indian Affairs succumbed to pressure from some First Nations that the government must not amend the *Indian Act* but instead keep section 83 and that the FNFMA should only be optional. Consequently, section 83 remains in force and operates as a parallel system for property taxation for First Nations that are structured and governed under the *Indian Act*. First Nations wishing to exercise property tax jurisdiction have the option to choose between section 83 of the *Indian Act* or the FSMA, but they cannot use both. A First Nation will need to consider the pros and cons of both options. This is discussed below.

SECTORAL GOVERNANCE INITIATIVES

Property Taxation/Business Taxes — *First Nations Fiscal Management Act*

The FNFMA provides an alternative to the *Indian Act* for First Nations that wish to collect property and other taxes on reserve lands. The act provides the First Nation with the legal authority to make local revenue laws "respecting the taxation for local purposes of reserve lands, interests in reserve lands or rights to occupy, possess or use reserve land" (section 5(1)(a)). This includes the power to impose property taxes for the provision of services, tax business activities, and impose development cost charges. While, strictly speaking, development cost charges are defined for the purposes of the act as "taxes," practically and from an administrative perspective they are normally treated as a "charge" or "fee."

As previously mentioned, the FNFMA also created the FNTC, which assists in the implementation of First Nations local revenue-raising powers and in balancing those powers with the interests of ratepayers who generally do not participate in the governing institutions of the First Nation but are subject to tax. The FNTC has the authority to review local First Nation revenue laws and to establish standards respecting their form and content. Local revenue laws (including borrowing and expenditure laws) involving

property tax must be approved by the FNTC under the FNFMA before they have legal effect. FNTC also has the power to address taxpayer complaints and order remedial action and, in an extreme case where the remedy is not followed, order the Financial Management Board (FMB) to intervene.

The standards established by the FNTC, together with the FNFMA and its associated regulations, form the regulatory framework for First Nation taxation under the FNFMA and should be reviewed if a First Nation is considering raising local revenues under this framework.

The FNTC standards and their procedures can be found on their website and include standards for:

- First Nation Property Taxation Laws
- First Nation Expenditures Laws
- First Nation Tax Rates Laws
- Submission of Information Required under Section 8 of the Act
- Establishing Criteria for Approval of Borrowing Laws
- Form and Content of Borrowing Laws
- First Nations Development Cost Charges Laws
- First Nation Taxpayer Representation to Council Laws
- First Nation Service Tax Laws
- First Nation Delegation Laws
- First Nation Business Activity Tax Laws
- First Nation Property Assessment Laws
- First Nations Local Revenue Laws

As with *Indian Act* section 83 bylaws, the FNTC website includes templates for laws and a lot of useful information on establishing and running a property taxation system, as well as information on the evolving exercise of other local revenue-raising authorities. In addition, the FNTC has published the *First Nations Real Property Taxation Guide*, which provides general information regarding First Nations property taxation. In BC, 55 First Nations have made local revenue laws under FNFMA, and others are developing laws but are not yet collecting. The following is a checklist for developing a property taxation system under the FNFMA (in addition to any community process a First Nation may have adopted).

Checklist: FSMA — Developing a Property Taxation System	
1.	First Nation indicates its intention to come under the FNFMA and requests that it be added to the schedules to the act. Resolution forwarded to the FNTC and the Minister.
	a. Where the First Nation already has a property taxation system under section 83 of the *Indian Act*, the First Nation reviews its property taxation and assessment bylaws (and other bylaws if applicable) to ensure that they are consistent with the FNFMA and the regulations made under it.
	b. Where the First Nation does not currently collect property taxes, the First Nation develops its required local revenue laws (taxation and assessment laws) and submits them to FNTC for initial review.
2.	Notification of the proposed law is published in accordance with the FNFMA and representations on the proposed law are solicited. Where a First Nation is instituting property taxation for the first time (whether under the *Indian Act* or FNFMA), the First Nation notifies the Province of British Columbia that it is intending to do so and under what section of the BC *Indian Self Government Enabling Act* its taxation will fall. When all conditions of this act have been met, the Province will issue a certificate indicating that it agrees to vacate the taxation field when the First Nation moves into the field. Where required, the First Nation seeks to enter into a local service agreement with an adjacent local government, in particular where the local government currently collects property taxes from the reserve.
3.	Subject to any revision required following the period where persons can make representations on the proposed law (consultation), the law is finalized and enacted by the governing body in accordance with whatever procedures the First Nation uses to make laws.
4.	A copy of the law enacted is sent to FNTC and any comments received during the notice period.
5.	The FNTC reviews the laws and notifies the First Nation of the decision of the Commission.
6.	First Nation establishes the administrative systems to support the enforcement of its taxation laws and enters into any agreements as required (local service agreements, agreement with BC Assessment, etc.)

FNTC, subject to available resources, has grants available from time to time to assist First Nations in developing their property taxation systems and laws, including transitioning their system of property taxation from the *Indian Act* to the FNFMA.

Consumption Taxes —
First Nations Goods and Services Tax Act/Budget Implementation Act

The federal *Budget Implementation Act, 2000* (S.C. 2000, c. 14) established tax room for First Nations to collect a point-of-sale consumption tax referred to as the First Nation Tax (FNT) (Part 4, s. 91–97) equivalent to the GST on fuel, alcohol and tobacco products sold on-reserve. Again, the FNT initiative was led by BC First Nations. The legislation provided that a First Nation could choose to be scheduled under the act and would pass its own law authorizing the collection of the tax and the entering into an administrative arrangement with Canada. The First Nation would then enter into an agreement with Finance Canada as well, to facilitate the collection of the tax by the CRA. Under the terms of the tax administration agreement, the FNT is collected and administered free of charge by the CRA, as long as the amount of FNT charged is the same as the GST it replaces. The CRA acts as an agent of the taxing First Nation. The amount remitted to the First Nation is based on an estimate of what is expected to be collected. The amount paid is reconciled at year's end with the amount actually collected. The auditor general provides a report to the First Nation on the amounts collected and their accuracy. One of the stipulations of the initiative is that section 87 of the *Indian Act* does not apply, and tax is collected from all persons (i.e., from citizens of the First Nation).

With the exception of those First Nations that were scheduled under the *Budget Implementation Act* and who still remain under this act (i.e., Westbank), this initiative has now been superseded by the *First Nations Goods and Services Tax Act* (S.C. 2003, c. 15). This legislation extends the First Nation Tax, now referred to as the First Nations Goods and Services Tax (FNGST), over all products and services and provides a different formula for calculating the First Nation's share of the tax room (i.e., it is not based solely on "point-of-sale" but rather on an estimate of overall consumption). As with the FNT, the federal government agrees to vacate tax room and give up GST revenues in favour of the First Nation; however, in the case of the FNGST, the tax administration agreements include provisions to control the amount of GST tax room that Canada will vacate, specifically where non-residents make up a large proportion of the First Nation government's tax base.

As with the FNT, participating First Nations apply the FNGST through their own tax law, as authorized by the federal *First Nations Goods and Services Tax Act*, and through a tax administration agreement with the government of Canada through the Minister of National Revenue. Again, the CRA collects, administers and enforces the tax for the First Nation. First Nations can expend FNT or FNGST revenues on programs and services of their choosing. The FNGST is also available to self-governing First Nations, as well as to Indian "bands" that continue to operate primarily under the *Indian Act*.

FNGST is fully harmonized with the federal GST, and it effectively replaces the GST. This means the FNGST has to apply at the same rate as the GST and to the same range of goods and services and is administered in exactly the same way as the GST. Goods and services that are not subject to the GST (such as basic groceries and residential rents) are not subject to FNGST.

There are two formulas that are used to determine the FNGST amount, a "simple" and a "detailed" method. The exact formulas are complicated and take into account the size of the First Nation, its geographical location, the estimated consumption of its citizens and the size of the non-citizen population. It is by no means an exact science. The choice of which formula to use is decided by Canada and the First Nation. For First Nations that are primarily located in rural areas, the federal government prefers to apply what is called the "simplified revenue estimation method." This method involves taking the net GST amount for a province, multiplying this by the fraction of people, aged 15 years and older,

living on First Nations lands relative to the population of the province. From this amount is deducted the net amount of GST that is paid back to low-income Canadians. Approximately 85 percent of First Nations that are collecting FNGST fall under the simplified revenue estimation method.

For First Nations that are located in more urban centres and would thus be more likely have more non–First Nations consumers of goods and services, the parties prefer to apply what is called the "detailed revenue estimation method." The detailed method is far more complicated. This formula starts by calculating the simplified revenue estimation amount for that First Nation. This total is then split into three different bases: consumer expenditure base (accounts for approximately 70 percent of tax collected); exempt supplies (e.g., tax on items purchased by doctors' and dentists' offices, as it is not associated with final consumption by consumers; accounts for approximately 17 percent of tax collected); and new housing construction (accounts for approximately 13 percent of tax collected). Under the consumer expenditure base, items consumed "in the home" account for 40 percent, while items consumed immediately at the place of supply (e.g., restaurant, casino, spa, hotel, golfcourse, hair salon) account for 30 percent. This immediate consumption amount is then removed from the formula and replaced with a number collected from the actual business data on First Nations land. This number is calculated by Statistics Canada based on the final amount of tax associated with immediate consumption at the place of supply for each industry. The result is a more accurate estimate of final consumption.

As noted, there are different approaches and formulas used in calculating the FNT and the FNGST, and it is therefore useful to understand why and to appreciate the implications. Of course, one of the biggest differences is that the FNT is applied only to three products (alcohol, fuel and tobacco), whereas the FNGST is on all goods and services and therefore the amount of total tax collected is much larger. In part because of the potential size of the tax room, the biggest difference between the FNGST and the FNT is that, in contrast to the FNT where all the revenues collected are kept by the First Nation (based on actuals and not estimates), there are limits on the amount of FNGST that can be kept by a First Nation and that are "attributable to the First Nation." For the FNT, the calculation is based entirely on where the goods and services are purchased (i.e., on-reserve or settlement land) and not where they are ultimately consumed. In contrast, the FNGST is based primarily on where the goods or services are consumed and not where they are actually purchased. In practice, this helps rural or undeveloped reserves, where citizens or others living on First Nation lands are buying goods and services off First Nation lands and then bringing them home to consume.

However, the FNGST approach may not be as beneficial for First Nations with significant development on their lands and that have large point-of-sale transactions — that is, where there are significant numbers of non-residents who are also purchasing on First Nation lands. Basically, there is a sliding scale where once a First Nation achieves a certain level of development, the percentage of the FNGST that the First Nation keeps drops off to next to nothing, and Canada keeps it.

Today, when the FNGST gets to be the equivalent of between two and eight times the estimated GST per each Canadian (multiply the estimated GST per each Canadian by the number of residents on the First Nation's lands) Canada will let the First Nation keep 50 percent of the amount of FNGST that is over and above two times the estimated GST attributed to the residents living on the First Nation's lands. However, when the FNGST gets to be over eight times the estimated GST, then Canada retains 95 percent of the amount that is over and above eight times the estimated GST.

In these formulas, the federal government does recognize some tax room over and above that attributable to residents of First Nations lands, and this can be seen as a bit of an incentive. However, eventually, with more development, these initial incentives will max out at a relatively low level of tax revenues, as a percentage of the total consumption taxes that an advanced First Nation's local economy might be generating in actual point of sales. In this way, the lion's share of the tax room stays with Canada.

Canada argues that the consumption model is fairer, and in any case more First Nations currently benefit from this approach. Nevertheless, some commentators do not consider this fair or good tax policy, as First Nations need sources of revenue and the policy can serve as a disincentive to economic development and is indicative of a fiscal relationship that needs to be fixed (see Section 4.4 — Developing a New Fiscal Relationship). Nevertheless, for many First Nations there is still a benefit to collecting these otherwise unavailable revenues, assuming their citizens are prepared to forgo the tax exemption, particularly for more rural First Nations whose citizens are making a substantial percentage of their purchases off-reserve and paying the GST in any case.

First Nations that are considering implementing a consumption tax are encouraged to contact Finance Canada to determine the financial impact of the tax and to get full details of the formulas used. To date, because only a handful of First Nations are raising this tax and some of the urban First Nations are waiting to see if the formulas will become more attractive, this tax remains relatively insignificant in terms of total revenues collected by First Nations, currently representing approximately $11 million/year.

Checklist: First Nations Goods and Services Tax	
1.	First Nation requests to be scheduled under the *First Nation Goods and Services Tax Act*.
2.	First Nation and Canada confirm whether long or short calculation method to be used.
3.	First Nation enters into collection agreement with Finance Canada under which Canada collects the GST on behalf of the First Nation and remits it to the First Nation periodically.
4.	First Nation enacts FNGST taxation law.
5.	First Nation and Canada calculate estimated tax to be collected for the First Nation.
6.	Canada pays the First Nation in accordance with the collection agreement and the estimate.
7.	Actual amount collected is reconciled with the estimate paid and accounted for in subsequent tax years.

In implementing the FNGST, affected retailers and service providers will need to be advised of the changes so that they properly collect and record the FNGST and remit the correct forms to the CRA. As more First Nations implement consumption taxes, there will be increased experience within the CRA and First Nations in educating retailers and service providers. Nine First Nations in BC are currently implementing consumption taxes.

Income Taxes: There are no sectoral governance initiatives addressing the collection of income taxes.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

The following describes the treatment of taxation under the various BC comprehensive governance arrangements. It should be noted that in many respects, some of the earliest and now most advanced Aboriginal taxation systems have been established in the north and in particular in the Yukon, and First Nations are encouraged to consider those arrangements as well.

All of the comprehensive governance arrangements in BC address taxation to some degree, but not always uniformly. All treaty arrangements provide the First Nation's government with broad taxation powers over its citizens, which are constitutionally protected. These powers are held concurrently with the federal and provincial governments. The treaty arrangements also provide that the First Nation may enter into tax agreements with the federal and/or provincial government with respect to the taxation of non-citizens. Through tax agreements, First Nations are able to collect taxes from non-citizens as well as to ensure that the federal and provincial governments back out of the tax room with respect to their citizens. Since all of the comprehensive governance arrangements under treaties are still relatively recent, there is limited experience with tax agreements in BC, other than that of the

Nisga'a and Tsawwassen Nations. These tax agreements are tied to the tax treatment of citizens: exemptions under the *Indian Act* are phased out after eight years for transaction taxes and 12 years for other taxes.

The Westbank and Sechelt self-government arrangements are different from modern treaty arrangements. The Sechelt agreement provides for direct powers over property taxes with respect to both members (citizens) and non-members. There are no other taxation powers set out in the *Sechelt Indian Band Self-Government Act*, although presumably, since Sechelt has legal status and capacity, it could enter into tax agreements with Canada or British Columbia with respect to other taxes if it so chose and the other government(s) agreed.

The *Westbank First Nation Self-Government Agreement* provides no explicit power of direct taxation for Westbank over its citizens, again in contrast to First Nations taxation powers under the BC treaty agreements. However, Westbank can negotiate tax agreements with Canada to obtain direct taxation powers over all residents on Westbank Lands, and, indeed, has such an agreement for a point-of-sale consumption tax. Westbank collects the First Nation Tax under the federal *Budget Implementation Act, 2000*.

Property Taxation

The treatment of property taxation under modern treaties in BC is quite different from that under the *Indian Act* or for the FNFMA. Under the modern treaties, the right to collect property taxes from citizens is constitutionally protected and concurrent with British Columbia and Canada, and the ability to collect property taxes from non-citizens is delegated from the Province. In the case of the *Indian Act* and the FNFMA, the powers come through the federal legislation. Under the BC treaty model, there is no ongoing role for the federal government contemplated or for the FNTC. However, there is a need for coordination to ensure a smooth transition from one system to the other, and a need to address issues such as public borrowing through the First Nations Finance Authority (FNFA), particularly where a First Nation formally under the FNFMA may already be a borrowing member of the FNFA.

For the purpose of enabling a First Nation that is a party to a treaty, land claims agreement or self-government agreement with Canada to benefit from the FNFMA, Section 141 does provide that adaptations to the act can be made or provisions of the act restricted. Regulations are contemplated under this provision. Some First Nations that are self-governing or negotiating self-government as a part of modern treaties would prefer to remain under the national federal model of property taxation rather than moving the provincial model, and most would like to use the services of the FNFA.

One of the major differences between the federal and provincial taxation model, is that under the provincial model, the First Nation has no jurisdiction over the land assessment aspect of property taxation, and the BC *Assessment Act* applies of its own volition. Accordingly, BC Assessment (a provincially created body under the BC *Assessment Act*) is required to assess treaty settlement land as it would all other lands in the province. Under the federal model of the FNFMA or the *Indian Act*, a First Nation is required to develop its own assessment law and in BC will typically contract the services from BC Assessment.

The other major difference in the systems concerns provincial taxation authorities — namely, bodies that under provincial legislation can either directly raise property taxes or require local governments to raise property taxes for them through a requisition. Under the federal model, these bodies have no right to collect taxes or require taxes be collected on-reserve. For First Nations with modern treaties, this is not the case. The net result is that a First Nation that is collecting property tax under the provincial treaty model will effectively have less tax room than a First Nation under the FNFMA

or *Indian Act*. Where a First Nation is already collecting property taxes under the federal system and moving into the provincial system, it will typically see a reduction in taxes available to the First Nation government, assuming that it keeps the overall tax burden on the ratepayer, as before the treaty (i.e., it does not raise the overall taxes collected in order to meet the shortfall, which it is required to do until such time as it begins to tax its own citizens). However, it should be kept in mind that a First Nation may in fact desire services from those taxing authorities whose taxation reach now extends onto treaty settlement land and where in the pre-treaty world the First Nation may have had a service agreement with that body (e.g., with BC Assessment). To facilitate the coordination of taxation, the Province enters into tax coordination agreements with treaty First Nations and has enacted the *Treaty First Nation Taxation Act* (S.B.C. 2007, c. 38).

Tsawwassen First Nation was collecting property taxes under the federal system prior to treaty and transitioned into the provincial model. Accordingly, Tsawwassen First Nation enacted a *Property Taxation Act* (Tsawwassen) and entered into a Real Property Tax Coordination Agreement (RPTCA) with the province. Tsawwassen collects property taxes from non-citizens and the Province vacates the field in accordance with this agreement. As discussed above, jurisdiction for property assessments is exercised by the province through the BC Assessment Authority.

While there is no specific reference to property taxation in the Maa-nulth agreement, all of the Maa-nulth First Nations have entered into RPTCAs with the Province and have subsequently enacted their own *Real Property Tax Act*. As of October 2014, only the Toquaht Nation, Uchucklesaht Tribe and Ucluelet First Nation laws have come into force. The Nisga'a Nation has also begun to collect property taxes following the expiration of the *Indian Act* exemptions after 12 years, and having not collected property taxes previously as an *Indian Act* band. This is also accomplished through a RPTCA with the Province to ensure that the tax room is available to the Nisga'a. The RPTCA was signed on July 31, 2014, and will require the Nisga'a Lisims Government to enact a real property tax law to begin collecting real property taxes, under the *Treaty First Nation Taxation Act* (S.B.C. 2007, c. 38). The RPTCA will allow the Nisga'a Lisims Government to charge property taxes to non-Nisga'a and to industry conducting operations on Nisga'a lands. The language in the Yale and Tla'amin agreements is similar to the Maa-nulth in that it does not contain references to property tax. Once the Tla'amin and Yale effective dates have passed, the Nations have the ability to enter into RPTCAs with the province to begin the process of collecting property taxes under the *Treaty First Nation Taxation Act*. Currently, Tla'amin collects property taxes under the federal system and will be transitioning after the effective date.

For non-treaty self-governing arrangements, the two examples are Sechelt and Westbank First Nation. Authority for Westbank to raise property taxes remains under section 83 of the *Indian Act* or in the future under the *First Nations Fiscal Management Act*. In order for Westbank to come under the FNFMA, a regulation would need to be made by Canada under the *Westbank First Nation Self-Government Act*. The self-government arrangements that provide Sechelt with the authority to collect taxes are under the federal *Sechelt Act*. Under the Sechelt Constitution, this power is exercised by Sechelt through the Sechelt Indian Government District (SIGD) Council, which is the Sechelt Indian Band Council acting in its capacity as the governing council of the SIGD, recognized under provincial legislation as a local government. This entitles Sechelt, acting through the SIGD, to derive the benefits available to local governments under provincial legislation. SIGD therefore has the benefit of the provincial property taxation system.

Income Taxes

The modern treaty arrangements in BC provide taxation jurisdiction over citizens, which includes the power to raise income taxes. The only First Nation in BC currently collecting income taxes is the Nisga'a, who have entered into a tax coordination agreement with the province that sets out the tax-sharing arrangements between the governments. In these arrangements, the Nisga'a keep approximately 50 percent of the income tax collected from their citizens and also a share of taxes collected from non-citizens living on their lands. Similar arrangements are contemplated for other treaty First Nations. There are no such income tax agreements in the non-treaty-based comprehensive governance arrangements. In looking at how First Nations are implementing their income tax systems, it is useful to look to the Yukon, where these systems have been up and running for some time. Under the Yukon tax arrangements, First Nations keep 95 percent of the federal taxes from persons residing on their lands and the territorial taxation system has been designed to accommodate First Nations taxation. In this system, taxpayers are required to identify which jurisdiction they are under when filing their yearly income tax returns.

Taxation Treatment of Citizens

A significant difference between the Westbank and Sechelt arrangements and modern treaty arrangements is that section 87 of the *Indian Act*, dealing with exemption from taxation by other governments, continues to apply in the former. In the treaty agreements, section 87 of the *Indian Act* no longer applies with respect to federal and provincial transaction taxes and other taxes (income, capital gains, etc.); however, remission orders for eight and 12 years respectively are put in place by Canada and British Columbia to delay the implementation of these provisions. Nisga'a citizens became liable to pay all applicable taxes on January 1, 2013. The Nisga'a agreement includes a "most favoured Nation" clause (Ch. 16, s. 17), which provides that if another First Nation gets a better arrangement with respect to tax exemption than the Nisga'a within 20 years, then that arrangement will apply to the Nisga'a. No such provision is found in the Tsawwassen, Maa-nulth, Yale or Tla'amin treaty agreements.

Taxation Treatment of First Nation Government/Assets

In addition to the provisions in modern treaties respecting the taxation of capital held by First Nations, the tax treatment of the institutions of government for these Nations is set out in a Tax Treatment Agreement, as required by Final Agreements. For the Nisga'a, this is called the Nisga'a Taxation Agreement. These agreements cover all forms of taxation and generally exclude the institutions of the First Nation governments from paying tax to other governments in Canada.

No such separate agreements exist for Westbank and Sechelt. These First Nations are treated as "bands" under the *Indian Act*, as section 87 continues to apply. In accordance with the terms of the self-government agreements, Westbank also receives the same tax exemption as municipalities in the *Income Tax Act*, and the same applies to Westbank-owned government corporations performing public services. This type of exemption is described in the *Westbank First Nation Self-Government Agreement*, Part XXVII, section 258(a).

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	PROPERTY TAXATION	TAXATION TREATMENT OF FN GOVERNMENT/ ASSETS	TAXATION TREATMENT OF CITIZENS
Sechelt	No provision.	Sechelt may make laws with respect to property taxation for local purposes. (s. 14(1)(e)) Part III, Division (1) s.5 of the Sechelt Constitution includes assessment, collection and enforcement procedures and appeals and is subject to adoption of pertinent BC legislative provisions. Can be applied to non-Indians on reserve. Under the Sechelt Constitution these powers are exercised by Sechelt through the Sechelt Indian Government District (SIGD).	Section 87 exemption of the *Indian Act* is not affected by new governance arrangements and Sechelt Indian Band is tax exempt. Sechelt Council acting in that form would likely be exempt under the "public body performing function of government" provisions of the *Income Tax Act*. (s. 149(1)(c)) The SIGD Council would also be exempt under the municipality provisions of the *Income Tax Act*.	Section 87 of the *Indian Act* continues to apply to Sechelt members who are registered Indians. Members remain exempt from taxes imposed by outside governments.
Westbank	Canada and Westbank First Nation may negotiate Westbank First Nation direct taxation powers over persons on Westbank Lands. (Part XXVIII, s. 260)	Property taxation for local purposes under section 83 of *Indian Act* or the *First Nations Fiscal and Statistical Management Act*. (Part XXXI, s. 275)	Section 87 of the *Indian Act* still applies to Westbank. For taxation purposes, Westbank is a public body performing a function of the government of Canada and receives a tax exemption under the *Income Tax Act*. (Part XXVII, s. 258)	Section 87 of the *Indian Act* continues to apply to Westbank members who are registered Indians. Members remain exempt from taxes imposed by outside governments. (Part XXXI, s. 276 (f))
Nisga'a	Nisga'a Lisims Government may make laws with respect to direct taxation of citizens. (Ch. 16, s. 1) Canada and British Columbia may negotiate Nisga'a direct taxation powers over persons other than Nisga'a citizens, on Nisga'a Lands. (Ch. 16, s. 3–4)	Nisga'a Lisims Government may make laws with respect to property taxation for local purposes of Nisga'a citizens. (Ch. 16, s. 3–4)	No capital taxation, including real property taxes and taxes on capital or wealth, with respect to the estate or interest of either the Nisga'a Nation or any Nisga'a Village in Nisga'a Lands on which there are no improvements or on which there is a designated improvement. (Ch. 16, s. 13)	Section 87 of the *Indian Act* has no application to Nisga'a citizens in respect to transaction taxes after the eighth anniversary of the effective date; and with respect to all other taxes after the twelfth anniversary of the effective date. (Ch. 16, s. 6)
Tsawwassen	Tsawwassen Government may make laws with respect to direct taxation of citizens. (Ch. 20, s. 1) Canada and British Columbia may negotiate Tsawwassen direct taxation powers over persons other than Tsawwassen citizens on Tsawwassen Lands. (Ch. 20, s. 4)	Tsawwassen Government may make laws with respect to property taxation of citizens. (Ch. 20, s. 1)	Tsawwassen First Nation is not subject to capital taxation, including real property taxes and taxes on capital or wealth, with respect to the estate or interest of Tsawwassen First Nation in Tsawwassen Lands on which there are no improvements or on which there is a designated Improvement. (Ch. 20, s. 7)	Section 87 of the *Indian Act* has no application to Tsawwassen citizens in respect to transaction taxes after the eighth anniversary of the Effective Date and with respect to all other taxes after the twelfth anniversary of the Effective Date. (Ch. 20, s. 16)
Maa-nulth	Maa-nulth governments have law making authority with respect to direct taxation of citizens. (s. 19.1.1) Canada and British Columbia may negotiate Maa-nulth Government direct taxation powers over persons other than Maa-nulth citizens on Maa-nulth Lands. (s. 19.2.1)	Maa-nulth Governments may make laws with respect to property taxation of their citizens. (s. 19.1.1)	A Maa-nulth First Nation is not subject to capital taxation, including real property taxes and taxes on capital or wealth, with respect to the estate or interest of the Maa-nulth First Nation in its Maa-nulth First Nation Lands on which there are no improvements or on which there is a designated improvement. (s. 19.3.1)	Section 87 of the *Indian Act* has no application to Maa-nulth citizens with respect to transaction taxes after the eighth anniversary of the Effective Date and with respect to all other taxes. (s. 19.5.1)

Table — Comprehensive Governance Arrangements... *continued*

	GENERAL JURISDICTION	PROPERTY TAXATION	TAXATION TREATMENT OF FN GOVERNMENT/ ASSETS	TAXATION TREATMENT OF CITIZENS
Yale	Yale First Nation has law-making authority with respect to direct taxation of Yale First Nation members within Yale First Nation Land. (s. 21.1.1)	No provisions.	Yale First Nation is not subject to capital taxation, including real property taxes and taxes on capital or wealth with respect to the estate or interest of Yale First Nation in Yale First Nation Land on which there are no improvements on which there is a designated improvement. (s. 21.3.1)	Section 87 of the *Indian Act* has no application to Yale First Nation members with respect to Transaction Taxes as of the first day of the first month after the eighth anniversary of the effective date and with respect to all other taxes, as of the first day of the first calendar year after the twelfth anniversary of the Effective Date. (s. 21.5.1 (a-b))
Tla'amin	Tla'amin Nation has law-making authority with respect to direct taxation of Tla'amin citizens living on Tla'amin lands. (Ch. 21, s. 1) Canada and British Columbia may negotiate Tla'amin Government direct taxation powers over persons other than Tla'amin citizens on Tla'amin Lands. (Ch. 21, s. 4)	No provisions.	Tla'amin is not subject to capital taxation, including real property taxes, with respect to the estate or interest of Tla'amin Nation in lands on which there are no improvements or on which there is a designated improvement. (Ch. 21, s. 7)	Section 87 of the *Indian Act* has no application with respect to Transaction Taxes as of the first day of the first month after the eighth anniversary of the Effective Date and with respect to all other taxes, as of the first day of the first month after the twelfth anniversary of the Effective Date. (s. Ch. 21, s. 16 (a-b))

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 83(a) Taxation			
In British Columbia there have been at least 80 First Nations that have passed a Property Assessment and Taxation Bylaw which includes amendments for rate adjustments, the following list shows the most recent assessment and annual rate Bylaws:			
PROPERTY ASSESSMENT			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
?Akisq'nuk First Nation		AKIS QNUK FIRST NATION RATES BYLAW 2007	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
?Akisq'nuk First Nation	1	TAXATION AND ASSESSMENT BYLAWS	Columbia Lake Indian Band Taxation And Assessment Bylaws
Adams Lake		TAXATION AND ASSESSMENT AMENDING BYLAWS	These Bylaws Replaced The Taxation And Assessment bylaws Which Were Approved By The Minister On July 30, 1993
Adams Lake	1993-1	ADAMS LAKE TAXATION AND ASSESSMENT BYLAW	Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Ashcroft	1993-1	ASHCROFT INDIAN BAND TAXATION AND ASSESSMENT BYLAW	Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Bonaparte		2004 RATES BYLAW	
Bonaparte	1993-3	BONAPARTE INDIAN BAND TAX RATES BYLAW 2012	Pursuant To S.83 Of The Indian Act, The 2012 Rates Bylaw Was Enacted To Provide For Real Property Taxation For The 2012 Tax Year
Boothroyd	1993-2	TAXATION AND ASSESSMENT BYLAW NO. 1, 1993	Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Boothroyd		BOOTHROYD INDIAN BAND RATES BYLAW 2013	Pursuant To S.83 Of The Indian Act, The 2013 Rates Bylaw Was Enacted To Provide For Real Property Taxation (Railway Right Of Way) For The 2013 Taxation Year
Boston Bar First Nation		BOSTON BAR FIRST NATION 2013 RATES BYLAW	Pursuant To S.83 Of The Indian Act, The 2013 Rates Bylaw Was Enacted To Provide For Real Property Taxation (Railway Right Of Way) For The 2013 Taxation Year
Boston Bar First Nation		PROPERTY ASSESSMENT AND TAXATION BYLAW	To Enact Independent Taxation Commencing In 2005 On Twelve Of The First Nation's Reserves
Burns Lake		BURNS LAKE INDIAN BAND 2012 RATES BYLAW NO. 2012-02	Pursuant To S.83 Of The Indian Act, The 2012 Rates Bylaw Was Enacted To Provide For Real Property Taxation For The 2012 Taxation Year
Burns Lake	1	PROPERTY TAXATION AND ASSESSMENT BYLAW	Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Chawathil		CHAWATHIL FIRST NATION TAX RATES BYLAW 2008	Being A Bylaw To Provide For Taxation For The 2008 Taxation Year
Chawathil	1994-1	TAXATION AND ASSESSMENT BYLAWS	Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Cheam		CHEAM FIRST NATION TAX RATES BYLAW 2012	Pursuant To S.83 Of The Indian Act, The 2012 Tax Rates Bylaw Was Enacted To Provide For Real Property Taxation For The 2012 Taxation Year
Cheam	1	TAXATION AND ASSESSMENT BYLAWS TAXATION	For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Coldwater		COLDWATER INDIAN BAND 2011 RATES BYLAW	Being A Bylaw To Provide For Real Property Taxation For The 2011 Taxation Year
Coldwater		PROPERTY TAXATION AND ASSESSMENT BYLAWS	To Provide For Taxation On Coldwater Indian Reserve No. 1, Paul's Basin Indian Reserve No. 2 And Gwen Lake Indian Reserve No. 3
Cook's Ferry	1	TAXATION AND ASSESSMENT BYLAWS	Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Cook's Ferry		COOK'S FERRY INDIAN BAND 2013 RATES BYLAW	Being A Bylaw To Provide For Real Property Taxation For The 2013 Taxation Year

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Cowichan	1	PROPERTY ASSESSMENT AND TAXATION BYLAW	A Bylaw To Provide For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Cowichan		COWICHAN INDIAN BAND BYLAW TO FIX TAX RATE FOR THE YEAR 2011	Being A Bylaw To Provide For Real Property Taxation For The 2011 Tax Year
Fort Nelson First Nation		FORT NELSON FIRST NATION RATES BYLAW 2013	Being A Bylaw to Provide For Real Property Taxation For The 2013 Taxation Year
Fort Nelson First Nation	1993-1	PROPERTY TAXATION AND ASSESSMENT BYLAWS FORT NELSON INDIAN BAND	A Bylaw For Taxation For Local Purposes Of Land, Or Interest In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Gitwangak	1	TAXATION AND ASSESSMENT BYLAW	Bylaw To Provide For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Haisla Nation		HAISLA NATON RATES BYLAW 2013	Pursuant To S.83 Of The Indian Act, The 2013 Rates Bylaw Was Enacted To Provide For Real Property Taxation for The 2013 Taxation Year
Kanaka Bar		KANAKA BAR INDIAN BAND 2013 RATES BYLAW	Pursuant To S.83 Of The Indian Act, The 2013 Rates Bylaw Was Enacted To Provide For Real Property Taxation (Railway Right Of Way) For The 2013 Taxation Year
Kanaka Bar	1992-1	TAXATION AND ASSESSMENT BYLAWS	Kanaka Bar Indian Band - Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Kitsumkalum		ASSESSMENT AND TAXATION BYLAW	Being A Bylaw to Enact Independent Band Taxation On The Whole Of Indian Reserve #1
Kwantlen First Nation		KWANTLEN FIRST NATION 2013 RATES BYLAW	Pursuant To S. 83 Of The Indian Act, The 2013 Rates Bylaw Was Enacted To Provide For Real Property Taxation For The 2013 Taxation Year
Kwantlen First Nation		ASSESSMENT AND TAXATION BYLAW	Being A Bylaw To Impose Real Property Taxation On Reserves #1, #2, #3, #4, #5 And #6
Kwaw-Kwaw-Apilt	1991-1	TAXATION AND ASSESSMENT BYLAWS	Kwaw Kwaw Apilt Taxation Bylaws For The Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Leq' A: Mel First Nation	1	LAKAHAHMEN TAXATION AND ASSESSMENT BYLAWS	To Provide For Taxation On The Lakahahmen Indian Reserves Namely: Aylechootlook #5, Holachten #8, Lakahahmen #11, Lakeway #2, Papekwatchin #4, Skweam #10, Yalstrick Island #1 And Zaitscullachan #9
Lheidli T'enneh		LHEIDLI T''ENNEH BAND RATES BYLAW NO. 2011	Being A Bylaw To Provide For Taxation For The 2011 Taxation Year
Lheidli T'enneh	1993-1	TAXATION AND ASSESSMENT BYLAWS TAXATION	For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Little Shuswap Lake		LITTLE SHUSWAP INDIAN BAND RATES BYLAW 2013-T02	Pursuant To S.83 Of The Indian Act, The 2013 Rates Bylaw Was Enacted To Provide For Real Property Taxation For The 2013 Taxation Year
Little Shuswap Lake		RESOLUTION AMENDMENT TO PROPERTY TAXATION BYLAW PR-95-02	The Resolution Amends Sections 14(1)(C) Of The Band's Taxation Bylaw To Specifically Provide An Assessment And Taxation Exemption For Property Used Or Occupied By The Band For Educational, Cultural, Religious, Health Or Community Purposes. These Amendments Are Required In Anticipation Of The Band Opening A Health Centre In Conjunction With Health Canada
Little Shuswap Lake		TAXATION AND ASSESSMENT BYLAWS	These Bylaws Replaced The Previous Bylaws Which Were Approved By The Minister On July 30, 1993
Lower Kootenay	1992-1	TAXATION AND ASSESSMENT TAXATION	For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Lower Nicola		TAXATION AND ASSESSMENT	Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Lower Similkameen	1	PROPERTY TAX BYLAW	To Provide For The Collection Of Taxes On Reserve
Lower Similkameen		LOWER SIMILKAMEEN INDIAN BAND TAX RATES BYLAW NO. 01.2013	pursuant To S. 83 Of The Indian Act, The 2013 Tax Rates Bylaw Was Enacted To Provide For Real Property Taxation For The 2013 Taxation Year
Matsqui		2003 RATES AND EPXPENDITURES BYLAW	.
Matsqui		1991-1	Matsqui Indian Band Taxation And Assessment Bylaws For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Lands In The Reserve
Mcleod Lake		MCLEOD LAKE INDIAN BAND TAXATION BYLAW	
Metlakatla		METLAKATLA FIRST NATION 2008 TAX RATES BYLAW	Being A Bylaw To Provide For Taxation Or The 2008 Taxation Year
Metlakatla		ASSESSMENT AND TAXATION BYLAW	Being A Bylaw to Implement Independent Band Taxation On The Wilnaskancaud I.R. No. 3
Moricetown		MORICETOWN FIRST NATION RATES BYLAW 2007	Being A Bylaw to Provide For Taxation For The 2007 Taxation Year
Moricetown		PROPERTY ASSESSMENT AND TAXATION BYLAW	
Mowachaht/ Muchalaht		PROPERTY ASSESSMENT AND TAXATION BYLAW	
Musqueam		MUSQUEAM INDIAN BAND 2013 RATES BYLAW NO. 2013-01	Being A Bylaw To Provide For Taxation For The 2013 Taxation Year
Musqueam	1991-1	TAXATION AND ASSESSMENT BYLAWS	Musqueam Indian Band Taxation And Assessment Bylaws For The Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Nadleh Whuten		PROPERTY ASSESSMENT AND TAXATION BYLAW	Being A Bylaw For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Nadleh Whuten		NADLEH WHUTEN INDIAN RATE BYLAW 2011	Being A Bylaw To Provide For Real Property Taxation In The 2011 Taxation Year
Nadleh Whuten		FINANCIAL ADMINISTRATION BYLAW	Being A Bylaw To Regulate The Receipt, Management And Expenditure Of Funds And Establkish The Administrative Structure Of The Nadleh Whuten Band Funds
Nak'azdli	1992-1	TAXATION AND ASSESSMENT BYLAWS	Nak'azdli Indian Band Taxation And Assessment Bylaws For The Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Nanoose First Nation		PROPERTY ASSESSMENT AND TAXATION BYLAW	To Provide For Taxation On The Nanoose First Nation's Reserves
Neskonlith		NESKONLITH INDIAN BAND 2007 RATES BYLAW	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
Neskonlith	1993-1	TAXATION AND ASSESSMENT BYLAWS	Neskonlith Indian Band Taxation And Assessment Bylaws For The Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Nicomen		NICOMEN INDIAN BAND 2013 TAX RATES BYLAW	Pursuant To S.83 Of The Indian Act, The 2013 Rates Bylaw Was Enacted To Provide For Real Property Taxation For The 2013 Taxation Year
Nicomen	1992-1	TAXATION AND ASSESSMENT BYLAWS	Nicomen Indian Band Taxation And Assessment Bylaws For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Okanagan	1	PROPERTY TAX BYLAW	To Provide For The Collection Of Taxes Of Reserve
Osoyoos		OSOYOOS FIRST NATION TAX RATES BYLAW NO. 001, 2007	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Osoyoos		1994-1	Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Penticton		PENTICTION INDIAN BAND PROPERTY ASSESSMENT BYLAW, 07-TX-01	Being A Bylaw To Provide For Assessment Services On The Penticton Indian Reserves
Penticton		PENTICTON INDIAN BAND PROPERTY TAXATION BYLAW, 07-TX-02	Being A Bylaw To Provide For Taxation On The Penticton Indian Band Reserves
Penticton		PENTICTON INDIAN BAN TAX RATES SCHEDULE AMENDING BYLAW 2013	Pursuant To S.83 Of The Indian Act, The 2013 Tax Rates Schedule Amending Bylaw Was Enacted To Provide For Real Property Taxation For The 2013 Taxation Year
Popkum	–	POPKUM FIRST NATION PROPERTY ASESSMENT AND TAXATION BYLAWS	To Provide For Taxation On Popkum Indian Reserve No. 1 And Popkum Indian Reserve No. 2
Popkum		POPKUM FIRST NATION TAX RATES BYLAW 2008	Being A Bylaw to Provide For Taxation For The 2008 Taxation Year
Scowlitz		SCOWLITZ FIRST NATION TAX RATES BYLAW 2013	pursuant To S. 83 Of The Indian Act, The 2013 Tax Rates Bylaw Was Enacted To Provide For Real Property Taxation For The 2013 Taxation Year
Seabird Island	1993-1	TAXATION AND ASSESSMENT AMENDING BYLAW	Seabird Island Indian Band Taxation And Assessment Amending Bylaw No. 1 (1993)
Shuswap		SHUSWAP INDIAN BAND 2007 RATES BYLAW	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
Shuswap	1991-1	TAXATION AND ASSESSMENT BYLAWS	Shuswap Indian Band Taxation And Assessment Bylaw For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Shxw'ow'hamel First Nation		SHXW'OWHAMEL FIRST NATION BYLAW 2007-01	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
Shxw'ow'hamel First Nation		REAL PROPERTY ASSESSMENT AND TAXATION BYLAW	To Provide For Independent Band Taxation On Ohamil Indian Reserve No.1, Wahleach Island Indian Reserve No.2 And Kuthlalth Indian Reserve No.3
Shxwhá:Y Village		SHXWHA:Y VILLAGE 2007 RATES BYLAW	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
Shxwhá:Y Village		ASSESSMENT AND TAXATION BYLAW	Being A Bylaw To Impose Taxation On Skway Indian Reserve #5
Shxwhá:Y Village		ASSESSMENT AND TAXATION AMENDING BYLAW	Being A Bylaw to Exempt The Farm Class Of Property From Assessment And Taxation
Siska		SISKA INDIAN BAND 2013 RATES BYLAW	Pursuant To S.83 Of The Indian Act, The 2013 Rates Bylaw Was Enacted To Provide For Real Property Taxation (Railway Right Of Way) For The 2013 Taxation Year
Siska	1991-1	TAXATION AND ASSESSMENT BYLAWS	Siska Indian Band Taxation And Assessment Bylaws For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Skawahlook First Nation		SKAWAHLOOK FIRST NATION TAX RATES BYLAW 2007	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
Skawahlook First Nation		PROPERTY ASSESSMENT AND TAXATION BYLAW	To Provide For Independent Taxation Commencing In 2005 On The Skawahlook Indian Reserve No. 1 And Ruby Creek Indian Reserve No. 2
Skeetchestn		SKEETCHESTN INDIAN BAND PROPERTY TAX EXPENDITURE BYLAW	The Subject Bylaw Was Enacted Pursuant To Section 83 Of The Indian Act And Specifically Sections 83(1) And (2) Which Requires That Any Expenditure Made Out Of Moneys Raised Through Real Property Taxation Must Be Made Under The Authority Of A Bylaw
Skeetchestn		SKEETCHESTN INDIAN BAND TAX RATES BYLAW 2007, NO. 12	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
Skeetchestn	1993-1	PROPERTY TAX BYLAW SKEETCHESTN INDIAN BAND	Property Tax Bylaw for Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Skidegate		REAL PROPERTY ASSESSMENT AND TAXATION BYLAW	
Skowkale		2004 RATES BYLAW	
Skowkale	1	TAXATION AND ASSESSMENT BYLAWS	A bylaw For Taxation Purposes Of Land Or Interest In Land In The Reserve
Skuppah	1992-1	TAXATION AND ASSESSMENT BYLAWS	Skuppah Indian Band Taxation And Assessment Bylaws For The Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Skuppah		SKUPPAH INDIAN BAND 2013 RATES BYLAW	Pursuant to S.83 Of The Indian Act, The 2013 Rates Bylaw Was Enacted To Provide For Real Property Taxation (Railway Right Of Way) For The 2013 Taxation Year
Snuneymuxw First Nation		SNUNEYMUXW FIRST NATION TAXATION RATES BYLAW 2013-1	Being A Bylaw To Provide For Real Property Taxation For The 2013 Taxation Year
Snuneymuxw First Nation	1992-1	NANAIMO INDIAN BAND TAXATION AND ASSESSMENT BYLAWS	Nanaimo Indian Band Taxation And Assessment Bylaws Section 41 And 49 Of The Taxation Bylaw and Sections 54(3) And 60 Of The Assessment Bylaw Were Not Approved
Soda Creek		SODA CREEK INDIAN BAND BYLAW NO. 2013-TX01	Being A Bylaw To Provide For Real Property Taxation For The 2013 Taxation Year
Soda Creek	1	PROPERTY TAX BYLAW	Being A Bylaw To Provide For Taxation On The Soda Creek Indian Reserve
Songhees First Nation		SONGHEES FIRST NATION TAX RATES BYLAW	Being A Bylaw to Provide For Taxation For The 2007 Taxation Year
Songhees First Nation	1995-1	SONGHEES TAXATION AND ASSESSMENT BYLAWS	Songhees Property Assessment Bylaw Pr-95-01 And Songhees Property Taxation Bylaw Pr-95-02
Spuzzum	1992-1	TAXATION AND ASSESSMENT BYLAWS	Spuzzum Indian Band Taxation And Assessment Bylaws For Taxation For Local Purposes Of Land, Or Interests In Land, In the Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Spuzzum		SPUZZUM INDIAN BAND RATES BYLAW 2013	Pursuant To S.83 Of The Indian Act, The 2013 Rates Bylaw Was Enacted To Provide For Real Property Taxation (Railway Right Of Way) For The 2013 Taxation Year
Squamish		SQUAMISH INDIAN BAND ANNUAL TAX RATES BYLAW NO. 1, 2008	Being A Bylaw To Provide For Taxation For The 2008 Taxation Year
Squamish	1992-1	TAXATION AND ASSESSMENT BYLAWS SQUAMISH INDIAN BAND TAXATION AND ASSESSMENT	Bylaws For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Squamish	1994-4	PROPERTY TAX EXPENDITURE BYLAW	Squamish Indian Band Property Tax Expenditure Bylaw
Squiala First Nation		SQUIALA FIRST NATION TAX RATES BYLAW 2007	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
St. Mary's		ST. MARY'S INDIAN BAND RATES BYLAW 2007 - YR 15	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
St. Mary's	1992-1	TAXATION AND ASSESSMENT BYLAWS	St. Mary's Indian Band Taxation And Assessment Bylaw for Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Stz'uminus First Nation		CHEMAINUS FIRST NATION PROPERTY ASSESSMENT AND TAXATION BYLAW	This Bylaw Amends The Taxation And Assessment Bylaw Which Was Approved By The Minister On April 22, 2005
Stz'uminus First Nation		CHEMAINUS FINANCIAL ADMINISTRATION BYLAW	This Bylaw Was Enacted To Provide For The Financial Administration Of The Chemainus First Nation Band Funds
Stz'uminus First Nation		PROPERTY ASSESSMENT AND TAXATION BYLAW	
Sumas First Nation		SUMAS FIRST NATION TAX RATES BYLAW 2007	Being A Bylaw to Provide For Taxation For The 2007 Taxation Year

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
T'it'q'et		T'IT'Q'ET FIRST NATION TAX RATES BYLAW 2013	Pursuant to s. 83 of the Indian Act, the 2013 Tax Rates Bylaw was enacted To Provide For Real Property Taxation For The 2013 Taxation Year
T'it'q'et	1993-1	TAXATION AND ASSESSMENT AMENDING BYLAW #1 (1993)	Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Tk'emlups te Secwepemc	1	KAMLOOPS PROPERTY TAXATION AND ASSESSMENT BYLAWS	A Bylaw to Provide For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Tk'emlups te Secwepemc	2	KAMLOOPS EXPENDITURE BYLAW	The Appropriation And Expenditure Of Moneys Of The Band To Defray Band Expenses
Tk'emlups te Secwepemc	3	PROPERTY RATES, CLASSIFICATION AND MISCELLANEOUS	Taxation For Local Purposes Of Land, Or Interests In Land, Including Rights To Occupy, possess Or Use Land In The Reserve
Tk'emlups te Secwepemc		KAMLOOPS INDIAN BAND PROPERTY ASSESSMENT BYLAW — BYLAW NO. 2005-04	Being A Bylaw to Repeal And Replace The Band's Original Assessment Bylaw And All Of Its Subsequent Amendments. The Bylaw Establishes A Fee Simple Equivalent Assessment Base And Clarifies The Role And Powers Of The Band's Assessment Committee From Those Of The Tax Administrator And Provides The Process By Which Any Appeal Of The Board's Decisions May Be Made To The Federal Court Of Canada. The Bylaw Also Sets Out The Assessment And Valuation Criteria To Be Utilized By The Assessor In Conducting The Assessments Which Will Mirror Those Utilized Under The Provincial System. It Also Amends The Dates As Set Out In The Original Bylaw To Mirror The Dates Of The Provincial Assessment Calendar
Tla'amin		TLA'AMIN FIRST NATION 2007 ANNUAL TAX RATES BYLAW	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
Tla'amin	1995-1	TLA'AMIN TAXATION AND ASSESSMENT BYLAW	Tla'amin Property Assessment Bylaw Pr-95-02 And Tla'amin Property Taxation Bylaw Pr-95-01
Tl'azt'en Nation	1	PROPERTY TAX BYLAW	Being A Bylaw to Collect Taxes On The Reserve
Tl'azt'en Nation		TL'AZT'EN NATION 20123 RATES BYLAW	Being A Bylaw To Provide For Real Property Taxation For The 2013 Taxation Year
Tla-O-Qui-Aht First Nations		TLA-O-QUI-AHT FIRST NATIONS 2004 RATES BYLAW	Being A Bylaw To Provide For Taxation For The 2004 Taxation Year
Tla-O-Qui-Aht First Nations		TAXATION AND ASSESSMENT BYLAW	Being A Bylaw To Provide For Taxation On The Tla-O-Qui-Aht First Nations' Reserves
Tobacco Plains		TOBACCO PLAINS INDIAN BAND RATES BYLAW 2007	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
Tobacco Plains	1991-1	TAXATION AND ASSESSMENT BYLAWS	Tobacco Plains Indian Band Taxation And Assessment Bylaws For Taxation For Local Purposes, Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Ts'kw'aylaxw First Nation	1994-1	TAXATION AND ASSESSMENT BYLAWS	Pavilion Indian Band Taxation And Assessment Bylaws For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Ts'kw'aylaxw First Nation		TS'KW'AYLAXW FIRST NATION RATES 2012 RATES BYLAW	Pursuant To S.83 Of The Indian Act, The 2012 Rates Bylaw Was Enacted To Provide For Real Property Taxation For The 2012 Taxation Year
Ts'kw'aylaxw First Nation		TS'KW'AYLAXW FIRST NATION BYLAW 2012-TD-1	Being A Bylaw To Provide For Real Property Taxation For The 2013 Taxation Year
Tsawout First Nation		TSAWOUT INDIAN BAND RATES BYLAW 2007 TX-01	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
Tsawout First Nation	1994-1	TAXATION AND ASSESSMENT BYLAWS	Tsawout Indian Band Taxation And Assessment Bylaws For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Tsawwassen First Nation	1994-1	TAXATION AND ASSESSMENT BYLAWS	Tsawwassen First Nation Taxation And Assessment Bylaws For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Tsleil-Waututh Nation		TSLEIL-WAUTUTH RATES BYLAW 2008	Being A Bylaw To Provide For Taxation For The 2008 Tax Year
Tsleil-Waututh Nation		PROPERTY ASSESSMENT AND TAXATION BYLAW	
Tzeachten		TAXATION AND ASSESSMENT BYLAWS	Tzeachten Indian Band Taxation And Assessment Bylaws For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Union Bar		UNION BAR FIRST NATION RATES BYLAW 2007	Being A Bylaw To Provide For Taxation For The 2007 Taxation Year
Upper Similkameen		UPPER SIMILKAMEEN INDIAN BAND 2013 RATES BYLAW	Being A Bylaw To Provide For Taxation For The 2013 Taxation Year
Upper Similkameen		TAXATION AND ASSESSMENT BYLAW	Taxation For Local Purposes Of Land Or Interests In Land, In The Reserve, Including Rights To Occupy And Possess Land
West Moberly First Nations		PROPERTY ASSESSMENT AND TAXATION BYLAW NO. 2002-4	
Wei Wai Kum (f. Campbell River)		CAMPBELL RIVER FIRST NATION RATES BYLAW 2010	Being A Bylaw To Provide For Taxation For The 2010 Taxation Year
Wei Wai Kum (f. Campbell River)		ASSESSMENT AND TAXATION BYLAWS	To Provide For Taxation On The First Nation's Reserves
Whispering Pines/Clinton		WHISPERING PINES/CLINTON INDIAN BAND 2011 RATES BYLAW	To Provide For Taxation For The 2011 Taxation Year
Whispering Pines/Clinton	#1(1995)	PROPERTY ASSESSMENT AND TAXATION BYLAW	Bylaw For The Purpose Of Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Williams Lake		WILLIAMS LAKE INDIAN BAND 2013 RATES BYLAW	Being A Bylaw To Provide For Real Property Taxation For The 2013 Taxation Year
Williams Lake		PROPERTY ASSESSMENT AND TAXATION BYLAW	
Yale First Nation		PROPERTY ASSESSMENT AND TAXATION BYLAW	The Bylaw Was Enacted Pursuant To The Indian Act, And Specifically Paragraph 83(1)(A), The Council Of A Band May Make Bylaws For The Purpose Of Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Yekooche		TAXATION AND ASSESSMENT BYLAWS	
RAILWAY RIGHT-OF-WAYS			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Boothroyd		BOOTHROYD INDIAN BAND TAXATION RATES BYLAW 2009	Being A Bylaw To Provide For The Taxation Of CP Rail
Chawathil		2004 RAILWAY RIGHT OF WAY TAX RATES BYLAW	Being A Bylaw to Provide For The Taxation Of Railway Lines
Kanaka Bar		2004 RAILWAY RIGHT OF WAY TAX RATE BYLAW	
Leq' A: Mel First Nation		LEQ'A:MEL FIRST NATION RAILWAY RIGHT-OF-WAY TAXATION BYLAW 2006	Being A Bylaw To Provide For Taxation Of Railway Right-Of-Way On The First Nation's Reserve
Matsqui		RAILWAY RIGHT OF WAY TAX RATES BYLAW	
Neskonlith		NESKONLITH INDIAN BAND 2007 RAILWAY RIGHT-OF-WAY RATES BYLAW	Being A Bylaw To Provide For The Taxation Of CPR Right-Of-Way Interests
Nicomen		2004 RAILWAY RIGHT OF WAY BYLAW	
Skuppah		SKUPPAH INDIAN BAND 2009 RATES BYLAW	Being A Bylaw To Provide For The Taxation Of CP Rail

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

Bylaws — Section 83(b) Expenditure			
In British Columbia there have been at least 53 First Nations that have passed at least one Bylaw providing for the Expenditure of Moneys Raised through Real Property Taxation, the following list shows the most recent expenditure Bylaws:			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
?Akisq'nuk First Nation		AKISQNUK FIRST NATION PROPERTY TAX EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Moneys Raised Through Real Property Taxation
Adams Lake	1994-3	ADAMS LAKE INDIAN BAND EXPENDITURE BYLAW	The Appropriation And Expenditure Of Moneys Of The Band To Defray Band Expenses
Bonaparte		PROPERTY TAX EXPENDITURE BYLAW	
Bonaparte		BONAPARTE INDIAN BAND ANNUAL EXPENDITURE BYLAW, 2012	Pursuant To S.83 Of The Indian Act, The 2012 Expenditure Bylaw Was Enacted To Provide For The Expenditure Of Revenue Raised During The 2013 Taxation Year
Bonaparte		FINANCIAL ADMINISTRATION BYLAW	Being A Bylaw To Set Financial And Administrative Guidelines For Fiscal Management Of First Nations Funds
Boothroyd		PROPERTY TAX EXPENDITURE BYLAW	To Provide For The Expenditure Of Taxation Funds
Burns Lake		BURNS LAKE INDIAN BAND PROPERTY TAX EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Moneys Raised Through Real Property Taxation
Burns Lake		BURNS LAKE INDIAN BAND PROPERTY TAX EXPENDITURE BYLAW	Pursuant To S.83 Of The Indian Act, The Property Tax Expenditure Bylaw Was Enacted To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation For The 2012 Taxation Year
Chawathil		PROPERTY TAX EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation
Chemainus First Nation		CHEMAINUS FIRST NATION EXPENDITURE BYLAW 2007	Being A Bylaw To Provide For The Expenditure Of Moneys Raised Through Real Property Taxation
Coldwater		PROPERTY TAX EXPENDITURE BYLAW	
Coldwater		ANNUAL PROPERTY TAX BUDGET 2011	Being A Bylaw to Provide For The Expenditure Of Revenue Raised Through Real Property Taxation
Cook's Ferry		2003 PROPERTY TAX EXPENDITURE BYLAW	
Cowichan		COWICHAN INDIAN BAND ANNUAL PROPERTY TAX BUDGET 20011	Being A Bylaw to Provide For The Expenditure Of Revenue Raised Through Real Property Taxation For The 2011 Taxation Year
Fort Nelson First Nation		FORT NELSON FIRST NATION TAXATION EXPENDITURE BYLAW	Being A Bylaw to Provide For The Expenditure Of Moneys Raised Through Real Property Taxation
Haisla Nation		HAISLA NATON ANNUAL EXPENDITURE BYLAW, 2013	Pursuant To S.83 Of The Indian Act, The 2013 Expenditure Bylaw Was Enacted To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation For The 2013 Taxation Year
Homalco		HOMALCO FIRS NATION FINANCIAL ADMINISTRATION BYLAW NO. 1	The Bylaw Establishes The Processes Which Govern The Financial Affairs Of The Nation
Kwantlen First Nation		KWANTLEN FIRST NATION TAXATION EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation
Kwantlen First Nation		KWANTLEN FIRST NATION TAXATION EXPENDITURE BYLAW	Pursuant To S.83 Of The Indian Act, The 2013 Expenditure Bylaw Was Enacted To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation For The 2013 Taxation Year
Kwaw-Kwaw-Apilt		1993 EXPENDITURE BYLAW	Kwaw-Kwaw-Apilt Indian Band 1993 Budget And Expenditure Bylaws
Lake Babine		FINANCIAL AND ADMINISTRATION BYLAW NO. 2002-01	
Lheidli T'enneh		LHEIDLI T'ENNEH BAND ANNUAL EXPENDITURE BYLAW 2011	Being A Bylaw To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation For The 2011 Taxation Year

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Little Shuswap Lake	1995-1	PROPERTY TAX EXPENDITURE BYLAW	
Lower Kootenay		PROPERTY TAX EXPENDITURE BYLAW AND BUDGET	
Lower Nicola		PROPERTY TAX EXPENDITURE BYLAW	
Lower Similkameen		TAXATION EXPENDITURE BYLAW	The Bylaw Was Enacted To Provide For The Taxation Of Revenue Raised Through Real Property Taxation
Matsqui		2002 EXPENDITURE BYLAW	
Moricetown		FINANCIAL ADMINISTRATION BYLAW	
Musqueam		MUSQUEAM INDIAN BAND PROPERTY TAX EXPENDITURE BYLAW	Being A Bylaw to Provide For The Expenditure Of Moneys Raised Through Real Property Taxation
Nadleh Whuten		NADLEH WHUTE'EN INDIAN BAND ANNUAL TAX EXPENDITURE BYLAW	Being A Bylaw O Provide For The Expenditure Of Revenue Raised Through Real Property Taxation In 2011
Nicomen		NICOMEN INDIAN BAND PROPERTY TAX EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation
Nicomen		NICOMEN INDIAN BAND PROPERTY TAX EXPENDITURE BYLAW 2012	Pursuant To S.83 Of The Indian Act, The 2013 Expenditure Bylaw Annual Budget 2013 Was Enacted To Provide For The Expenditure Of Tax Revenue For The 2012 Taxation Year
Penticton		PENTICTON INDIAN BAND EXPENDITURE BYLAW ANNUAL BUDGET 2013	Pursuant To S.83 Of The Indian Act, The 2013 Expenditure Bylaw Annual Budget 2013 Was Enacted To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation For The 2013 Taxation Year
Seabird Island		PROPERTY TAX EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Moneys Raised Through Taxation
Shuswap		TAXATION EXPENDITURE BYLAW	
Shuswap		SHUSWAP INDIAN BAN EXPENDITURE BYLAW ANNUAL BUDGET 2007	Being A Bylaw To Provide For The Expenditure Of Moneys Raised During The 2007 Tax Year
Skawahlook First Nation		SKAWAHLOOK FIRST NATION TAXATION EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Moneys Raised Through Real Property Taxation
Skeetchestn		SKEETCHESTN INDIAN BAND PROPERTY TAX EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Moneys Raised Through Real Property Taxation
Skowkale		EXPENDITURE AND BUDGET BYLAW	Being A Bylaw To Provide For The Budgeting And Expenditure Of Moneys Raised Through Real Property Taxation
Skuppah		SKUPPAH INDIAN BAND TAXATION EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation
Snuneymuxw First Nation		PROPERTY TAX EXPENDITURE BYLAW (1996)	
Songhees First Nation		SONGHEES FIRST NATION PROEPRTY TAX EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Moneys Raised Through Real Property Taxation
Spuzzum		SPUZZUM INDIAN BAND ANNUAL EXPENDITURE BYLAW 2013	Pursuant To S.83 Of The Indian Act, The 2013 Expenditure Bylaw Annual Budget 2013 Was Enacted To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation For The 2013 Taxation Year
Squamish		PROPERTY ASSESSMENT AMENDMENT BYLAW NO. 1-2001	
Squamish	1994-4	PROPERTY TAX EXPENDITURE BYLAW	Squamish Indian Band Property Tax Expenditure Bylaw

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Stellat'en First Nation		EXPENDITURE BYLAW NO. 1998-1	Bylaw Respecting The Appropriation And Expenditure Of Moneys For Primary And Secondary Education
Stellat'en First Nation		BYLAW NO. 1998-1	This Is A Bylaw Respecting The Appropriation And Expenditure Of Funds
T'it'q'et	1995-1	EXPENDITURE BYLAW	A Bylaw For The Appropriation And Expenditure Of Moneys Of The Band To Defray Band Expenses
Tla'amin		TLA'AMIN FIRST NATION PROPERTY TAX EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Moneys Raised During The 2007 Taxation Year
Tla'amin		TLA'AMIN FIRST NATION ANNUAL EXPENDITURE BYLAW	
Tl'azt'en Nation		TL'AZT'EN NATION 2013 EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Revenue Raised During The 2013 Tax Year
Ts'kw'aylaxw First Nation		TS'KW'AYLAXW FIRST NATION PROPERTY TAX EXPENDITURE BYLAW	Being A Bylaw To Provide For The Expenditure Of Moneys Raised Through Real Property Taxation
Tsawout First Nation	1995-1	PROPERTY TAX EXPENDITURE BYLAW	Tsawout Indian Band Property Tax Expenditure Bylaw
Tsawwassen First Nation	1994-3	EXPENDITURE BYLAW	Tsawwassen First Nation Expenditure Bylaw For The Appropriation And Expenditure Of Moneys Of The Band To Defray Band Expenses
Tsleil-Waututh Nation		TSLEIL-WAUTUTH NATION EXPENDITURE BYLAW NO. EXP 2009-01	Being A Bylaw To Provide For The Expenditure Of Moneys Raised Through Real Property Taxation
Tzeachten		2003 BUDGET BYLAW (EXPENDITURE BYLAW)	
Upper Similkameen		2002 PROPERTY TAX EXPENDITURE BYLAW	
Wei Wai Kum (f. Campbell River)		PROPERTY TAX EXPENDITURE BYLAW NO. 3	
Whispering Pines/Clinton		WHISPERING PINES EXPENDITURE BYLAW 1996	
Williams Lake		WILLIAMS LAKE INDIAN BAND PROPERTY TAXATION EXPENDITURE BYLAW	The Subject Bylaws Enacted Pursuant To Section 83 Of The Indian Act, Specifically Section 83(1) And (2) Which Requires That Any Expenditure Made Out Of Moneys Raised By Real Property Taxation Must Be Made Under The Authority Of A Bylaw
Yale		FINANCIAL ADMINISTRATION BYLAW	The bylaw Was Enacted Pursuant To Paragraphs 83(1)(B) [The Appropriation And Expenditure Of Moneys Of The Band To Defray Band Expenditures], And 83(1)(C) [The Appointment Of Officials To Conduct The Business Of The Council Prescribing Their Duties...] And 83(1)(G), [Ancillary Powers]
Yekooche		FINANCIAL ADMINISTRATION BYLAW	Being A Bylaw To Institute Financial And Administrative Guidelines For Fiscal Management

Table — BC First Nations' Laws/Bylaws in Force... *continued*

SECTORAL GOVERNANCE INITIATIVES		
First Nations Goods and Services Tax (FNGST)		
*Self-Governing	All Sectoral Governance Initiative Information Source: AANDC Feb. 2014 Taxation By Aboriginal Governments Facts Sheet	
PROVINCE/TERRITORY	**ABORIGINAL GOVERNMENT**	
Newfoundland and Labrador (1)	• Nunatsiavut (Labrador Inuit)* Nekaneet First Nation	
Manitoba (1)	• Buffalo Point First Nation	
Saskatchewan (2)	• Whitecap Dakota First Nation	• Nekaneet First Nation
British Columbia (9)	• Akisq'nuk First Nation	• Tobacco Plains First Nation
	• Lower Kootenay First Nation	• Tsawout First Nation
	• Shuswap First Nation	• Tsleil-Waututh First Nation
	• St. Mary's First Nation	• Nisga'a First Nation*
	• Matsqui First Nation	
Yukon (11)	• Carcross Tagish First Nation*	• Selkirk First Nation*
	• Champagne and Aishihik First Nations*	• Ta'an Kwach'an Council*
	• First Nation of Nacho Nyak Dun*	• Teslin Tlingit Council*
	• Kluane First Nation*	• Tr'ondëk Hwech'in First Nation*
	• Kwanlin Dun First Nation*	• Vuntut Gwitchin First Nation*
	• Little Salmon/Carmacks First Nation*	
Northwest Territories (1)	• Tlicho First Nation*	
First Nations Sales Tax (FNST)		
PROVINCE/TERRITORY	**ABORIGINAL GOVERNMENT**	
British Columbia (8)	• Adams Lake First Nation	• Little Shuswap Indian Band
	• Chemainus First Nation	• Tla'amin First Nation
	• Cowichan First Nation	• Tzeachten First Nation
	• Tk'emlups te Secwepemc	• Westbank First Nation*
First Nations Personal Income Tax (FNPIT) Agreements		
PROVINCE/TERRITORY	**ABORIGINAL GOVERNMENT**	
Newfoundland And Labrador (1)	• Nunatsiavut Government (Labrador Inuit)*	
British Columbia (1)	• Nisga'a First Nation*	
Yukon (11)	• Carcross Tagish First Nation*	• Selkirk First Nation*
	• Champagne and Aishihik First Nations*	• Ta'an Kwach'an Council*
	• First Nation of Nacho Nyak Dun*	• Teslin Tlingit Council*
	• Kluane First Nation*	• Tr'ondëk Hwech'in First Nation*
	• Kwanlin Dun First Nation*	• Vuntut Gwitchin First Nation*
	• Little Salmon/Carmacks First Nation*	
Northwest Territories	• Tlicho Government	
Real Property Tax Under S.83 of the *Indian Act*		
PROVINCE/TERRITORY	**ABORIGINAL GOVERNMENT**	
Nova Scotia (1)	• Eskasoni Band	
Quebec (1)	• Innu Takuaikan Uashat Mak Mani Utenam	
Manitoba (2)	• Opaskwayak First Nation	• Pinaymootang First Nation
Saskatchewan (5)	• Carry The Kettle First Nation	• Ocean Man First Nation
	• Fishing Lake First Nation	• Sweetgrass First Nation
	• Muskowekwan First Nation	
Alberta (16)	• Alexander First Nation	• Mikisew Cree First Nation
	• Alexis First Nation	• O'chiese First Nation
	• Bigstone Cree First Nation	• Paul Indian Band

Table — BC First Nations' Laws/Bylaws in Force... *continued*

PROVINCE/TERRITORY	ABORIGINAL GOVERNMENT	
Alberta (16)... *continued*	• Dene Tha' First Nation	• Stoney Tribal Council
	• Enoch Cree First Nation	• Sturgeon Lake Indian Band
	• Fort McKay First Nation	• Sucker Creek First Nation
	• Fort McMurray First Nation	• Tsuu T'ina Nation
	• Loon River Cree Nation	• Whitefish Lake First Nation
British Columbia (33)	• Ashcroft Indian Band	• Scowlitz First Nation
	• Bonaparte Indian Band	• Siska Indian Band
	• Boothroyd Indian Band	• Skuppah Indian Band
	• Boston Bar First Nation	• Snuneymuxw First Nation
	• Burns Lake Indian Band	• Soda Creek Indian Band
	• Cook's Ferry Indian Band	• Spuzzum Indian Band
	• Fort Nelson Indian Band	• T'it'q'et First Nation
	• Haisla (Kitimaat) Nation	• Tl'azt'en Nation
	• Kanaka Bar Indian Band	• Ts'kw'aylaxw First Nation
	• Kitsumkalum First Nation	• Union Bar First Nation
	• Kwantlen First Nation	• Upper Similkameen Indian Band
	• Little Shuswap Indian Band	• West Moberly First Nation
	• Lower Similkameen Indian Band	• Westbank First Nation
	• Mcleod Lake Indian Band	• Williams Lake Indian Band
	• Musqueam Indian Band	• Yale First Nation
	• Nak'azdli Indian Band	• Yekooche First Nation
	• Nicomen Indian Band	
Real Property Tax under the *First Nations Fiscal Management Act* (FNFMA)		
PROVINCE/TERRITORY	**ABORIGINAL GOVERNMENT**	
Alberta (1)	• Siksika Nation	
British Columbia (55)	• Adams Lake Indian Band	• Shuswap First Nation
	• Aitchelitz First Nation	• Shxw'ow'hamel First Nation
	• Akisq'nuk First Nation	• Shxwha:Y First Nation
	• Chawathil First Nation	• Simpcw First Nation
	• Cheam	• Skawahlook First Nation
	• Coldwater Indian Band	• Skeetchestn Indian Band
	• Cowichan Tribes	• Skidegate First Nation
	• Gitsegukla First Nation	• Skowkale First Nation
	• Gitwangak First Nation	• Tla'amin First Naton
	• K'omoks First Nation	• Songhees First Nation
	• Kitselas First Nation	• Splatsin First Nation
	• Kwaw-Kwaw-Apilt First Nation	• Squamish Nation
	• Leq'a:Mel First Nation	• Squiala First Nation
	• Lheidli T'enneh	• St. Mary's First Nation
	• Lower Kootenay Indian Band	• Sts'ailes
	• Lower Nicola Indian Band	• Stz'uminus First Nation
	• Matsqui First Nation	• Tk'emlups Te Secwepemc
	• Metlakatla First Nation	• Tla-O-Qui-Aht First Nation
	• Moricetown First Nation	• Tobacco Plains Indian Band
	• Mount Currie	• Tsartlip First Nation
	• Nadleh Whut'en Band	• Tsawout First Nation

Table — BC First Nations' Laws/Bylaws in Force... *continued*

PROVINCE/TERRITORY	ABORIGINAL GOVERNMENT	
British Columbia (55)... *continued*	• Neskonlith Indian Band	• Tsleil Waututh Nation
	• Osoyoos Indian Band	• T'sou-Ke First Nation
	• Penticton Indian Band	• Tzeachten First Nation
	• Popkum First Nation	• We Wai Kai Nation
	• Seabird Island Band	• Wei Wai Kum Nation
	• Shackan First Nation	• Whispering Pines/Clinton Indian Band
New Brunswick (1)	• Metepenagiag Mi'kmaq Nation	
Nova Scotia (1)	• Millbrook Band	
Ontario (3)	• Chippewas Of Georgina Island First Nation (Telephone Tax)	• Nipissing First Nation (Telephone Tax)
	• Serpent River First Nation (Telephone Tax)	
Manitoba (1)	• Buffalo Point First Nation	
Saskatchewan (3)	• Muskeg Lake Cree Nation	• Whitecap Dakota First Nation
	• White Bear First Nation	

Aboriginal Governments levying provincial-type taxes		
PROVINCE/TERRITORY	**ABORIGINAL GOVERNMENT**	
BC (1) (Tobacco Tax)	• Cowichan Tribes	
Manitoba (1) (Tobacco Tax And Fuel Tax	• For Confidentiality Reasons, Manitoba Will Not Disclose Individual Taxation Agreements Between Manitoba And Manitoba First Nations	
Newfoundland And Labrador (1) (Personal Income Tax And HST Revenue Sharing)	• Nunatsiavut Government*	
Saskatchewan (5) (Liquor Consumption Tax)	• Whitecap Dakota First Nation	• Mosquito Grizzly Bear's Head Lean Man First Nation
	• Kahkewistahaw First Nation	• White Bear First Nation
	• Peter Ballentyine Cree Nation	
Yukon Territory (11) (Personal Income Tax)	• Carcross/Tagish First Nations*	• Selkirk First Nation*
	• Champagne And Aishihik First Nations*	• Ta'an Kwach'an Council*
	• First Nation Of Nacho Nyak Dun*	• Teslin Tlingit Council*
	• Kluane First Nation*	• Tr'ondek Hwech'in First Nation*
	• Kwanlin Dun First Nation*	• Vuntut Gwitchin First Nation*
	• Little Salmon/Carmacks First Nation*	

COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)		
CGA	**LAW NO.**	**DESCRIPTION**
Huu-ay-Aht First Nations		Real Property Tax Act — not in force
Ka:yu:'k't'h'/Chek'tles7et'h' First Nations		Real Property Tax Act — not in force
Nisga'a Nation	2008/06	Nisga'a Goods And Services Tax Act (June 11 2008)
Nisga'a Nation	2013-02	Nisga'a Personal Income Tax Act
Sechelt Indian Band (SIGD)	2006-03	Establish Parcel Taxes And Their Collection
Sechelt Indian Band (SIGD)	2006-05	Community Recreation Parcel Tax Imposition
Sechelt Indian Band (SIGD)	2009-03	Application Of BC Assessment Act
Sechelt Indian Band (SIGD)	2009-04	Property Taxation Bylaw
Sechelt Indian Band (SIGD)	2009-05	Community Parcel Tax Amendment
Sechelt Indian Band (SIGD)	2011-02	Annual Tax Rates
Toquaht Nation	18/2011	Real Property Tax Act
Tsawwassen First Nation		Property Taxation Act
Uchucklesaht Tribe	19/2011	Real Property Tax Act

Table — BC First Nations' Laws/Bylaws in Force... *continued*

CGA	LAW NO.	DESCRIPTION
Ucluelet	18/2011	Real Property Tax Act
Westbank First Nation	WESTBANK FIRST NATION EXPENDITURE BYLAW ANNUAL BUDGET 2013	Being A Bylaw To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation
Westbank First Nation	WASTBANK FIRST NATION PROPERTY TAXATION AMENDMENT BYLAW 09-TX-04	Being A Bylaw To Amend Certain Properties To The List Of Exempt Properties Offered By The First Nation
Westbank First Nation	TAXATION AND ASSESSMENT BYLAWS 1990-1	Westbank First Nation Taxation And Assessment Bylaws For Taxation For Local Purposes Of Land, Or Interests In Land, In The Reserve, Including Rights To Occupy, Possess Or Use Land In The Reserve
Westbank First Nation	WESTBANK FIRST NATION EXPENDITURE BYLAW ANNUAL BUDGET 2010	Being A Bylaw To Provide For The Expenditure Of Revenue Raised Through Real Property Taxation
Westbank First Nation	TAXATION EXPENDITURE BYLAW 1992-1	Westbank First Nation Expenditure Bylaw For The Appropriation And Expenditure Of Moneys Of The Band To Defray Band Expenses

Table — Tax Agreements

TAX AGREEMENTS
• *Huu-ay-aht First Nation Real Property Tax Co-ordination Agreement*, 1 April 2011. www2.gov.bc.ca/gov/DownloadAsset?assetId=196F3C923F7544B7BA2885BE75F781AC
• *Ka:yu:'k't'h'/Chek'tles7et'h' First Nations Real Property Tax Co-ordination Agreement*, 1 April 2011. www2.gov.bc.ca/gov/DownloadAsset?assetId=802C5C274CA44B8AB0C90F4DE760030E
• *Nisga'a Nation Taxation Agreement*, 11 May 2000. www.aadnc-aandc.gc.ca/eng/1100100031755/1100100031760
• *Nisga'a Nation Real Property Tax Co-ordination Agreement, 31 July 2014*. www2.gov.bc.ca/gov/DownloadAsset?assetId=E5121212D5AF472C87104274A7CDB755
• *Toquaht Nation Real Property Tax Co-ordination Agreement*, 1 April 2011. www2.gov.bc.ca/gov/DownloadAsset?assetId=EC606CF316074C8FA04C889786010F1C
• *Tsawwassen First Nation Tax Treatment Agreement*. www.tsawwassenfirstnation.com/pdfs/TFN-About/Treaty/TFN_Tax_Treatment_Agreement.PDF
• *Tsawwassen First Nation Real Property Tax Co-ordination Agreement*, 8 December 2006. http://www2.gov.bc.ca/gov/DownloadAsset?assetId=50ECE6DC65174E359FD95EF9BEA130EF&filename=final_side_tsawwassen_hreal_property_tax.pdf
• *Uchucklesaht Tribe Real Property Tax Co-ordination Agreement*, 1 April 2011. www2.gov.bc.ca/gov/DownloadAsset?assetId=C81F896E04564191AFE98598C3B01EEF
• *Ucluelet Nation Real Property Tax Co-ordination Agreement*, 1 April 2011. www2.gov.bc.ca/gov/DownloadAsset?assetId=C0C2DC47EA4E4E7E9DF7D398ABD3493A
• *Westbank First Nation First Nation Sales Tax Collection Agreement*, 25 August, 1999. www.fin.gc.ca/activty/firstnations/fnstaa-aatvpn/aa1999-B08.pdf
• Yukon First Nations Tax Agreements. www.eco.gov.yk.ca/landclaims/land_claims_agreements.html#taxsharing

RESOURCES

First Nations

First Nations Tax Commission (FNTC)

321 – 345 Chief Alex Thomas Way
Kamloops, BC V2H 1H1
Phone: 250-828-9857
Fax: 250-828-9858
Email: mail@fntc.ca
www.fntc.ca

Suite 202, 190 O'Connor Street
Ottawa, ON K2P 2R3
Phone: 613-789-5000
Fax : 613-789-5008

- Property Tax Toolkit.
  www.fntc.ca/index.php?option=com_content&view=frontpage&Itemid=1&lang=en
- *First Nations Real Property Taxation Guide* (2007).
  www.fntc.ca/dmdocuments/General/web_english_bw.pdf

First Nations Gazette

c/o First Nations Tax Commission
321 – 345 Chief Alex Thomas Way
Kamloops, BC V2H 1H1
Phone: 250-828-9857
Fax: 250-828-9858
Email: mail@fntc.ca
www.fng.ca

Suite 202, 190 O'Connor Street
Ottawa, ON K2P 2R3
Phone: 613-789-5000
Fax : 613-789-5008

Federal

Department of Finance Canada

Aboriginal Tax Policy Section
Phone: 613-992-3997
Fax: 613-947-1677
Email: FNGSTinfo@fin.gc.ca

- First Nations Goods and Services Tax — Information.
  www.fin.gc.ca/activty/firstnations/fnpam_-eng.asp
- First Nation Goods and Services Tax Administration Agreements.
  www.fin.gc.ca/activty/firstnations/aagoods_-eng.asp
- First Nation Personal Income Tax Administration Agreements.
  www.fin.gc.ca/activty/firstnations/aapers_-eng.asp
- First Nations Sales Tax Administration Agreements.
  www.fin.gc.ca/activty/firstnations/aasales_-eng.asp

Aboriginal Affairs and Northern Development Canada (AANDC)
10 Wellington, North Tower
Gatineau, Quebec
Postal Address:
Ottawa, ON K1A 0H4
Toll-free: 1-800-567-9604
Fax: 1-866-817-3977

- Fact Sheet — Taxation by Aboriginal Governments — February 2014.
  www.aadnc-aandc.gc.ca/eng/1100100016434/1100100016435

Canada Revenue Agency
www.cra-arc.gc.ca/brgnls/menu-eng.html

- *Indian Act* Exemption for Employment Income Guidelines.
  www.cra-arc.gc.ca/brgnls/ndns-eng.html
- RC4365 First Nations Goods and Services Tax (FNGST).
  www.cra-arc.gc.ca/E/pub/tg/rc4365/rc4365-e.html
- RC4072 First Nations Tax (FNT).
  www.cra-arc.gc.ca/E/pub/gp/rc4072/rc4072-e.html
- Forms and publications that Aboriginal peoples may need.
  www.cra-arc.gc.ca/formspubs/clntgrp/thrs/brgnls-eng.html
- B-039 — GST/HST Administrative Policy — Application of the GST/HST to Indians.
  www.cra-arc.gc.ca/E/pub/gm/b-039/b-039-e.html
- GI-127 — Documentary Evidence when Making Tax-Relieved Sales to Indians and Indian Bands over the Telephone, Internet and Other Electronic Means.
  www.cra-arc.gc.ca/E/pub/gi/gi-127/README.html
- NOTICE254 — Collecting First Nations Taxes in a Participating Province.
  www.cra-arc.gc.ca/E/pub/gi/notice254/notice254-e.html
- NOTICE264 — Sales Made to Indians and Documentary Evidence — Temporary Confirmation of Registration Document.
  www.cra-arc.gc.ca/E/pub/gi/notice264/README.html

Provincial

Government of British Columiba
Ministry of Finance
PO Box 9065 STN Prov Government
Victoria, BC V8W 9E2

- First Nations Self-Taxation.
  www.sbr.gov.bc.ca/business/Property_Taxes/FirstNations/about.htm

BC Assessment
Assessment Services for First Nations
Toll-free: 1-866-825-8322
Toll-free fax: 1-855-995-6209
https://evaluebc.bcassessment.ca/SSL/ContactUs.aspx

- Assessment Services for First Nations.
  www.bcassessment.ca/govt/Pages/Assessment-Services-for-First-Nations.aspx

SELECT LEGISLATION

Provincial

- *Treaty First Nation Taxation Act* (S.B.C. 2007, c. 38)
- *Indian Self Government Enabling Act* (R.S.B.C. 1996, c. 219)

Federal

- *Budget Implementation Act*, 2000 (S.C. 2000, c.14)
- *First Nations Fiscal Management Act* (S.C. 2005, c. 9)
- *First Nations Goods and Services Tax Act* (S.C. 2003, c. 15)
- *Income Tax Act*, [R.S.C. 1985, c. 1 (5th Supp.)]

COURT DECISIONS

- *Alexandre Dubé v. The Queen* (2011 SCC 39)].
- *Argol Recalma v. Her Majesty the Queen* (98 DTC 6238)(F.C.A.)
- *Estate of Rolland Bastien v. The Queen* (2011 SCC 38)
- *Southwind v. Canada* (98 DTC 6084)(F.C.A.)
- *Shilling v. Canada* (2006 FCA 254)]
- *Westbank v. BC Hydro and Power Authority*, [1999] 3 SCR 134

PART 1 /// SECTION 3.30

Traffic and Transportation

3.30

TRAFFIC AND TRANSPORTATION

3.30

TRAFFIC AND TRANSPORTATION

BACKGROUND

Jurisdiction over traffic and transportation is linked to public works, land management, and land and marine use planning. As with most other jurisdictions, it is also linked to taxation, administration of justice, and financial administration. The range of matters that may be considered under this head of power are quite broad and can include control of traffic on roads and waterways, airports, harbours, wharves and related public works. On-reserve, with the exception of some federal and provincial regulatory or licensing requirements (which may apply to airports, operation permits and inspections), this is an area where First Nations are exercising jurisdiction or would, in most cases, be expected do so in the future.

Canada prefers that traffic regulations and standards on lands controlled by First Nations parallel provincial rules, and that any change in these arrangements be negotiated with the Province.

In addition to what one would normally consider matters related to traffic and transportation are issues that, in the context of settling the land question in BC, can also be considered traffic and transportation related from the perspective of access. Specifically, this means "access to First Nations lands," as raised by BC and Canada in treaty negotiations and other comprehensive governance negotiations, and which will now ultimately need to be considered over Aboriginal title lands whether there has been a declaration of title or not. In these cases, "access" means allowing third parties with legal authority to enter reserves or settlement lands for legally authorized purposes. It also applies to transportation and other corridors through First Nation lands that are public and may or may not be included in the lands over which the Nation has jurisdiction or where there are certain conditions attached to the recognition of such lands being under First Nation control.

Roads and Waterways

It is important to understand the difference between the setting aside of transportation corridors as interests in land and the governance of their actual construction and use of these roads and waterways. That is, it is important to know: what the rules are for the actual establishment and registration of roads and waterways, which then become an aspect of lands and land management; and what the rules are for governing the construction, management, use (access) and maintenance of roads, waterways and related works (e.g., bridges, fences) — a matter linked to public works and taxation.

In BC, the *Highway Act* (R.S.B.C. 1996, c. 188) defines what constitutes a road and what the different types of roads are. In some cases, provincial roads crossing reserve land or right-of-ways have not been surveyed or properly acquired by BC. Consequently, there have been ongoing disputes between First Nations and the provincial ministry of highways and others about whether a road crossing the reserve is legally recognized (and, if it is, how wide it should be). In most cases, though, the publicly travelled roads and other corridors have been surveyed out of the reserve land base and are legally no longer part of the reserve (although still part of the Nation's traditional territory over which Aboriginal title and rights are asserted). In some cases, First Nations under the *Indian Act* have established their own roads, but have not necessarily identified them through survey or described them as such in a bylaw or law. As a result, without an adequate regulatory framework in place, it is sometimes unclear what is or is not a public right-of-way, with respect to either First Nations citizens or the general public.

In the absence of an established Canadian or First Nation bylaw or regulation under the *Indian Act* for reserve lands comparable with a provincial roads statute, roads on reserve lands are typically held or identified simply as land "lots" on surveys and plans of the reserve, with no special road designation. While there may be some common-law rights of egress and access, it is more desirable to define the rights of persons to use publicly travelled routes on reserve lands by properly demarcating roads under law, thereby providing certainty to those living or conducting business on-reserve or who may be acquiring interests in First Nation lands (whether citizens or others). If this is not done, there may be disputes over road use (involving citizens, the First Nation, other interest holders, and anyone requiring access to the reserve for lawful purposes).

The confusion as to what lands on-reserve are accessible by the public, including roads, or indeed by the citizens of a First Nation where a private interest in land has been granted to a citizen (e.g., a certificate of possession), is compounded by the rather opaque and ancient notions of trespass contained in the *Indian Act*. Under the *Indian Act*, the trespass rules essentially treat the reserves as private lands set aside for the use and benefit of the Indians for whom the lands were originally set apart. The trespass rules do not contemplate a First Nation government establishing land interests including the creation of roads and other right-of-ways through the exercise of law-making powers (e.g., creating statutory right-of-ways and easements, including roads). Rather, access to the reserve is limited, obtained through private contractual arrangements (e.g., leases, easements, permits) with third parties and where the federal government has, for the most part, assumed fiduciary responsibility to manage these arrangements. Therefore, in developing a legal code or other bylaws or laws with respect to creating transportation corridors, First Nations will want to consider carefully how they legally establish roads and other statutory right-of-ways and easements that run with the land at the same time they consider more fundamentally how laws respecting trespass will apply on their lands post-*Indian Act*.

On-reserve control of waterways can, like roads, also be an interesting issue. The approach that a First Nation takes will depend on whether the waterway is located within the reserve and is navigable, as these factors will influence whether there is a legal basis, separate from a claim of Aboriginal title, for exercising First Nation jurisdiction over the waterway.

Order-in-Council 1036/38 (British Columbia Order-in-Council 1036, July 29, 1938) is the legal instrument that transferred reserve lands from BC to Canada. In BC, it is important to note that under *Order-in-Council 1036/38*, the Province retains the power to resume up to 20 percent of a reserve's lands for "roads, canals, bridges, towing paths, or other works of public utility or convenience." Since 1938, the use of the resumptive power to claw back First Nations' reserve lands has been used 20–25 times, and less than five times since 1980. The Province contends that negotiated settlements are the preferred method of resolving conflicts over reserve lands. This instrument has not been repealed or deemed unconstitutional.

Control of Traffic

Control of traffic involves the power to regulate, control and enforce traffic rules (such as by issuing tickets). These powers are exercised by the Nation's governing body and left to administrative bodies to enforce (e.g., the police, bylaw officers, and the courts and other adjudicating bodies). Establishing harmonized traffic rules with surrounding jurisdictions often makes the most sense. Thus, it can be beneficial for a Nation to adopt or incorporate (by reference) the traffic regulations and standards pertaining generally within the province. A Nation that permitted driving on the opposite side of the road, for instance, would soon face safety problems.

Nations will also want to ensure they can enforce their traffic laws either in provincial court or through a body that can hear cases in an efficient manner. This may require making additional administrative

agreements with the BC provincial courts. In BC, local governments off-reserve are experimenting with new structures that allow for ticket enforcement outside the provincial courts, thus expediting the process and reducing court-related costs. First Nations may want to consider taking similar approaches.

Airports, Harbours, Wharves and Other Works

The construction and operation of harbours and airports is federally regulated (through permits and licences) by Transport Canada and the Canadian Transport Commission. Canada does not recognize First Nations' jurisdiction over standard-setting for the construction and operation of these facilities. Nevertheless, this should not stop Nations from exercising jurisdictional or administrative authority to establish, maintain or operate a harbour or airport once the relevant federal standards are met or addressed. In particular, the importance of regional and smaller airports across the country has been growing. Where First Nations are located in an area favourable for port development or airport construction, they may wish to consider their options for developing this infrastructure.

INDIAN ACT GOVERNANCE

Under section 73 of the *Indian Act*, Canada may make regulations for the control of the speed, operation and parking of vehicles on roads within a reserve. Under Canada's *Indian Reserve Traffic Regulations* (C.R.C., c. 959), provincial laws and regulations applicable to motor vehicles must be complied with on-reserve, unless they are inconsistent with the regulations.

First Nations may, under s.81 (1) (b) of the *Indian Act*, also make bylaws for the "regulation of traffic," and under s.81 (1) (f) for "the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works." As of October 2014, 42 BC First Nations have made bylaws under these sections, and a significant number of communities have traffic regulation bylaws.

SECTORAL GOVERNANCE INITIATIVES

There are no specific sectoral initiatives dealing with traffic or transportation. However, the *Framework Agreement on First Nation Land Management* (Framework Agreement) does provide broad land management powers that extend to creating interests on-reserve, including roads (Section 3.20 — Lands and Land Management). Assuming the road is within the reserve (i.e., not a provincial road), the Framework Agreement transfers jurisdiction over the actual roads themselves but not over the movement of traffic on the road. In other words, it deals with the first aspect of governance — that of establishing transportation corridors — as discussed above. Consequently, for First Nations under the Framework Agreement, the *Indian Reserve Traffic Regulations* continue to apply, as do the section 81 traffic bylaw-making powers. Any section 81 bylaws made by a First Nation with a land code remain in effect to the extent they are consistent with that land code.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All comprehensive governance arrangements address traffic and transportation, and provide for First Nation jurisdiction over traffic and transportation on First Nation land — both as an aspect of creating transportation corridors as an incident of land management powers and as an aspect of governing the movement of traffic on transportation corridors so designated. Each of these arrangements addresses how roads are designated, surveyed, recorded and governed thereafter.

With respect to the establishment of transportation corridors as a legal interest in land, it is interesting to note that Westbank First Nation has passed a road dedication law (*Westbank First Nation Road Dedication Law No. 2010-02*). Other Nations have included rules about road designation in their land acts and, where appropriate, have tied those rules to the provincial systems where the First Nation's land

management regime is linked to the provincial land registry system. With respect to the movement of traffic on designated roads, Westbank has exercised its law-making authority and enacted a traffic and parking control law (*Westbank First Nation Traffic and Parking Control Law No. 2005*–13), which is supported by a series of enforcement and ticketing laws (*Westbank Notice Enforcement Law No. 2008–02*).

Through the Sechelt Indian Government District, Sechelt has enacted traffic and transportation laws. [NOTE: See *A Law to Regulate Traffic and Use of Streets in the Sechelt Indian Government District* (1988–11); 1989–06 Placing and Maintaining Traffic Signs; 1989–08 Naming of Streets]. All of the First Nations have, for the most part, adopted provincial rules by reference, by replication or by default.

Outside BC, the *Cree Naskapi (of Quebec) Act* (S.C. 1984, c. 18), section 45 (1) (j), has a much broader description of the jurisdiction recognized over roads and transportation and includes "wharves, harbours, dry-docks and other landing places."

In the event of a conflict between a First Nation law and a law of another government, the rules vary depending on the agreement.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS	CONSULTATION REQUIREMENTS
Sechelt	Sechelt council has, to the extent that it is authorized by the Constitution of the band to do so, the power to make laws in relation to the construction, maintenance and management of roads and the regulation of traffic on Sechelt Lands. (s. 14(1)(m)) Sechelt Constitution Part III Division (1) s. 10, subjects the power to the adoption of pertinent BC equivalent regulations, standards and rights.	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)	No provisions.
Westbank	Westbank First Nation has jurisdiction in relation to the regulation and control of ground traffic and transportation, and the design, construction, management and maintenance of the ground transportation infrastructure on Westbank Lands. (Part XX, s. 208(a))	Westbank law prevails. (Part XX, s. 211)	No provisions.
Nisga'a	A Nisga'a Village Government may make laws with respect to the regulation of traffic and transportation on Nisga'a roads within its village, and on Nisga'a roads other than Nisga'a roads within Nisga'a villages, to the same extent as municipal governments have authority with respect to the regulation of traffic and transportation in municipalities in British Columbia. (Ch. 11, s. 72–73)	Federal or provincial law prevails. (Ch. 11, s. 74)	Upon request of the Nisga'a Nation or a Nisga'a village, British Columbia will consult with the Nisga'a Nation or that Nisga'a village with respect to regulation of traffic and transportation on the Nisga'a highway or a secondary provincial road that is adjacent to a settled area on Nisga'a Lands. (Ch. 7, s. 42)
Tsawwassen	Tsawwassen Government may make laws with respect to traffic, parking, transportation and highways on Tsawwassen Lands to the same extent as local governments have authority to make laws with respect to traffic, parking, transportation and highways in municipalities in British Columbia. (Ch. 16, s. 128)	Federal or provincial law prevails. (Ch. 16, s. 129)	On the request of Tsawwassen First Nation, British Columbia will Consult with Tsawwassen First Nation with respect to the regulation of traffic and transportation on a crown corridor that is adjacent to Tsawwassen Lands. (Ch. 7, s. 12)
Maa-nulth	Each Maa-nulth First Nation Government may make laws with respect to traffic, transportation, parking and highways on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation to the same extent as municipal governments have authority to make laws with respect to traffic, transportation, parking and highways in municipalities in British Columbia. (s. 13.29.1)	Federal or provincial law prevails. (s. 13.29.2)	No provisions.

Table — Comprehensive Governance Arrangements... ***continued***

	GENERAL JURISDICTION	CONFLICT OF LAWS	CONSULTATION REQUIREMENTS
Yale	Yale First Nation Government may make laws with respect to traffic, parking, transportation and highways on Yale First Nation Land to the same extent as municipal governments have authority to make laws with respect to traffic, parking, transportation and highways in municipalities in British Columbia. (s. 3.31.1)	Federal or provincial law prevails. (s. 3.31.2)	No provisions.
Tla'amin	The Tla'amin Nation may make laws with respect to traffic, transportation, parking and highways on Tla'amin Lands to the same extent as municipal governments in British Columbia. (Ch. 6, s. 1)	Federal or provincial law prevails. (Ch. 6, s. 2)	Before commencing any work referred to in Ch. 6, s. 3, British Columbia, a Public Utility or a Local Government will deliver to the Tla'amin Nation a written work plan describing the effect and extent of the proposed work on Tla'amin Lands. The Tla'amin Nation will, within 30 days of receipt of the work plan, notify British Columbia, the Public Utility or the Local Government, as the case may be, as to whether or not it approves the work plan, such approval not to be unreasonably withheld. (Ch. 6, s. 4)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(b) Regulation of Traffic			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Ahousaht	1995-1	TRAFFIC	Bylaw Respecting Traffic
Nisga'a Village Of Gingolx	7-88	TRAFFIC	Bylaw Respecting Traffic
Gitanyow	8	TRAFFIC	To Provide For The Regulation Of Traffic In The Kitwancool Reserve
Gitlaxt'aamiks	1-88	TRAFFIC	Bylaw Respecting Traffic
Gitsegukla	1-73	TRAFFIC	To Provide For The Regulation Of Traffic
Gitsegukla	90-2	TRAFFIC	Bylaw Respecting Traffic
Gwa'sala-Nakwaxda'xw	1994.05	TRAFFIC	Bylaw Respecting Traffic
Haisla Nation	6	TRAFFIC	Regulation Of Traffic And Placement And Maintenance Of Traffic Signs
Haisla Nation	Unnumbered	TRAFFIC, ANIMAL, NOISE, NUISANCE, FIREARMS, FIRE	Bylaw Respecting Traffic, Animal Control, Nuisance, Noise, Firearms, Fire Protection, Emergency Program, Smoke Alarms (General Provisions That Include All These Subjects) Amendments
Hartley Bay	12	TRAFFIC	Bylaw Respecting Traffic And Registration Of Bicycle
Heiltsuk	18	TRAFFIC	Bylaw respecting Traffic
Iskut	1-74	TRAFFIC	Regulation Of Traffic
Katzie	2004-1	TRAFFIC	Bylaw Respecting Traffic And Parking
Kispiox	1	TRAFFIC	Regulation Of Traffic
Kispiox	4	TRAFFIC	Regulation Of Traffic
Kwakiutl	Unnumbered	TRAFFIC	Bylaw Respecting Traffic (Amending bylaw No. 2-86)
Lax-Kw'alaams	1983-3	TRAFFIC	Bylaw Respecting Highway Traffic
Lax-Kw'alaams	5	TRAFFIC	To Provide For The Regulation Of Traffic In The Port Simpson Reserve No. 1
Lytton	1978-1	TRAFFIC	Bylaw To Regulate Use Of Recreational And Off-Highway Vehicles
Metlakatla	1997-03	TRAFFIC	Bylaw Respecting Traffic
Moricetown	2	TRAFFIC	Regulation Of Traffic
Mount Currie	1	TRAFFIC	Regulation Of Traffic

Table — BC First Nations' Laws/Bylaws in Force... *continued*

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Musqueam	3	TRAFFIC	To Provide For Regulation Of Traffic On The Musqueam Reserve No. 2 And 3
Musqueam	Unnumbered	TRAFFIC	Bylaw Respecting Traffic And Street
Nak'azdli	1987-02	TRAFFIC	Bylaw Respecting Traffic
Namgis First Nation	26	TRAFFIC	Bylaw Respecting Traffic
Nazko	3	TRAFFIC	To Provide For The Regulation Of Traffic. (Rather Than Registering This bylaw As No. 1, Privy Council Registered It As No. 3)
N'quatqua	1	TRAFFIC	Regulation Of Traffic
Nuxalk Nation	12	TRAFFIC	To Provide For Regulation Of Traffic In The Bella Coola Reserve
Nuxalk Nation	14	TRAFFIC	To Provide For The Regulation Of Traffic
Nuxalk Nation	8	TRAFFIC	To Provide For The Regulation Of Traffic On The Foot Suspension Bridge Across The Bella Coola River And Situated On The Bella Coola Reserve
Okanagan	4	TRAFFIC	To Provide For Recreational And Off-Highway Vehicles
Old Massett Village Council	6	TRAFFIC	Bylaw Respecting Traffic
Qualicum First Nation	1997-1	TRAFFIC	Bylaw Respecting Parking
Quatsino	1992.3	TRAFFIC	Bylaw Respecting Vehicle Traffic
Seton Lake	Unnumbered	TRAFFIC	Bylaw Respecting Traffic
Skwah	2013.4	REGULATION OF TRAFFIC	Bylaw Respecting The Regulation Of Traffic And Parking Being A Bylaw To Repeal And Replace Bylaw No. 89-01
Songhees First Nation	2001-09	TRAFFIC	Bylaw Respecting Traffic And Parking Control
Squamish	3	TRAFFIC	To Provide For The Control Of Traffic On Capilano Reserve No. 5
Tahltan	1-75	TRAFFIC	Regulation Of Traffic
T'it'q'et	1.73	TRAFFIC	To Provide For The Regulation Of Traffic
Tk'emlups te Secwepemc	N/A	TRAFFIC	Bylaw Respecting To Provide For The Regulation Of Traffic
Tl'azt'en Nation	99.05	TRAFFIC	Bylaw Respecting All Terrain Motor Vehicles
Tsleil-Waututh Nation	2006	TRAFFIC	Bylaw Respecting Street And Traffic
T'sou-Ke First Nation	02	TRAFFIC	Bylaw Respecting Traffic
West Moberly First Nations	2002-1	TRAFFIC	Bylaw Respecting Traffic, ATV, Snowmobiles
We Wai Kai (f. Cape Mudge)	34.72	TRAFFIC	To Provide For The Regulation Of Traffic
Xaxli'p	2	TRAFFIC	To Provide For Traffic Regulations Within The Boundaries Of The Reserve Lands To Regulate The Motor Vehicles Moving Therein
Yunesit'in	1979-1	TRAFFIC	Bylaw To Provide For The Regulation Of Traffic
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Huu-Ay-Aht	20/2011	Compliance Notice And Ticket Regulation	
Ka:'Yu:'K't'h'/Che:K'tles7et'h'	16/2011	Enforcement Act	
Sechelt (Shíshálh) First Nation	1988-11	SIGD Traffic And Use Of Streets Law	
Toquaht	16/2011	Enforcement Act	
Tsawwassen First Nation	026-2009	TFN Traffic And Parking Regulation	
Uchucklesaht	16/2011	Enforcement Act	
Ucluelet	16/2011	Enforcement Act	
Westbank First Nation	2005-13	WFN Traffic And Parking Control Law	
Westbank First Nation	2008-02	WFN Notice Enforcement Law	
Westbank First Nation	2010-02	WFN Road Dedication Law	

RESOURCES

Provincial

BC Ministry of Transportation and Infrastructure
PO Box 9850 STN PROV GOVT
Victoria, BC V8W 9T5
Phone: 250-387-3198
Fax: 250-356-7706
Email: tran.webmaster@gov.bc.ca

Federal

Transport Canada
330 Sparks Street
Ottawa, ON K1A 0N5
Phone: 613-990-2309
Toll-free: 1-866-995-9737
Teletype: 1-888-675-6863
Fax: 613-954-4731
Email: www.tc.gc.ca/eng/contact-us.htm#general

SELECT LEGISLATION

Provincial

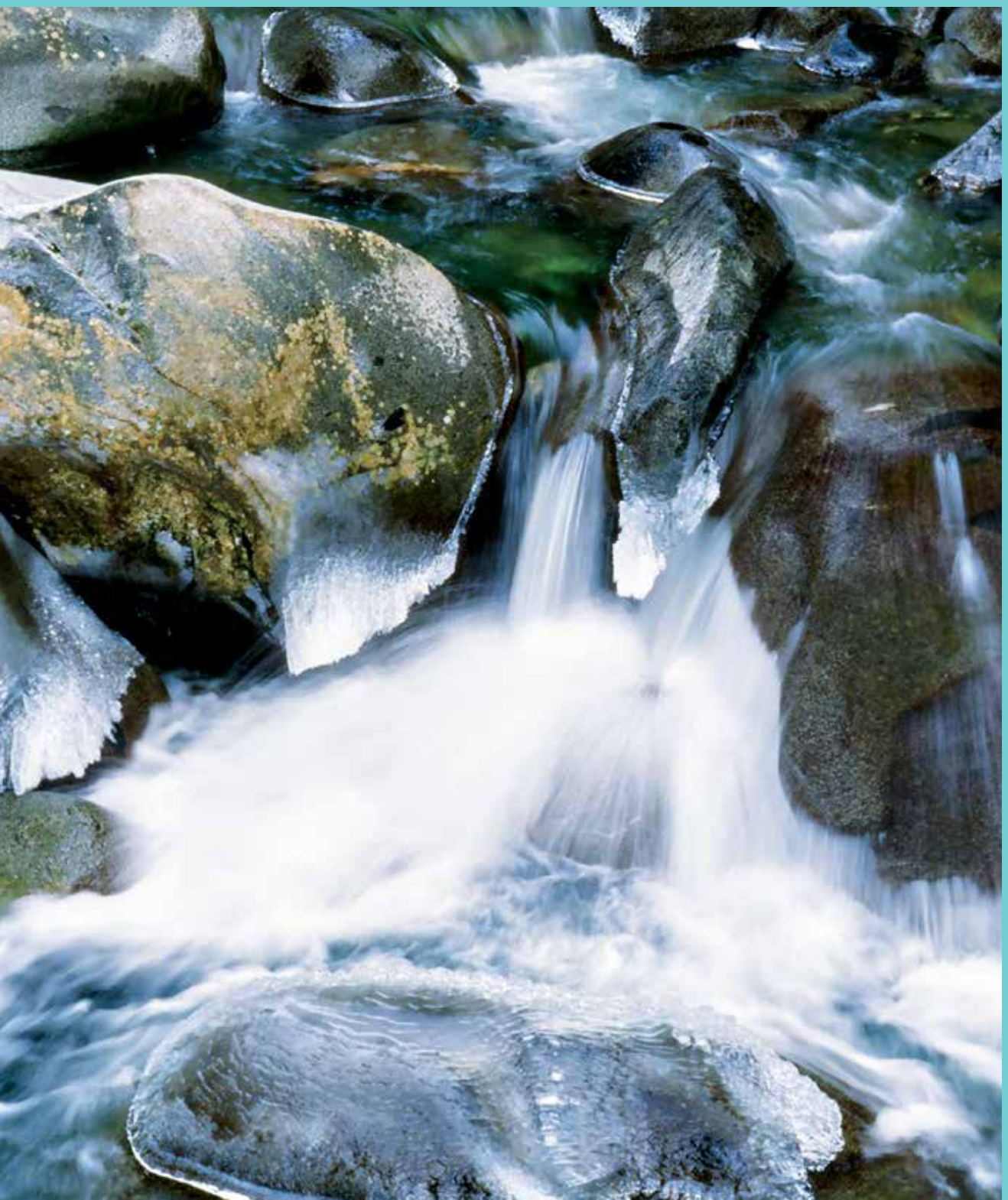
- *Highway Act* (R.S.B.C. 1996, c. 188)
- *BC Order in Council* 1036/38: www.bclaws.ca/civix/document/id/arch_oic/arc_oic/1036_1938

Federal

- *Indian Reserve Traffic Regulations* (C.R.C., c. 959)

PART 1 /// SECTION 3.31

Water



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WATER

3.31

WATER

BACKGROUND

Disputes over rights to water have been the reason for much conflict between and among Nation states, governments and individuals throughout world history. Those parts of BC where water is a scare resource and there are competing interests for its use are no exception. These interests include those of First Nations, who face similar water-related issues throughout Canada, not the least of which is access to clean drinking water.

"Of all the natural resources, water is perhaps the best suited to shared management because, even under western property law, no one can 'own' water. Instead, people and jurisdictions have specific rights of use."

Royal Commission on Aboriginal Peoples

Water rights can be based on land ownership or possession. For example, many common law jurisdictions, like Canada, recognize "riparian rights," which are protected by property law. Riparian rights are where the owner of the banks of the water source has a right to the "undiminished, unaltered flow" of the water. First Nations have customary water rights, informed by Indigenous legal traditions, and their own perspectives on access to water sources.

Rights to water through ownership and governance over water use by the different levels of government is an important subject matter that is considered when implementing Aboriginal title and rights and rebuilding First Nations governance. Water can be viewed from the perspective of either who has rights or title to water (i.e., who "owns" the access to the source and can license its use) or who has jurisdiction to govern its purveyance (i.e., to operate water systems — the collection, storage, treatment and distribution of water and ensure water quality "from source to tap").

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.

Article 32: UN Declaration

Water is a subject matter that crosses a number of areas of jurisdiction, including lands and land management, land and marine use planning, agriculture, public works, taxation, fish and fish habitat, minerals and precious metals, oil and gas, and the environment. Water consumption and quality is affected by a full range of land usage and economic development activities in First Nations communities and throughout their ancestral lands, such as agriculture, mining, oil and gas development, hydroelectric power generation and forestry. In the municipal context, a discussion of water management usually also includes a discussion of wastewater management. The primary focus of this chapter is on rights to fresh water and its governance for domestic use. For a discussion of some of the issues relating to marine use, see Section 3.19 — Land and Marine Use Planning; for issues relating to industrial uses, see Section 3.10 — Environment.

Today, with growing demand for water as a resource both for individual use and for economic development, all governments in Canada, including First Nations governments, face increased pressure to ensure that science, as well as community and traditional knowledge inform each level and area of water governance. In the last few years, this pressure has resulted in new and significant legislation over water, moving toward more comprehensive regulatory regimes both on- and off-reserve in BC. The provincial *Water Sustainability Act* (S.C. 2013, c. 21) and the federal *Safe Drinking Water for First Nations Act* (S.C. 2013, C. 21), discussed in this chapter, are key pieces of legislation under which regulatory development by other governments is moving ahead and are therefore important considerations for First Nations.

While dealing with water rights and related governance issues can appear complicated, it is helpful to approach the subject from two parallel perspectives. First, to understand the current arrangements that recognize and allow access to water for First Nations and review where any aspect of existing water management could affect governance arrangements that First Nations might be considering.

Second, to use this information to help sort through the governance arrangements over water that would meet First Nations' long-term needs. Looking at water this way, a First Nation may discover that access to water and the governance of water systems, and the associated costs, may have ramifications across many aspects of governance.

Division of Powers

In Canada, freshwater, water operations and water systems are generally the responsibility of provincial and territorial governments, with the exception of "Lands reserved for Indians." Under the *Constitution Act, 1867*, the provinces have control of the lands and resources, which includes water. The provinces have jurisdiction over "property and civil rights in the province" (s. 92(13)), ownership of natural resources (s. 92A), jurisdiction over municipalities (s. 92(8)) and the power over "generally all matters of a merely local or private nature in the province" (s. 92(16)). As such, provincial governments control rights to access water sources and are primarily responsible for regulating and protecting water quality, regulating drinking water systems and making water use and allocation decisions. As the underlying landowner, the provinces are entitled to allocate their waters for private uses by granting water rights to private parties through land grants, licences and leases.

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.

Article 25: UN Declaration

Over the years, the various jurisdictions within Canada have developed comprehensive regulatory regimes that govern the protection of source water; provisions for access to water for human consumption and agricultural and industrial use; water quality standards; and the governance of water works, including oversight of water treatment plants and water delivery services. Essentially, these regulatory functions fall into three main categories:

1. Rules respecting legal access to water
2. Standards for water quality for various kinds of use
3. Standards for water systems and associated waterworks of various kinds, including treatment plants, distribution and delivery services, and so on.

While jurisdiction over water concerns governance over access rights to water sources and water systems that take water from source to point of use, the rules that govern water management also concern maintaining water flows from each source, to ensure that the needs of fish and fish habitat and general environmental protection are also met. The federal Department of Fisheries and Oceans has been known to take out water licences on some streams and rivers in BC to ensure that there is sufficient water available to allow fish to spawn at times of low water.

In BC, there are currently a number of provincial statutes that include measures intended to protect water quality, water quantity and aquatic ecosystem health. The *Environmental Management Act* (S.B.C. 2003, c. 53) focuses on the protection of water quality through regulating industrial and municipal waste discharge, pollution, hazardous waste and contaminated site remediation. The *Drinking Water Protection Act* (S.B.C. 2001, c. 9) provides a legal framework for drinking water protection in the province. The *Forest and Range Practices Act* (S.B.C. 2002, c. 69) and its associated regulations include water quality provisions to protect water resources from the impacts of forest practices on Crown land. The *Water Sustainability Act* (S.B.C. 2014, c. 15) is the most recent legislation.

However, the most important concerns for First Nations are who has rights to the water and who has the right to determine access to that water for all the possible uses.

Rights and Access to Sources of Water

Aboriginal Title to Water and the Winters' Doctrine

For First Nations, access to water, or title to water, is considered an aspect of Aboriginal title. First Nations maintain that they have Aboriginal title to water, and therefore the right to use it and to govern its use. First Nations also argue that "Lands reserved for Indians" should include sufficient water rights to meet today's needs (including not just domestic use, but all uses). While there is case law that supports a strong argument for Aboriginal title and rights to water, to date there has been no decision of a Canadian court that has confirmed title to water or rights to water. A claim to title to water was made in the context of the Ahousaht fishing case, but the trial decision did not rule on this point and it was not addressed in the appeal (*Ahousaht Indian Band and Nation v. Canada (Attorney General)*, (2011) BCCA 237). More recently, in the *Tsilhqot'in* case, no declaration of Aboriginal title to water was sought by the Tsilhqot'in Nation at the Supreme Court of Canada. The small portion of the title area designated by the trial judge that was either privately owned or underwater lands was not included in the title claim, and consequently questions of ownership as well as governance over water were not addressed directly by the Supreme Court.

In the United States, there have been important court cases dealing with tribal water rights on reservations, including establishing what is referred to as the "Winters' Doctrine." In 1908, the U.S. Supreme Court found in *Winters v. United States*, 207 U.S. 564 (1908) that an Indian reservation (in this case, the Fort Belknap Indian Reservation in Montana) may reserve water for future use in an amount necessary to fulfill the purpose of the reservation, with a priority for that water dating from the treaty that established the reservation. The Winters' doctrine establishes that when the U.S. federal government created Indian reservations, water rights were reserved in sufficient quantity to meet the purposes for which the reservation was established. The principles of the Winters' Doctrine as they may apply to Indian reserves in Canada have not been considered by Canadian courts. But it is reasonable to assume that a "Winters'-type" doctrine should apply in Canada, and certainly in BC, to reserves where there is also an assumption of Aboriginal title and the associated water rights that title brings. Many First Nations are proceeding on this basis and accessing and governing water sources associated with their lands accordingly.

In BC, First Nations rights to access water whether with respect to Indian reserves or throughout ancestral lands must therefore be viewed as part of resolving the land question and as an aspect of reconciliation with the Crown based on recognition of unextinguished Aboriginal title. In preparing for reconciliation negotiations, First Nations should consider what water they need, both for today and into the future, and then ensure that sufficient water is and will be available by addressing the impacts of imposed federal and provincial legislative regimes within their territories. If this is not to be addressed in the courts, First Nations need clarity through negotiations on rights of access for both existing reserve lands and lands acquired through modern treaty-making or other reconciliation mechanisms, both confirming access to water sources and then its governance thereafter from source to tap. In BC, these negotiations are affected by the somewhat unique way in which water rights have been handled in the province.

British Columbia: A Unique History in Canada

BC is unusual in Canada because the law as it applied to the original Crown colony was different from the law in use in Canada at the time that BC joined Confederation. This is significant because the *British Columbia Terms of Union, 1871*, the agreement made between British Columbia and Canada, specified that where there was a conflict in law, the BC law would continue to apply. It is therefore necessary to know something about how the provincial law evolved and the implications for First Nations today.

During the first years of British administration under the Hudson's Bay Company in what would become BC, when land was granted to a person the law specified that the common law right to water was an appurtenance to the land — that is, water rights were part of the land grant. If a person owned the land, he or she owned the water (this is basically the same argument that First Nations use today with respect to reserves and Aboriginal title lands); water was not administered separately. When BC became a Crown Colony in 1858, it passed legislation that confirmed this arrangement.

However, this changed quickly, because conflicts immediately arose over access both to water and to minerals and precious metals. At the time, the primary impetus for exploring the BC Interior was to find gold, which required clear legal rights of use for both water and subsurface resources. This required oversight by the BC government, and very quickly the ownership of both rights to water and subsurface rights to minerals and precious metals were reserved for the Crown Colony by way of legislation. From that point on, Crown grants of land no longer included water or subsurface rights, and in 1865, under the *Crown Colony Land Ordinance* of that year, BC began to license water.

Most of the early water licences predate the formal establishment of Indian reserves. The provincial water licensing system is based on an "appropriation" model following the "first in time, first in right" principle, which means that the first registered interest has priority over all later registrations. First Nations were actually barred from applying for water licences until 1888, and in some areas in BC where water is scarce, that 20-year period left them far down the priority list from the legally recorded "first" user of the water. The provincial government did not recognize Aboriginal rights to fresh water then, nor has it done so since.

The whole provincial water management and licensing system was well established before British Columbia joined the Dominion of Canada in 1871. As part of the Terms of Union, in addition to the general issues with respect to First Nations lands discussed above, large tracts of land known as the Railway Belt and the Peace River Block were transferred to the federal government. Where Indian reserves were set aside from these lands, their original status as federal lands created some different rules over water and subsurface rights, which may also need to be considered (see below).

The difference between British Columbia's and Canada's management of both water and subsurface rights remains the basis of conflicts today, which in many cases need to be resolved either in court or through direct negotiations between First Nations and British Columbia and/or Canada, either as part of modern treaty-making or through other reconciliation mechanisms.

The Creation of Reserves and Water Rights

Following Confederation in 1867, the province and the Dominion of Canada established the Indian Reserve Commission in 1876 (originally known as the Joint Reserve Commission) to identify and reserve lands to be set aside for "Indians" and to facilitate the transfer of those lands to Canada. In setting apart lands for the reserves, the Reserve Commissioners were instructed to make it their practice to allot water with the lands. It is understood that this practice was unique to BC, and flowed from the federal concern that British Columbia's system of allocating water and subsurface minerals separately from Crown grants of land was in conflict with the legal view taken by Canada, namely, that those rights were an appurtenance to the lands (included in the land) and would be retained by First Nations. British Columbia has always disputed the authority of the Reserve Commissioners to allot water rights.

It appears that the commission in its early years recognized the original Aboriginal title to water in BC because the surveys of the lands to be set aside as reserves usually included an attached water record. However, with a change in Reserve Commissioners, and the identification of some initial conflicts between the provincial water recording protocols and those used by Canada, this practice

became less common. It is therefore important for each Nation to know what water rights, if any, are associated with their existing reserves.

At one point, a number of Indian reserve water records were registered with the Dominion Water Power Branch, a federal agency, rather than in the provincial water recording system. Although not all reserve allocations included water rights, as conflicts over water grew in importance, many efforts were made by chiefs and the federal government to ensure that reserve water was recorded provincially. The various local Indian Agents were directed to ensure that sufficient water rights were attached to each parcel of reserve land.

Notwithstanding issues with water records for Indian reserves, by 1909 water records in BC were a tangled mess on their own and the provincial government introduced its first *Water Act*. In 1909, after more than a century of conflicting systems for recording water, the government of BC established a Board of Investigation under the *Water Act* to review various water claims and to try to resolve issues of priority and access to water across the province. Not surprisingly, a very high percentage of the issues that were raised with the Board of Investigation involved Indian reserve lands for which Canada held a water record from the time of the establishment of the reserve, but which was not recorded properly in the provincial system.

Water continued to be an issue through the period of the McKenna McBride Royal Commission (established in 1912), which adjusted the size of Indian reserves. Many of the water record issues raised before 1900 were still not properly resolved by 1916, or even at the time lands to be reserved for Indians in BC were finally transferred from provincial to federal jurisdiction in 1930 and 1938. However, by then the water rights for most Indian reserves were registered in some form or other with the province, since that seemed to be the only way to ensure that water that belonged to the various parcels of reserve lands would not be given away to other users. One problem with the provincial registration system was the “use it or lose it” provisions. Over the years, when the volume listed on an early water licence was not in current use, the province had the authority to reduce the volume listed and transfer water rights to other applicants.

In some cases, the Indian Agents and First Nations clearly understood that unless there was a demonstrated use of water close to the volumes set out in the licence, the volume in the licence could be reduced, and if the water was not used and was lost this would be prejudicial to the First Nation. Some First Nations, either with the support of federal officials or not, have spent time and money to repair old works or have engaged in direct negotiations with government to meet the strict legal requirements of a licence to ensure its continuation. However, the province often simply used the provisions in the law to reduce a water licence volume to an Indian reserve, or to declare it abandoned when a competing user requested part of the water volume listed on the original Indian reserve water licence. In this way, many of the earlier efforts to record Indian water rights on-reserve water no longer protected the volume of water originally identified. As such, the volume needed in the future may not be available to that community except through negotiations or litigation.

In the 1970s, the provincial government decentralized water management to regional offices, which led to problems for some Indian reserves. Since the federal ministry responsible for Indian Affairs (today AANDC) held almost all of the water licences for Indian reserve, most local issues over water volumes and access to water with respect to those licences had to involve the AANDC office in Vancouver. This was not always realized or respected, and local First Nation water rights were changed or cancelled, often without the First Nation’s knowledge. This was a particular issue for the Railway Belt and Peace River Block, which were complicated by the original status of the land prior to the establishment of the Indian reserves. Lands which had originally been part of the Railway Belt or the Peace River Block continued to be federal lands, but the water rights for those parcels were registered in the provincial system; provincial officials appear to have rarely understood that the

Province might not have the power to cancel water rights associated with these specific reserves, since potentially the provincial *Water Act* did not apply. More generally, First Nations argue that the province had no right to alter or cancel any water rights associated with any reserve in the first place.

By the mid-1980s, as a result of court decisions and regardless of the fact that the *Indian Act* is silent on legal capacity, British Columbia began to recognize the legal status and capacity of First Nations to hold water licences in their own name and not simply have them held for them by the federal government. This policy meant that many new or replacement water licences were issued and then held in the name of the First Nation, and the federal government was removed from the water licences for those reserves. This was seen as a positive step, a move toward self-government. Interestingly, the Province's policy with regard to First Nations holding water licences in their own name is different from the province's policy not to recognize the legal capacity of a "band" to own real property (i.e., "fee-simple" off reserve).

More recently, provincial officials in the Ministry of Environment, Water Stewardship Division, undertook a major review of provincial water licences associated with Indian reserves, creating a written report for most Nations and engaging in discussions with Nations on adjustments or changes to the original water record, so that it better fits within the current provincial system. Some replacement water licences were issued at this time, recording changes to the provisions of the earlier water licences. Not all First Nations were willing to participate in this process, since for many the changes proposed by the Province only confirmed the limited water record in the provincial system, did not include the original date of priority, and did nothing to ensure that sufficient water would be available for current or future use on-reserve. Today, many reserves still do not have adequate water rights recorded, notwithstanding the compelling arguments for an Aboriginal title to water.

In those parts of BC where water is scarce, significant rights to water have now been granted to third parties from the available sources, and in some cases no more water licences are available — all the volume has been taken. In some cases, water has also been assigned in perpetuity under the *Industrial Development Act* (R.S.B.C. 1996, c. 220) — for example, the Rio Tinto Alcan Licence to a significant portion of available water in the Nechako River Basin. Any assertion of water rights by First Nations would have to address this on-the-ground reality. Nevertheless, where third-party water rights have been granted on top of those reasonably attributed to First Nations, and where those rights now impair a First Nation's access to a source (whether associated with reserve lands or not), these interests are subject to challenge. In some cases, the water actually being used by licence holders is much less than the volumes set out in the licence and the licence holders are simply meeting the strict legal requirements of the licence to ensure its continuation (e.g., fixing works and making improvements). This form of "water speculation" based on anticipated future demand has been common in BC in areas where water is a valuable commodity and in short supply. At some point, the requirements of other users, including First Nations, must be accommodated.

In some recent cases, where a Nation has requested a water licence for domestic purposes to supply an existing on-reserve population, the province has refused the application, citing an adjacent local government as a more appropriate source of domestic water. The BC *Water Act* has been significantly updated through the *Water Sustainability Act*, and the opportunity has thus been created for a new and strengthened regulatory framework. However, the majority of these regulations are as yet undeveloped and it is therefore unclear as to whether the underlying rules respecting access rights will remain essentially the same. Property in and the right to the use and flow of all water in the province is for all purposes vested in the provincial government, and the act still provides that private interests can be granted and licences issued or approvals given under the act in a system of priority. The current water licences, including copies of the original applications for a stream or body of water, both current and cancelled, are online and can be viewed easily through the Water Licences Query (http://a100.gov.bc.ca/pub/wtrwhse/water_licences.input).

What Each First Nation Can Do: Each BC First Nation will need to look at what water rights or licences, if any, are currently recorded for its existing reserve lands and determine whether this volume is sufficient to meet community needs for domestic use and economic activity. The same analysis should be part of the First Nation's assessment of the lands that may come under its jurisdiction, either as a result of additions to reserve or as part of settling land claims — namely, those lands within the Nation's Aboriginal title lands (whether yet declared or recognized in a reconciliation or other agreement) or within its ancestral lands that transcend the former. This analysis should include current needs as well as future needs, which may be harder to calculate. It should include domestic use, any agricultural use that the land could support, and any other economic use that could create a sustainable economy on a Nation's reserve lands, future treaty settlement lands or recognized Aboriginal title lands. Other considerations for First Nations include environmental needs, such as fish spawning and rearing habitats and water quality, and maintaining riparian species for use in medicines, for food and for cultural practices and ceremonies.

All sources of water (e.g., lake, river, aquifer) will need to be considered and an analysis undertaken to identify other users, including those potentially competing with the Nation for access to the same water source. This assessment of possible sources should include any local government or water district, as well as other users of the resource. Discussion of rights to water will necessarily involve the Province and adjacent water districts and/or local governments. It is vital to ensure that a Nation's water interests can be addressed. These discussions and/or negotiations will necessarily be part of any modern treaty or other reconciliation negotiations. In modern treaty negotiations, access to water is guaranteed through the creation of established "water reserves" for the First Nation, which it can draw from and regulate the distribution of water from the source to the end consumer.

Having considered issues of rights to and access to water sources, we now turn our attention to issues of how water systems are governed and water quality is maintained.

Governance of Water Systems and Safe Drinking Water

With respect to the distribution of water "from source to tap," either the federal government or provincial government sets the standards for legal entities that have the authority or responsibility to distribute and sell water (the purveyors of water). In BC, there are tight controls over who can own and operate water systems and distribute water to homes and businesses. For the most part, local governments undertake this work in accordance with provincial legislation and regulations. A water system includes all infrastructure associated with the collection, storage, treatment or distribution of drinking water and the rules and standards governing that system. In rural BC, water management and delivery is often through special-purpose local improvement districts, but for the most part water services are provided by regional districts and/or municipalities. In addition to any rules set out in the BC *Water Act* or other acts, local government water management powers and responsibilities are provided in the BC *Local Government Act* (R.S.B.C. 1996, c. 323) and the BC *Community Charter* (S.B.C. 2003, c. 26).

Some BC First Nations reserves receive domestic water services though agreements with local governments (water improvement districts, municipalities, regional districts). Water provided this way meets provincial drinking water standards, and the facilities that produce and distribute water are subject to provincial inspection and regulation. For other BC reserves, First Nations may run their own water systems, or residents simply draw from wells and other sources.

Water Governance On-Reserve

For First Nations that are not self-governing, the federal government is responsible for the supply, governance and distribution of water on-reserve, including water systems and water quality. To deliver water services, the federal government may deliver, in exceptional circumstances, water services directly; contract with a third party; or contract with a First Nation to provide the service. For the most part, BC First Nations are providing water services under contract (through funding agreements) with AANDC. They in turn either contract services from a provincially regulated provider or are responsible for the design, construction, operation and maintenance of the water systems. Today, and until the regulations under the *Safe Drinking Water for First Nations Act* (see below) are made, unless First Nations have enacted their own bylaw under section 81(1)(f) or (l) of the *Indian Act* or taken over management of water through comprehensive governance arrangements, their water systems are administered in accordance with federal policies and procedures for maintenance and operations. First Nations are responsible for ensuring that water systems on-reserve are operated by trained operators, who monitor drinking water quality and issue boil-water advisories. Many First Nations in BC have in fact made bylaws under the *Indian Act* to regulate some aspect of water management/ administration for their on-reserve water systems (see below).

Where First Nations are purchasing services from an adjacent water purveyor (e.g., an improvement/ water district or an adjacent local government), it is often because insufficient water rights are attached to the reserve (or other lands), or the cost of building a water system is too high. In such cases, the sensible option is for the water to be provided through a local service agreement, assuming terms can be reached.

To assist First Nations in running their water systems, AANDC provides funding for operator training courses and for operator certification testing and registration costs in all regions. Training helps ensure that operators have the level of training and skills required to operate and maintain water and wastewater systems. Responsibilities of the water operators include sampling and testing to continuously monitor drinking water quality and to take corrective action when required. Operators are also responsible for documenting maintenance and monitoring activities. In BC, AANDC regional staff worked with Thompson Rivers University to develop a First Nations–oriented four-year university program for training operators.

AANDC's Circuit Rider Training Program (CRTP), based on an international model, provides qualified experts who rotate through a circuit of First Nation communities, providing training and mentoring for on-reserve operators running First Nations systems. Circuit Rider trainers also help First Nations with minor issues related to the operation and maintenance of their systems.

While legislation respecting water and wastewater systems is well developed in the provinces and territories, the legal framework on First Nation lands is still being designed and developed and is very much a work in progress for most reserves. Because section 91(24) of the *Constitution Act, 1867* gives the federal government exclusive jurisdiction over "Indians, and lands reserved for the Indians," whether provincial regulatory water standards apply on-reserve is questionable (unless a First Nation is using water from a provincially regulated provider). It may be argued that jurisdiction over water standards falls under heads of power in relation to lands, environment or health. Until recently, with the passage of the federal *Safe Drinking Water for First Nations Act*, there was no legislation governing drinking water standards in First Nations communities outside of any bylaws that First Nations may have made under the *Indian Act* or laws under comprehensive governance arrangements.

In addition to First Nations governments, three federal departments have assumed responsibility with respect to water systems and associated water standards on-reserve: AANDC, Health Canada and Environment Canada. AANDC provides funding to First Nations for the provision of water services to communities, although typically only for citizens' domestic use and in public buildings (e.g., drinking water for band housing and community buildings and for fire protection). The funding includes some provision for capital construction, upgrading, and operating and maintenance costs. Waterworks, as with all assets of a First Nation governing under the *Indian Act*, are owned by Canada and are only administered by the First Nation. Where a Nation administers its water system with respect to its citizens and its public buildings, the First Nation pays 20 percent of the costs of doing so and Canada pays the balance. Arrangements with respect to commercial development vary, depending on the Nation's own revenues raised from fees and taxes. As a rule, Canada does not pay to support commercial developments.

For non-self-governing First Nations and those that have not assumed responsibility for administration under the terms of funding agreements, AANDC also oversees the design, construction and operations and maintenance of water facilities on-reserve. However, if the collection, storage facility or distribution system is being built to meet municipal standards, where it is part of a larger local government system, provincial standards will typically apply. Health Canada and Environment Canada also have responsibilities with respect to providing potable water on-reserve. Historically, Health Canada has been responsible for monitoring drinking water quality on reserves located south of the 60th parallel. This is done either directly or by contracting with First Nations. Environment Canada has also been responsible for protecting source water under its regulatory powers over wastewater discharge into federal waters or into water whose quality has become a matter of national concern. Environment Canada has also played a role where provincial water quality standards apply and the water used on-reserve comes through an agreement with a provincially regulated purveyor of water.

In BC, drinking water off-reserve must meet provincial standards, and testing is done through local health boards. Environment Canada uses slightly different criteria. Differences in provincial and federal standards for acceptable drinking water are periodically identified. In general, as long as the water meets one or the other of these government criteria, it is safe to drink. For its part, Health Canada has established a Protocol for Safe Drinking Water for First Nation Communities that sets out clear standards for the design, operation and maintenance of drinking water systems, and a *Procedure Manual for Safe Drinking Water in First Nations Communities* based on the *Guidelines for Canadian Drinking Water Quality* (GCDWQ).

Up until 2013, however, there was no legislative framework to ensure compliance with any such protocol or procedures (by AANDC, First Nations or other service providers). Recommendations from the Office of the Auditor General of Canada, the Standing Senate Committee on Aboriginal Peoples and others had called for enforceable standards. Partly as a response to this legislative gap, the federal government enacted the *Safe Drinking Water for First Nations Act* (S.C. 2013, c. 21), which came into force on November 1, 2013. This legislation is intended to establish a comprehensive framework to regulate drinking water and wastewater on-reserve. The act provides for the federal government to establish and then enforce through province-specific regulations legally binding safe drinking water standards on-reserve, presumably building on those standards that have already been established by Health Canada or may otherwise be established under provincial law. In order to understand the ongoing work and governance design issues that First Nations may have with respect to the implementation of the act, including the development of the regulations, it is useful to have some idea of the events that transpired leading up to its introduction.

The impetus for the legislation can be traced back to 2003, and indeed even earlier. In March 2003, in response to a national on-site assessment of water treatment plants, the federal government launched the First Nations Water Management Strategy to improve the quality and safety of drinking water on-reserve. The strategy, as well as its successor, the First Nations Water and Wastewater Action Plan (launched in April 2008 to coincide with the termination of the strategy), was intended to look at water quality on-reserve by using a more focused and comprehensive "multi-barrier" approach to ensuring high water quality from source to tap. This approach looks at all of the threats to water quality and ensures that there are "barriers" in place to either eliminate the threats or minimize their impact. It includes selecting the best available sources of water (e.g., lake, river, aquifer) and protecting them from contamination, using effective water treatment, and preventing water quality deterioration in the water system. The approach recognizes that while each barrier may not completely remove or prevent contamination, together the barriers work to provide greater assurance that the water will be safe to drink over the long term.

As part of the action plan to improve the quality of water in First Nations communities, the Minister of AANDC, in collaboration with the AFN, established an independent expert panel to advise First Nations on options for water quality regulation. The panel released its report in 2006, providing valuable background information and setting out options for regulatory control and reform. It remains an important resource for understanding Canada's recent legislation to regulate water systems and water quality on-reserve.

The First Nations Water and Wastewater Action Plan included several program enhancements, including a national engineering assessment of the state of existing water and wastewater facilities on-reserve; consultations on a new federal legislative framework for safe drinking water; and investments in a national Waste Water Program. In addition, in March 2006, the federal government announced a "plan of action" to address drinking water concerns in First Nations communities, including a commitment to report regularly to Parliament on progress. High-risk Nations were identified, only a handful of which were located in BC, and became a priority for resources. This work has been national in scope and is distinct from any discussions of self-government or other jurisdictional arrangements regarding water in the context of First Nations governance agreements in BC inside and outside of modern treaty-making. The legislative result of this water governance reform initiative and "plan of action" was the *Safe Drinking Water for First Nations Act*. This short piece of legislation and the contemplated large number of detailed regulations made under it is to apply to all First Nations that are not self-governing.

Recognizing that this water initiative is not intended to affect First Nation water and other associated rights, a somewhat unique "non-derogation" clause was included in the act. While the clause states that "nothing in the Act or the regulations is to be construed so as to abrogate or derogate from any existing Aboriginal or treaty rights," it goes on to qualify that statement when it adds "except to the extent necessary to ensure the safety of drinking water on First Nation lands." This is one of the few times, if not the only time, that the federal government has clearly set out in legislation to potentially justify an infringement of an Aboriginal right, as it is required to do under the "Sparrow Test" (see Section 3.12 — Fish, Fisheries and Fish Habitat). In this case, the legislative intention is clean water. This is somewhat ironic, as First Nations consider clean water as not only an Aboriginal right but also a basic human right. The legislation itself does not address solid waste.

The legislation allows for the development of a number of federal regulations in which the details of the governance arrangements are to be set out, and accordingly the scheme proposed is relatively flexible. The regulation-making powers are quite exhaustive and very detailed. In the event of a conflict, regulations made under the act will prevail over any laws or bylaws made by a First Nation under the *Indian Act* or the *First Nations Land Management Act* unless the regulations provide

otherwise. As such, for BC First Nations that are not self-governing but may have made laws or bylaws in this subject area and do not want the federal regulations to override their laws or bylaws when there is a conflict, it will be necessary to ensure that the regulations applicable to BC say this. Some of the key regulation-making powers are:

- the Governor in Council may make regulations in relation to providing safe drinking water on First Nation lands (lands subject to the *Indian Act* or the *First Nations Land Management Act* (2(2))
- on the recommendation of the AANDC Minister, regulations can be made governing the provision of drinking water and the disposal of waste water on First Nation lands, including regulations respecting (4(1))
    - the training and certification of operators of drinking water systems and waste water systems;
    - the protection of sources of drinking water from contamination;
    - the location, design, construction, modification, maintenance, operation and decommissioning of drinking water systems;
    - the distribution of drinking water by truck;
    - the location, design, construction, modification, maintenance, operation of decommissioning of waste water systems;
    - the collection and treatment of waste water;
    - the monitoring, sampling and testing of waste water and the reporting of test results; and
    - the handling, use and disposal of products of waste water treatment.
- on the recommendation of the Minister of Health, the Governor in Council may make regulations respecting the standards for the quality of drinking water on First Nations lands (4(2))
- on the recommendation of the AANDC Minister and the Minister of Health, the Governor in Council may make regulations respecting (4(3))
    - the monitoring, sampling and testing of drinking water on First Nations lands and the reporting of test results;
    - the making of remediation orders if standards established under subsection (2) have not been met; and
    - emergency measures in response to the contamination of drinking water on First Nation lands.

Regulations made under section 4 of the *Safe Drinking Water for First Nations Act* may incorporate, by reference, laws of a province and may be restricted within any province to the First Nations specified in the regulation or may exempt specified First Nations from their application. While the Minister of AANDC is responsible for the development of the regulations, the Minister of Health is also involved in recommending regulations. Further, the Minister of AANDC or the Minister of Health or both may enter into an agreement for the administration and enforcement of many of the regulations made under the act with any province, corporation or other body. For non-self-governing First Nations these regulations will be important, and First Nations are expected to be involved in their development on a regional basis.

In keeping with the federal government's approach, using provincial bodies or relying on provincial laws, standards and systems when designing post–*Indian Act* systems of governance over Indians and "Lands reserved for Indians," the *Safe Drinking Water for First Nations Act* contemplates using provincial water standards and regulatory systems. Since the provinces and territories have existing laws and regulations governing drinking water and wastewater systems, the federal government has proposed to review these regulations and identify areas that may be adapted as federal regulations. For the most part, this is to be achieved by incorporating "by reference" provincial legislation and regulations — perhaps an unusual practice but not unconstitutional. This will likely take many years to develop and bring into effect and will likely cost a significant amount of money.

Nevertheless, the federal government has maintained that the legislation will:

- provide First Nations communities with drinking water and wastewater standards comparable to provincial or territorial standards off-reserve
- provide more opportunities for First Nations communities and municipalities to work together in areas such as training and sharing systems
- establish a common base on which to evaluate the effectiveness of the operation, design and maintenance of water and wastewater systems, and
- allow for regional flexibility, as federal regulations could vary from province to province and territory to territory.

The regulations permit Canada to confer any legislative, administrative, judicial or other power on any person or body that the governor in council considers necessary to effectively regulate the undertakings, which could include the province or a provincial body, a corporation and, presumably, a First Nation, although specific recognition of First Nations jurisdiction is not provided for in the legislation. Interestingly, the act includes provisions that set one of the most comprehensive limits on liability for actions taken by the Minister or federal officials in carrying out their responsibilities under the act that we have seen in legislation respecting the governance over Indians. Ironically, these are the types of provisions that First Nations governments and their institutions also need but that are not typically included in legislation respecting First Nations governments when addressing matters of similar risk, either in federal or First Nation law. Limits on liability is an issue that First Nations certainly must consider and are doing so.

There is an underlying and tacit assumption in the act that First Nations will have some ongoing role in the management of water and wastewater systems on-reserve until such time as they have achieved recognized jurisdiction (assuming they want it) in accordance with self-government agreements or as determined by a court. One of the regulatory powers provides for the Minister to deem a First Nation to be the "owner" of a water and wastewater system based on "classes" of systems on-reserve (s. 5(1)(q). However there is no statutory right or guarantee as to the role of First Nation governments, and this will need to be addressed in the regulations.

The omission from the legislation of any recognition of First Nations jurisdiction and law-making powers is one of the main criticisms of this federal legislative initiative from First Nations. First Nations maintain that, building on the section 81 powers in the *Indian Act*, recognition of First Nations jurisdiction could have been provided for while maintaining assurances that basic health and safety standards would be met by requiring that First Nations jurisdiction over water standards meet or beat identified standards. This is the model in self-government agreements. Had this been included, this initiative could have been transformed into a sectoral governance initiative.

Another issue that First Nations have with the legislation is the incorporation by reference of provincial laws — first, whether this is appropriate and, if it is, whether it should not be the First Nation making that decision. Second, since incorporation by reference is to be done by regulation, there will be less scope for parliamentary oversight or public input. In addition to issues of law-making powers and referential incorporation of provincial laws and regulations, some BC First Nations have also said that actually improving water systems and water quality on-reserve requires self-governance in First Nations communities and that the act can only be implemented so far. Further, during the development of the *Safe Drinking Water for First Nations Act*, First Nations from across Canada expressed concerns that the introduction of water standards legislation, without matching investment in human capacity, could actually jeopardize First Nations' drinking water by increasing costs associated with monitoring, reporting and compliance and imposing financial penalties related to enforcement. Many believe that the responsibility for water quality under this act is being offloaded without the necessary governance structures and financial supports in place. However, despite these real concerns with regard to the

new act, First Nations in BC are looking to participate in regulatory development under the new federal legislation, and the federal government has committed in the preamble to the act to working with First Nations to develop federal regulations and standards, based on regional needs and priorities.

When the act came into force on November 1, 2013, Canada committed to developing the corresponding regulations with First Nations. Since that time, AANDC has determined that regulations will be developed through a staggered approach, region by region, with the order of the regions being determined as the process unfolds. To prepare for their engagement with First Nations on regulatory development under the act, Canada articulated 11 essential components of the *Safe Drinking Water for First Nations Act*:

- protecting sources of drinking water
- location, design, construction, modification, maintenance, operation, and decommissioning of drinking water and wastewater systems
- distribution of drinking water and collection of wastewater by truck
- training and certification of operators
- treatment standards
- monitoring, sampling, and testing
- collection, recording, and reporting of information
- handling, use and disposal of wastewater treatment products
- emergency measures in response to the contamination of drinking water
- mechanisms and verification of compliance with the regulations, and
- appeal mechanisms.

As the regulations are developed and the act is implemented, it will be necessary for each First Nation to assess the implications of the act for its current water services and distribution arrangements.

The Evolving British Columbia Water Legislation and Regulatory Regime

On May 29, 2014, the provincial *Water Sustainability Act* (WSA) received Royal Assent and is expected to come into force in April 2015. The WSA repeals most of the *Water Act* (R.S.B.C. 1996, c. 483) and enacts the WSA in substitution. As discussed above, the *Water Act* had come under increasing criticism for its failure to effectively address contemporary water management and governance challenges in BC. The existing *Water Act* will remain in force during transition to the WSA. Once the WSA comes into force, the Province intends to repeal the *Water Act*.

Like the federal *Safe Drinking Water for First Nations Act*, the WSA is essentially a framework for water governance and leaves many of the important details to be developed through new regulations. Because of the complexity of the WSA and the number of proposed regulations, the provincial government has signalled that it will take a phased approach to implementing the WSA, starting with priority areas such as groundwater, water fees, and rentals. The Province is now looking to develop the corresponding regulations to be utilized when the act comes into force in 2015. How this act and its regulations will affect both First Nations access to water sources and the possible regulation of water and wastewater systems on-reserve as a potential outcome of incorporation by reference of provincial laws under regulations made in accordance with the federal *Safe Drinking Water for First Nations Act* is yet to be seen.

According to the provincial government, the WSA modernizes the language of the *Water Act* and does the following:

- re-enacts the regulatory scheme for the diversion and use of stream water and applies that scheme to both stream water and groundwater

- authorizes the establishment of water objectives and requirements that water objectives be considered in decision-making under this and other enactments
- mandates the consideration of the environmental flow needs of a stream in licensing decisions
- moves to this Act provisions from the *Fish Protection Act* respecting sensitive streams, bank-to-bank dams and fish population protection orders as well as provisions respecting the protection of streams
- provides new powers to be applied when streams are at risk of falling or have fallen below their critical environmental flow thresholds to modify the existing precedence of water use for the purpose of protecting the aquatic ecosystem of streams and aquifers and essential domestic uses
- renames water management plans as water sustainability plans and provides new regulatory powers that can be exercised on the recommendation of a water sustainability plan, including regulations restricting the authority of approving officers, restricting the use of land or resources, reducing water rights, imposing requirements in respect of works and providing for dedicated agricultural water that can only be used for prescribed land and purposes
- authorizes an administrative monetary penalty scheme
- authorizes regulations providing powers and duties of officials under this Act to officials under other enactments
- repeals most of the *Water Act*, leaving only provisions related to water users' communities, and renames that Act as the *Water Users' Communities Act*
- makes consequential amendments to other Acts.

While the WSA puts forward broad changes to water management and governance in BC, it is conspicuously silent with respect to Aboriginal rights over water and does not recognize a right for First Nations either to a priority for water or to have a role in decision-making with respect to water. The WSA is essentially silent on the legal duty to consult and accommodate where Aboriginal title and rights may be affected. Accordingly, BC First Nations have expressed their concerns about the act to the Province and are hoping that some of these issues may be addressed in regulations. The lack of recognition of Aboriginal rights to water in the act is compounded by the Province's continued assertion in the act of "exclusive" Crown rights to water and jurisdiction over all freshwater resources in BC. Of note, however, is that the WSA does contain a specific provision regarding treaty First Nations water reservations (s. 40) — namely, a volume of water that is set aside and reserved for First Nations that have entered into a modern treaty.

Further, and notably, for the first time in BC, groundwater is included in the legislation. Leading up to the passage of the WSA, the Province has expressed its intention to regulate groundwater, and, accordingly, the Yale and Tla'amin agreements include provisions that assume that this would occur shortly. Since groundwater is often used as a source of water for lands reserved for Indians, planning should be underway to ensure that these provisions do not have a negative impact on existing or potential sources of water for reserves. This may occur as part of the modernization initiative.

Considering the Options

First Nations have a number of options with respect to securing access to water sources within their ancestral lands, including as part of negotiating comprehensive governance arrangements through modern treaty-making or through other reconciliation mechanisms that are developing. Other options include going to court to seek rights to water either in accordance with the principles of Aboriginal title within ancestral lands and riparian rights or along the lines of the Winters' doctrine for reserve lands. Alternatively, some First Nations have simply chosen to exercise their dominion over water by using the water source and taking their chances if challenged, being prepared to defend their actions.

Some First Nations have deemed this necessary if they cannot secure access to water through agreement and where there may some risk to them (e.g., a lack of water for fire protection)

With respect to the purveying of water and the governance of water systems, First Nations in BC have been looking to fill the regulatory gaps since well before the *Safe Drinking Water for First Nations Act*. Some First Nations have established special purpose local improvement water districts on-reserve under provincial jurisdiction, which remains an option. Approximately 20 percent of First Nations in BC are governing water systems to some extent using section 81 *Indian Act* bylaws. However, in moving beyond the *Indian Act*, each Nation will want to consider how it governs water and make laws in this area.

A number of BC First Nations receive their water services under local service agreements with a local government that operates under a provincially regulated system. The decision as to whether a First Nation receives water through a neighbour will depend on proximity to the water source and the cost-effectiveness of a First Nation running its own system. Where access to water services is required to support economic development, such arrangements may be beneficial to both the Nation and the adjacent jurisdiction. The terms of such service agreements can vary, depending on the relationship between the parties and whether the reserve is treated simply as another "private" water user or as a government.

Before building or considering changing or expanding a community's existing water system, it is important to have solid land use plans in place, setting out the uses of the land to be serviced and the infrastructure requirements. Based on solid plans and taking into consideration the existing sources of water and water systems (along with other specific variables, such as individual landholdings and current access routes, etc.), these plans could include seeking greater access to water volumes at source, expanding or replacing existing storage and distribution facilities, or purchasing water from an adjacent local government. Where citizens hold private interests in land (e.g., certificates of possession — see Section 3.20 — Lands and Land Management) and/or a First Nation permits individual water systems (i.e., where an individual can service a number of other properties in addition to their own from a water source they control), there may be other considerations in planning a water system and how individual water systems are regulated. All systems, private or not, are expected to follow certain standards for water quality and monitoring. In some jurisdictions, "private" water systems are not allowed; they are usually allowed in more urban settings.

First Nations often experience many of the same challenges as any small and/or rural community in Canada might face in building water systems and then ensuring the provision of safe drinking water through that system. Key issues to keep in mind relating to the provision of drinking water, whether on reserve land, treaty settlement lands or other First Nation–controlled lands, include access to source water; the high costs of equipping, constructing and maintaining facilities, often in remote locations; obsolete, inferior or deficient infrastructure; limited local capacity and ability to retain qualified or certified operators; and often, most critically, a lack of resources to properly fund the construction of water and wastewater systems and their operations and maintenance, including access to capital through long-term public debt financing. This lack of resources only compounds the impact of the other constraints.

While it is hoped that the *Safe Drinking Water for First Nations Act* might help to address some of the issues that First Nations face in building and operating water systems, many First Nations are skeptical. This is in part due to the lack of recognition in the act of any specific governance control of First Nations over water tied to comprehensive governance reform (i.e., what is the role of the governing body or other bodies — e.g., water boards — and how are representatives of those bodies chosen, who are they accountable to, what are their revenue-raising powers, etc.). Moreover, First Nations are skeptical because there are also serious concerns about the cost of meeting the standards and who will pay.

Many First Nations feel they will not be able to meet the standards even though they want to, simply because do not have the resources to do so. Further, the act does not contemplate the need for or establish any institutional support for First Nations (e.g., sub-regional, regional or national First Nation bodies that might assist First Nations in meeting the standards). Rather, the assumption appears to be that non-Aboriginal entities will provide this role, if at all. While it is too early to determine whether the new act will aid in resolving some of the long-standing issues with respect to clean drinking water on many reserves, perhaps the regulations combined with increased resources will provide some much-needed change in these cases.

Finally, some First Nations are securing access to water from streams and rivers to support economic development initiatives and specifically hydroelectric projects. Run-of-river power-generating projects are becoming more common in BC. First Nations in BC are getting involved in these and other alternative energy projects (wind and wave, etc.) within their ancestral lands, often through joint ventures and partnerships where the power generated is sold to the province in accordance with its clean energy programs. Some of the comprehensive governance arrangements under modern treaties preserve water volumes for hydroelectric purposes (these are set out in the tables, below).

In summary, the current period of legislative and regulatory change is placing additional pressures on First Nations governments and administrations as they are called upon by the federal and provincial governments to engage in new regulatory development. First Nations looking at how water services are to be provided on-reserve or other First Nations lands will need to reconsider the appropriate legal framework for access to water sources and governing water systems, including regulating water quality, in the face of these changes. A Nation may choose to run its own water system and may consider whether to incorporate the water system under the provincial structure or regulate its own system under a bylaw or law. The latter could consider the long-term governance of the water system and establish a structure through which the capital assets of the water system are owned, operated and maintained, and to establish and collect any charges and fees for water. The choice will, of course, have to take into consideration the current or future source of a Nation's water, as well as the source of its jurisdiction to regulate use and distribution.

INDIAN ACT GOVERNANCE

For the most part, water licences granted by BC are recorded to the specific reserve as a whole and are held in the name of Canada or the *Indian Act* "band" to which they were granted. With respect to ownership of water, it is not clear whether rights to water are associated with Certificates of Possession (private member interests) created in the reserve under the *Indian Act*. In BC, some citizens of a First Nation may have water licences provincially recorded in their own name and associated with their private interest in the reserve.

Under section 64 of the *Indian Act*, the Minster may use moneys of the band to build water works. The following sections of the *Indian Act* are not changed by the passage of the *Safe Drinking Water for First Nations Act*:

> 64 (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band;
>
> (b) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;
>
> (g) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;
>
> (k) for any other purpose that in the opinion of the Minister is for the benefit of the band.

While there is no specific regulatory power under section 73(1) of the *Indian Act*, the governor in council may make orders or regulations under section 73(3) to carry out the purposes and provisions of the *Indian Act*. No regulations have been made with respect to water under this regulation-making power and it is unlikely any ever will, given the *Safe Drinking Water for First Nations Act*.

With respect to First Nations management of water works and the distribution of water on-reserve, section 81 of the *Indian Act* provides powers to the council to make bylaws with respect to the use of water. This would allow a First Nation to regulate the local water systems on-reserve. However, this provision does not address the underlying ownership of water and is a power only with respect to the delivery of water, regardless of the source of or title to water. Further, these powers are now subject to the *Safe Drinking Water for First Nations Act*, and in the event of a conflict that act applies. Nevertheless, making bylaws that address aspects of management and administration of water systems, including the collection of fees and other matters of essential governance that are not addressed directly in the *Safe Drinking Water for First Nations Act*, make the passing of bylaws under section 81 an attractive option in light of that act:

> 81 (1) The council of a band may make bylaws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> (f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;
>
> (l) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

To date, 37 First Nations in BC have made bylaws under section 81 to regulate water management and water systems on-reserve.

SECTORAL GOVERNANCE INITIATIVES

Sectoral Initiatives On-Reserve

There have been no sectoral governance initiatives specifically addressing jurisdiction over water, and none are currently being led by First Nations. However, there are powers available to a First Nation under the *Framework Agreement on First Nation Land Management* (Framework Agreement) and the *First Nations Land Management Act* (FNLMA) with respect to the management of water. While the FNLMA does not specify water directly, it does refer to powers over resources in the lands. Essentially, a First Nation with a land code (see Section 3.20 — Lands and Land Management) can manage any interests in water that are associated with its reserve lands, including any provincial water licences that may apply.

Under the *First Nations Fiscal and Statistical Management Act*, there are also powers available relating to the raising of revenues for the provision of local services on reserve lands, including the construction and operation of waterworks. This includes the ability to raise property taxes and other local revenues, including development cost charges (see Section 3.11 — Financial Arrangements). It also includes access to the First Nations Finance Authority (FNFA) as a means to raise revenues in the bond market for the construction of capital works, including water systems and waste water systems. The ability to raise revenues to support water works is particularly important where First Nations need to provide services to third parties to support economic development initiatives.

Sectoral Initiatives within Ancestral Lands

As discussed elsewhere in this report, a number of First Nations have entered into Strategic Engagement Agreements (SEA) or other reconciliation agreements with British Columbia that include a commitment to consult and potentially accommodate Nations' interests with respect to a range of natural resources within their ancestral lands (see Section 1.3 — Sectoral Governance Initiatives). While final decision-making in all but one of these agreements remains with British Columbia (the only one that does not is the Haida, *Kunst'aa guu — Kunst'aayah Reconciliation Protocol*), they do provide for a degree of shared decision-making and planning that can typically include access to water. In accordance with their terms, the SEAs set out a shared decision-making framework. A shared decision-making matrix is a part of the framework and usually identifies four shared decision levels and a fifth strategic shared decisions level (a sample shared decision-making matrix is reproduced in Section 3.20 — Lands and Land Management). Essentially, the matrix scales decision-making with a corresponding description of the First Nation's involvement in the land and resource use decisions being made by the Province. The matrix will most often make specific reference to the involvement of the Aboriginal group with respect to "water," which at the strategic level includes consideration of "new water licences" and "Water Management Plans"

It should be noted that shared decision-making mechanisms in these agreements are still in the early days of being developed and tested for their efficiency and effectiveness. Accordingly, it would be premature to say what long-term benefits might come to First Nations as a result of these agreements, notwithstanding the ability of the First Nation to be involved in the provincial decision-making processes at various levels at this time.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

All comprehensive government arrangements address jurisdiction over water. Under the Westbank self-government arrangements, Westbank has jurisdiction to manage and regulate water use insofar as it has legal rights to access the water. This power is distinct from the jurisdiction that Westbank has under its agreement over the supply, treatment, conveyance, storage and distribution of water as part of its jurisdiction for public works. Westbank has exercised this jurisdiction and enacted laws in this regard.

The *Sechelt Indian Band Self-Government Act* does not have anything specific on water, although where water forms part of the land, presumably Sechelt has jurisdiction. There are also a number of heads of power in section 14, setting out Sechelt's legislative powers, that could be relied on to regulate the use of water and water systems.

The treaty agreements, with the exception of Tsawwassen, provide for a specific water reservation for the First Nation required by the treaty and recognized under provincial law. This addresses issues around the right to access water sources. The *Tsawwassen First Nation Final Agreement* makes provision for Tsawwassen to receive water from the Greater Vancouver Water District. The Nisga'a, Maa-nulth, Yale and Tla'amin agreements all provide that application may be made to BC for a water licence against a general water reservation found in the treaty. The Maa-nulth Agreement provides that the First Nations have jurisdiction with respect to consenting to applications for water licences and the supply and use of water from any water licence granted by the Province. All of the treaty First Nations can regulate the purveying of water on treaty settlement lands.

All of the treaty agreements, with the exception of Tsawwassen, also specifically address water reservations for hydroelectric generating purposes. The Maa-nulth, Tla'amin and Yale agreements all address the possibility of the Province regulating groundwater in the future. In the case of Yale, there is an express opportunity to participate in provincial water planning processes.

Table — Comprehensive Governance Arrangements

	OWNERSHIP AND ACCESS TO WATER	CONFLICT OF LAWS
Sechelt	The constitution may establish rules and procedures to be followed with respect to the disposition of rights and interests in Sechelt Lands and to provide for any other matters relating to the government of the Band, its members or Sechelt lands. (s. 10(1)(f) and (h))	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)
Westbank	Westbank has jurisdiction to manage and regulate water use on Westbank Lands to the extent that Westbank First Nation has rights over water as recognized by federal or provincial legislation or by operation of law. (Part XII, s. 136) Westbank may enter into agreements with Canada or other governments concerning waters adjacent to Westbank Lands or where an interest of Westbank First Nation is or may be affected. (Part IV, s. 25)	Westbank law prevails. (Part XII, s. 140)
Nisga'a	The Treaty is not intended to grant the Nisga'a Nation any property in water. (Ch. 3, s. 137) British Columbia has established a Nisga'a water reservation of 300,000 cubic decametres of water per year from the Nass River and other streams for domestic, industrial, and agricultural purposes. The Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation, or a Nisga'a citizen may, with the consent of the Nisga'a Nation, apply to BC for a water licence (not subject to any rentals, fees or other charges) for volumes of flow to be applied against the Nisga'a water reservation which will be considered in accordance with criteria set out in the Treaty. (Ch. 3, s. 122, 124 and 128) The Agreement does not preclude the Nisga'a from selling water in accordance with federal and provincial laws. (Ch. 3, s. 138) The Nisga'a may apply in accordance with provincial laws of general application for a water licence with respect to a stream wholly outside Nisga'a Lands. (Ch. 3, s. 139)	N/A
Tsawwassen	Tsawwassen may participate as a member of the Greater Vancouver Regional District, and may participate in the board of the Greater Vancouver Water District (GVWD). If the board of the GVWD and Tsawwassen fail to agree on the terms and conditions upon which Tsawwassen is added to the GVWD, Tsawwassen may appeal to the Province. The Minister has absolute power and authority to settle the terms and conditions upon which Tsawwassen is added to the GVWD. Tsawwassen can and has negotiated an agreement with the GVWD on the construction and capital costs for the infrastructure connection to the source of the water supply from the GVWD for the provision of water service to Tsawwassen Lands. The water services provided in accordance with the Final Agreement by the GVWD to Tsawwassen are to be on the same terms as apply with respect to providing such services to a member municipality of equivalent size, including equivalent terms with respect to costs, including costs of infrastructure. (Ch. 17, s. 1, 2, 24–27)	N/A
Maa-nulth	The Final Agreement does not alter federal law or provincial law with respect to property in water and storage, diversion, extraction or use of water and groundwater will be in accordance with federal and provincial law. (s. 8.1.1 and 8.1.3) A Maa-nulth First Nation may only sell water in accordance with federal law and provincial law that permit the sale of water. (s. 8.1.2) On the Effective Date, BC established a water reservation for domestic, industrial, and agricultural purposes, in favour of each Maa-nulth First Nation. (s. 8.2.1) A Maa-nulth First Nation, or a citizen with the consent of that Maa-nulth First Nation, may apply to BC for Water Licences (not subject to any rentals, fees or other charges) to be applied against that Maa-nulth First Nation's water reservation which will be considered in accordance with criteria set out in the Treaty. (s. 8.4.1–8.4.5) If BC enacts Laws regulating the volume of groundwater under Maa-nulth First Nation Lands and if groundwater is available, BC will negotiate and attempt to reach agreement with the applicable Maa-nulth First Nation on the volume of Groundwater which may be extracted and used for domestic, agricultural and industrial purposes. (s. 8.5.1)	N/A

Table — Comprehensive Governance Arrangements... ***continued***

	OWNERSHIP AND ACCESS TO WATER	CONFLICT OF LAWS
Yale	A water reservation is established by British Columbia in favour of Yale First Nation. The opportunity to participate in provincial water planning processes is provided to Yale First Nation. (s. 7.6.1–7.6.2) Yale First Nation Government may make laws with respect to: a. the consent of Yale First Nation under 9.3.4 (a) to applications for Water Licences to be applied against the Yale First Nation Water Reservation; and b. the supply and the use of water from a Water Licence issued to Yale First Nation. (s. 9.2.1) If Federal and Provincial Law permit the sale of water, Yale First Nation may sell water in accordance with Federal and Provincial Law. (s. 9.4.1) If BC brings into force laws regulating the volume of groundwater under Yale First Nation land and if groundwater can be extracted and used and is available, BC and Yale will negotiate and attempt to reach agreement on the volume of groundwater which may be extracted and used for domestic, agricultural and industrial purposes by Yale First Nation on Yale First Nation land. (s. 9.7.1)	Yale First Nation Law under 9.2.1(a) prevails. (s. 9.2.2) Federal or provincial law under 9.2.1(b) prevails. (s. 9.2.3)
Tla'amin	On the effective date, BC will establish a water reservation in favour of the Tla'amin Nation. (Ch. 7, s. 5) The Tla'amin Nation may only sell water in accordance with federal and provincial law that permit the sale of water. (Ch. 7, s. 1–2) The Tla'amin Nation may make laws in relation to: a. the consent of the Tla'amin Nation under paragraph 7; and b. the supply and use of water from a Water Licence issued under paragraph 9. (Ch. 7, s. 18) Storage, diversion, extraction or use of water and Groundwater will be in accordance with federal and provincial law.	Tla'amin Law under s. 18(a) prevails. (Ch. 7, s. 19) Federal or provincial law under s. 18(b) prevails. (Ch. 7, s. 20)

	MANAGEMENT OF WATER WORKS	CONFLICT OF LAWS	HYDROELECTRIC VOLUMES
Sechelt	While water works are not specifically addressed in the Act, the Council has, to the extent that it is authorized by the constitution, the power to make laws in relation to zoning and land use planning with respect to Sechelt lands; expropriation, for community purposes, of interests in Sechelt lands by the Band; the use, construction, maintenance, repair and demolition of buildings and structures on Sechelt lands; the administration and management of property belonging to the band; health services on Sechelt lands; the preservation and management of natural resources on Sechelt Lands; and matters related to the good government of the Band, its members or Sechelt Lands. (s. 14)	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)	No provision.
Westbank	Westbank First Nation has jurisdiction in relation to public works, community infrastructure and local services including works and services in relation to: (a) the collection, conveyance and treatment and disposal of sewage; (b) the supply, treatment, conveyance, storage and distribution of water. (Part XXI, s. 212)	Westbank law prevails. (Part XXI, s. 216)	No provision.

Table — Comprehensive Governance Arrangements… ***continued***

	MANAGEMENT OF WATER WORKS	CONFLICT OF LAWS	HYDROELECTRIC VOLUMES
Nisga'a	Subject to the Roads and Rights of Way Chapter, Nisga'a Lisims Government may make laws with respect to the design, construction, maintenance, repair, and demolition of buildings, structures, and public works (including water) on Nisga'a Lands. (Ch. 11, s. 69)	Federal or provincial law prevails. (Ch. 11, s. 71)	In addition to the water reservations BC has established a water reservation in favour of the Nisga'a Nation of the unrecorded water of streams (not including the Nass River) that are wholly or partially in Nisga'a Lands ("Nisga'a Hydro Power Reservation") to enable the Nisga'a Nation to investigate the suitability of those streams for hydro power purposes and any related storage purposes. If Nisga'a applies for a Water Licence for hydro power purposes BC will grant the Water Licence if the proposed hydro power project conforms to federal and provincial regulatory requirements. (Ch. 3, s. 140–144)
Tsawwassen	Tsawwassen Government may make laws with respect to public works and related services on Tsawwassen Lands. (Ch. 16, s. 126)	Federal or provincial law prevails. (Ch. 16, s. 127)	No provision.
Maa-nulth	Each Maa-nulth First Nation Government may make laws with respect to the consent to applications for Water Licences to be applied against the Maa-nulth water reservation and for the supply and use of water from a Water Licence. (s. 8.3.1)	Federal or provincial law prevails. (s. 8.3.2)	In addition to the water reservations, BC has established a water reservation of the unrecorded water of Streams specified in the agreement to enable each Maa-nulth First Nation to investigate the suitability of those Streams for hydro power purposes including related storage purposes. (s. 8.6.1) If a Maa-nulth First Nation applies for a Water Licence for hydro power purposes and any related storage purposes BC will grant the Water Licence if the proposed hydro power project conforms with federal law or provincial law and there is sufficient available flow in the stream. (s. 8.6.2)
Yale	Yale First Nation Government may make laws with respect to public works and related services on Yale First Nation Land. (s. 3.30.1)	Federal or provincial law prevails. (s. 3.30.2)	Yale will be provided with the opportunity to investigate the suitability of specific streams for hydro power purposes. (s. 7.2.5) In addition to the establishment of a Yale First Nation Water Reservation, on the Effective Date BC will establish water reservations under the *Water Act* in favour of Yale First Nation, for five years after the Effective Date to enable Yale First Nation to investigate the suitability of those streams for hydro power purposes, including related storage purposes. (s. 9.6.1) If Yale First Nation applies for a Water Licence for hydro power purposes and any related storage purposes, BC will grant the Water Licence if the proposed hydro power project conforms to Federal and Provincial Law and there is sufficient Available Flow in the Stream subject to that water reservation. (s. 9.6.7)
Tla'amin	The Tla'amin Nation may make laws in relation to public works and related services on Tla'amin Lands. (Ch. 15, s. 146)	Federal or provincial law prevails. (Ch.15, s. 147)	In addition to the Tla'amin Nation's water reservation under paragraph 5, on the Effective Date BC will establish a water reservation under the *Water Act* in favour of the Tla'amin Nation for 5 years to enable the Tla'amin Nation to investigate the suitability of those Streams for hydro power purposes, including related storage purposes. (Ch. 7, s. 25) Where the Tla'amin Nation applies for a Water Licence for hydro power purposes and any related storage purposes for a volume of flow to be applied against the water reservation under paragraph 25 and the proposed hydro power project conforms with federal and provincial law and there is sufficient Available Flow in the Stream that is subject to the water reservation, BC will grant the Water Licence. (Ch. 7, s. 26)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(l) Water supplies			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Adams Lake	2	WATER SUPPLIES	Construction And Maintenance Of A Waterworks System
Dzawada'enuxw First Nation	1	WATER SUPPLIES	To Provide For The Regulation Of The Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies
Gingolx (Nisga'a Village Of)	2-88	WATER SUPPLIES	Bylaw Respecting Regulation Of Wells
Gingolx (Nisga'a Village Of)	7	WATER SUPPLIES	Regulation Of The Use Of Public Wells, Cisterns, Etc.
Gitanmaax	2	WATER SUPPLIES	To Provide For Maintenance Of A Water Supply System Within The Reserve And The Provision Of A Tax
Gitanyow	7	WATER SUPPLIES	To Provide For The Regulation Of The Use Of Public Wells, Cisterns, Reservoirs, Etc.
Gitanyow	9	WATER SUPPLIES	To Provide For Maintenance Of A Water System Within The Kitwancool Reserve And The Provision Of A Tax
Gitga'at First Nation	8	WATER SUPPLIES	To Provide For The Maintenance Of A Water System With The Kulkayu Res. 4a And The Provision Of A Tax
Gitxaala Nation	1	WATER SUPPLIES	Regulation Of Use Of Public Wells, Cisterns Etc.
Gitxaala Nation	8	WATER SUPPLIES	Regulations For The Control And Management Of The Kitkatla Electric Power System
Iskut	4-74	WATER SUPPLIES	To Provide For The Regulation Of The Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies
Kispiox	11	WATER SUPPLIES	To Provide For The Maintenance Of A Water System Within The Kispiox Reserve And The Provision Of A Tax
K'omoks First Nation	1	WATER SUPPLIES	To Provide For The Regulation Of The Use Of Public Wells, Cisterns, Reservoirs Or Other Water Supplies Within The Comox Reserve
Kwakiutl	1	WATER SUPPLIES	To Provide For The Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies On The Kwawkewlth Reserve
Kwakiutl	2-86	WATER SUPPLIES	Bylaw Regarding Control Of Vehicular Traffic
Lax-Kw'alaams	1	WATER SUPPLIES	To Provide For Regulation Of The Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies
Lax-Kw'alaams	8	WATER SUPPLIES	To Provide For Maintenance Of A Water System Within The Reserve And The Provision Of Tax
Lower Nicola	1	WATER SUPPLIES	Governing The Use And Users Of The Band's Domestic Water Systems
Lytton	2	WATER SUPPLIES	For Regulations Of Domestic Water Supplies On The Klickkum-cheen Reserve No. 18 And The Nuuautin Reserves 2a And 2b.
Malahat First Nation	1	WATER SUPPLIES	Bylaw To Permit The Development And Use Of Lands Within The Foreshore Area Of The Malahat Reserve No. 11
Mamalilikulla-Qwe'qwa'sot'em	1	WATER SUPPLIES	To Provide For The Regulation Of The Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies And For The Assessment Of Dues For The Use Of Water From The Mamalillikulla Water System
Nak'azdli	1	WATER SUPPLIES	To Provide For The Construction And Maintenance Of A Waterworks System
Namgis First Nation	1	WATER SUPPLIES	To Provide For The Regulation Of The Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies On The Nimpish Reserve
New Aiyansh (Nisga'a Village Of)	1	WATER SUPPLIES	Regulation Of The Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies
Nanoose First Nation	1	WATER SUPPLIES	To Provide For Maintenance Of A Water System Within The Nanoose Indian Res. And The Provision Of A Tax
Nuxalk Nation	1987-1	WATER SUPPLIES	Bylaw For Waterworks System
Nuxalk Nation	2	WATER SUPPLIES	To Provide For The Regulation Of The Use Of Public Wells, Cisterns, And Reservoirs

Table — BC First Nations' Laws/Bylaws in Force... ***continued***

FIRST NATION	BYLAW NO.	BYLAW TITLE	DESCRIPTION
Okanagan		WATER SUPPLIES	Bylaw Respecting Construction, Maintenance And Regulation Of Waterworks System
Okanagan		WATER SUPPLIES	Bylaw Respecting Construction, Maintenance And Regulation Of Sewer Systems
Penelakut	2	WATER SUPPLIES	Bylaw Respecting The Zoning And Land Use Regulation
Penticton	1	WATER SUPPLIES	To Provide Funds For Maintaining The Band-Owned Domestic Water System
Quatsino	1	WATER SUPPLIES	To Provide For Regulation Of The Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies On The Quatsino Reserve
Skidegate	4	WATER SUPPLIES	Construction And Maintenance Of The Waterworks System
Snuneymuxw First Nation	1	WATER SUPPLIES	To Provide For The Construction, Maintenance And The Raising And Expenditure Of Money For The Support Of The Nanaimo Town Indian Res. No. 1 Waterworks System
Tahltan	4-75	WATER SUPPLIES	Regulation Of The Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies
T'it'q'et	2.73	WATER SUPPLIES	To Provide For The Construction And Maintenance, And The Raising And Expenditure Of Money For The Support Of The Lillooet Reserve Waterworks System
T'kemlups te Secwepemc	00-49-2000	WATER SUPPLIES	Bylaw Respecting Water Rates And Regulations
T'kemlups te Secwepemc	1995-004	WATER SUPPLIES	Bylaw Respecting Water Supplies
T'kemlups te Secwepemc	1995-04	WATER SUPPLIES	Bylaw Respecting Industrial Park — Water Works
T'kemlups te Secwepemc	2004-03	WATER SUPPLIES	Bylaw Respecting Water Rates And Regulations
Tlowitsis Tribe	1	WATER SUPPLIES	To Provide For The Regulation Of Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies
Tlowitsis Tribe	4	WATER SUPPLIES	To Provide For The Erection And Control Of Toilets And Privies
Tsartlip	1	WATER SUPPLIES	To Provide For Maintenance Of A Water System Within The South Saanich Res. No. 1 And The Provision Of A Tax
Tsawout First Nation	2006-2	WATER SUPPLIES	bylaw Respecting The Operation And Use Of Waterworks For The Tsawout First Nation
Tsleil-Waututh Nation	UNNUM-BERED	WATER SUPPLIES	bylaw Respecting Waterworks
Westbank First Nation	2	WATER SUPPLIES	To Provide For The Erection And Control Of Toilets Or Prives On The Westbank Reserve No. 9
Westbank First Nation	3	WATER SUPPLIES	To Provide For The Regulation Of The Use Of Public Wells, Cisterns, Etc.
We Wai Kai (f. Cape Mudge)	1	WATER SUPPLIES	To Provide For The Regulation Of The Use Of Public Wells, Cisterns, Reservoirs And Other Water Supplies On The Cape Mudge Reserve
We Wai Kai (f. Cape Mudge)	8	WATER SUPPLIES	To Provide For Construction And Maintenance And The Raising And Expenditure Of Money For Support Of Reserve Waterworks System
Wei Wai Kum (f. Campbell River)	1	WATER SUPPLIES	To Provide For The Regulation Of The Use Of Public Wells, Cisterns, Reservoirs Or Other Water Supply With The Campbell River Reserve
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Sechelt Indian Band (SIGD)	1989-03	Water System — Authorization To Charge Water Rates	
Tsawwassen First Nation	048-2009	TFN Local Water Works Regulation	
Tsawwassen First Nation	065/2013	Reclaimed Water Reuse Regulation	
Tsawwassen First Nation	029/2012	Water Shortage Response Plan Regulation	
Westbank First Nation	2005-16	WFN Waterworks Law	

RESOURCES

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www.gov.bc.ca/env/contacts.html
www.livingwatersmart.ca

- BC Water Licences Query Online Tool:
  http://a100.gov.bc.ca/pub/wtrwhse/water_licences.input

BC Water and Waste Association (BCWWA)
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Federal

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Toll-free: 1-866-225-0709
Fax: 613-941-5366
Email: info@hc-sc.gc.ca

- *Procedure Manual for Safe Drinking Water in First Nations Communities*, 2007.
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  www.hc-sc.gc.ca/ewh-semt/pubs/water-eau/2012-sum_guide-res_recom/index-eng.php

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- *Protocol for Safe Drinking Water for First Nation Communities*, 21 March 2006. www.aadnc-aandc.gc.ca/eng/1100100034913/1100100034920
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LINKS AND RESOURCES

- *Order of Her Majesty in Council admitting British Columbia into the Union,* (16 May 1871). www.ubcic.bc.ca/files/html/McKennaMcBride/bctu.html
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SELECT LEGISLATION

Provincial

- *Community Charter* (S.B.C. 2003, c. 26)
- *Local Government Act* (R.S.B.C. 1996, c.323)
- *Water Act* (R.S.B.C. 1996, c. 483)
- *Water Sustainability Act* (S.B.C. 2014, c. 15)

Federal

- *Safe Drinking Water for First Nations Act* (S.C. 2013, c. 21)

PART 1 /// SECTION 3.32

Wildlife

3.32

WILDLIFE

3.32

WILDLIFE

BACKGROUND

British Columbia is home to more than 1138 species of vertebrates, including 488 bird species, 142 mammal species, 18 reptile species, 22 amphibian species, 83 freshwater fish species and 368 saltwater fish species. A significant proportion of First Nations people are active hunters, trappers and/or fishers. These activities have always been and remain an important part of the domestic economy for most communities and an important aspect of the Indigenous way of life — indeed, much more so than for most other Canadians. Many First Nations citizens rely on the foods they procure for themselves and their extended families both for their sustenance and for other purposes. As such, the continued availability, access and use of "wildlife" is an important food security concern for First Nations in BC. Moreover, socially, the creation stories, myths, legends and Indigenous legal and political systems are often intrinsically tied to the natural world, including through connections with particular species of animals or types of animal (e.g., the names of clans and the roles of chiefs), the human world and the animal world being one.

Food Security

The World Food Summit (1996) defined food security as existing "when all people at all times have access to sufficient, safe, nutritious good to maintain a healthy and active life". Commonly, the concept of food security is defined as including both physical and economic access to food that meets people's dietary needs as well as their food preferences.

Food security is built on three pillars:
1. Food availability: sufficient quantities of food available on a consistent basis;
2. Food access: having sufficient resources to obtain appropriate foods for a nutritious diet; and
3. Food use: appropriate use based on knowledge of basic nutrition and care, as well as adequate water and sanitation.

As recognized and fundamental Aboriginal rights, the right to hunt, trap and fish are all now well established in Canadian law and are protected under section 35 of the *Constitution Act, 1982* (*R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Sappier*; *R. v. Gray*, [2006] 2 S.C.R. 686; *R. v. Morris*, [2006] 2 S.C.R. 915, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44). Court decisions have confirmed that Aboriginal peoples have the constitutionally protected right to hunt and fish for "food, social and ceremonial purposes" and that this right takes priority over non-Aboriginal uses of wildlife resources. In fact, not surprisingly, most of the earliest cases confirming Aboriginal rights had to do with these activities, which are obviously so integral to the distinctive culture of Aboriginal peoples.

Jurisdictional issues that may be considered under this subject matter include the management and conservation of wildlife and wildlife habitat, including migratory birds and animals; trapping; parks; and fish. Migratory animals include species such as moose, sheep and caribou. Fish are addressed in Section 3.12 — Fish, Fisheries and Fish Habitat. This subject matter is also linked to the following jurisdictions: environment; lands and land management; land and marine planning; water; forests; heritage and culture; Aboriginal healers and traditional medicine; and public order, safety and security. Wildlife issues also include economic development, such as outfitting, harvesting of natural resources as well as research and compensation.

Indigenous Wildlife Management Systems

Historically, Indigenous groups regulated their own hunters, fishers and trappers and had rules regarding others who came into their territories. While Indigenous legal traditions respecting land tenure may typically have conceived of land not as "property" that can be "owned" — but as inherited or borrowed from future generations — the systems did provide for the regulation of an individual right to hunt and fish, including what, where and how much an individual could hunt or fish and what happened to the meat or catch. In some cases, there was specific ownership of certain fishing sites or access to a particular hunting area. The very survival of a group depended on this type of resource management. Typically, with permission to do so, individuals from surrounding tribes could hunt and fish in another tribe's territory. In some cases, Nations that shared areas entered into "treaties" and other agreements to regulate the joint use of a shared resource (e.g., the Okanagan and Shuswap salmon treaty). For some cultures, particularly in the Interior of BC, the meat from a hunt was distributed equally among the citizens, with chosen

individuals being responsible for distributing it to the family groupings. Families often managed fishing sites and hunting areas, this responsibility typically being passed down through lineage or appointed chiefs. It was also not uncommon for tribes to organize seasonal burning and thinning as a method of management. This work, normally undertaken by women, helped to ensure productivity and accessibility of plant foods and medicines, but also promoted biodiversity and improved food sources for wildlife species that had diets similar to those of humans (e.g., bears).

Today, First Nations continue to manage access to wildlife and wildlife habitat based on Indigenous legal traditions, while also taking into consideration how other governments seek to manage and regulate the resource. Although the courts have clearly established the individual Aboriginal right to hunt, they have been less clear about a Nation's collective right to regulate individual hunting rights, as Indigenous groups did historically. Presumably, though, if there is an individual right to hunt, there must also be an inherent right to govern wildlife as logically they go hand-in hand: you cannot have one without the other. Further, there are questions respecting the right of Aboriginal peoples to trade, barter or sell wild meats or other animal parts. Regardless of how these matters may be resolved in court, First Nations continue, with varying degrees of effectiveness, to regulate individual hunters from their Nations or visitors to their ancestral lands and to support legitimate and controlled trade and commerce in wild animal meats and parts. There is still a strong and well-respected convention today that First Nation hunters seek permission when they wish to hunt in another Nation's territory. Usually, in the absence of any other system, they will go to the local band office to tell someone that they want to hunt. In some cases, First Nations may have adopted policies and will issue permits.

Imposition of External Wildlife Management Systems

While Aboriginal people traditionally regulated hunting and trapping throughout their ancestral lands, things significantly changed with the arrival of Europeans, who by the 1850s were imposing their own wildlife laws over Indigenous peoples' territories. Indeed, in other parts of what eventually became Canada, the fur trade had been the backbone of the colonial economy and the reason for colonial exercise. By the time BC joined confederation in 1871, the fur trade era had all but ended. Government interference with First Nation hunting and trapping began in BC with the Douglas treaties (1850–1854), which state that the signatories are "at liberty to hunt over the unoccupied lands" (lands that had not been pre-empted by settlers) of the treaty areas. As settlement grew, First Nation hunting and trapping areas were reduced. In 1899, Treaty 8 was extended into BC. It states that Indian people can hunt and trap throughout the treaty lands, subject to regulation by Canada.

In the 1900s, Indigenous hunters and trappers faced increasing government interference. In 1912, BC introduced registered traplines and later required licensing of all firearms. In 1926, trapline boundaries were surveyed. Meanwhile, the provincial police were authorized to enforce hunting and trapping regulations. From 1918 until the 1930s, all provincial police constables were also game wardens. With increasing regulation and enforcement, many Indigenous people hunted and trapped "illegally".

Responsibility for hunting and trapping regulation began to shift away from the provincial police when the BC Game Commission was established in 1920. In 1957, the BC Game Commission was replaced by the BC Fish and Game Branch, which later became the Fish and Wildlife Branch. This agency is now known as the Fish, Wildlife and Habitat Management Branch and is still responsible for regulating hunting and trapping in BC.

Division of Powers

The Canadian Constitution makes no specific reference to wildlife or wildlife management. Under section 92 (13) of the *Constitution Act, 1867*, the provinces have jurisdiction over "property and civil rights in the province," and under section 92(16) they have power over "generally all matters of a

merely local or private nature in the province." Consequently, wildlife comes under both federal and provincial jurisdiction, and wildlife management is a shared responsibility. Federal responsibility includes protection and management of migratory birds and nationally significant wildlife habitat, as well as responsibility for endangered species, control of international trade in endangered species, research on wildlife issues of national importance, and international wildlife treaties and issues.

For the most part, provincial and territorial wildlife agencies are responsible for all other wildlife matters. These include conservation and management of wildlife populations and habitat within their borders; issuing of licences and permits for fishing, game hunting and trapping; and providing guidelines for safe angling and trapping and outfitting policies.

The *Canada Wildlife Act* (R.S.C. 1985, c. W-9) has established national wildlife areas. While the federal government is ultimately responsible for ensuring that the act is implemented, the provinces and the territories play important roles in research, habitat management, creating wildlife regulations, and enforcement. In practice, though, the provinces and territories mostly regulate wildlife.

The federal government also plays a role in relation to migratory birds and "species at risk." Like jurisdiction over the environment, jurisdiction over "species at risk" is divided somewhat oddly between the federal and provincial governments. This is because the constitutional divisions of powers were determined long before concepts such as environment or species at risk existed. The federal government exercises jurisdiction over a number of at-risk species, but only on federally owned lands (such as national parks), Department of National Defence lands, and "Lands reserved for Indians." The federal government also exercises jurisdiction over migratory birds wherever they are. This stems from Canada's constitutional responsibilities for matters that have international or interprovincial dimensions.

Federal Regulation

Species at Risk

The federal *Species at Risk Act* (S.C. 2002, c. 29) (SARA), proclaimed in June 2003, aims to prevent wildlife species from becoming extinct and to secure the necessary actions for their recovery. It recognizes that wildlife protection is a joint responsibility. It applies to all federal lands in Canada, and all wildlife species listed as being at risk and their critical habitat. Under SARA, the federal government receives recommendations from an independent science advisory body, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), as to whether a species is at risk of extinction. However, there is no legal requirement for the federal government (in this case Cabinet) to act on these recommendations. If listing an animal is deemed to have social, economic or political impacts, the animal can be denied listing, referred for further consultation, or sent back to the scientific body for further study. In this way, a species can be left off the list, leaving it vulnerable to continued decline.

Preamble

…responsibility for the conservation of wildlife in Canada is shared among the governments in this country and that it is important for them to work cooperatively to pursue the establishment of complementary legislation and programs for the protection and recovery of species at risk in Canada.… It is important that there be cooperation between the governments in this country to maintain and strengthen national standards of environmental conservation and that the Government of Canada is committed to the principles set out in intergovernmental agreements respecting environmental onservation…

Species at Risk Act

SARA contains a special "safety net" provision that can protect areas normally under provincial jurisdiction, but only if the federal Minister of Environment approves. To date, the "safety net" has never been used, a fact that is criticized by environmental groups (e.g., in the urgent situation of well-known species, such as the northern spotted owl). When a species is listed, SARA requires the development of a "recovery strategy" that should identify habitat crucial for its survival. Until habitat is identified, it cannot be maintained, protected or restored. To date, the majority of recovery strategies developed do not identify critical habitat — this despite requirements in SARA to do so.

With respect to Aboriginal peoples, SARA explicitly acknowledges Aboriginal traditional knowledge (ATK) and experience with respect to species at risk. The act requires that ATK be considered when COSEWIC assesses a species and that COSEWIC form an ATK subcommittee to assist with this work. SARA also requires co-operation and consultation with Aboriginal peoples affected by a recovery

strategy, including any action plan, management plan or action to protect critical habitat. This is considered key to effective implementation on reserve lands, in land claims settlement regions, and where traditional harvesting activities are carried out. The National Aboriginal Council on Species at Risk (NACOSAR) advises the Minister on the administration of SARA. NACOSAR is a seven-member council that currently includes two representatives from BC. Based in Ottawa, NACOSAR meets four times a year and at least once with the Minister of Environment.

Notwithstanding the good intentions behind SARA, many environmental groups and First Nations have criticized the act. Environmental groups such as the David Suzuki Foundation say that SARA is not having the effect it could. They argue that the legislation is weak and there are too many loopholes. This, combined with a lack of funding, poor habitat protection, political interference and poor implementation, they say, leaves Canada's rich wildlife with poor protection. While most First Nations would agree with this analysis, many also have different concerns. They argue that SARA's targeted application to only federal lands, including reserves, puts First Nations in a difficult position. In some cases, this limited application places reserves at a development disadvantage. That is, where adjacent provincial lands may have already been developed or could be but are not subject to the act, the reserve lands may often be the last undeveloped habitat for certain species at risk. To date, Canada has generally been unwilling to open up SARA as an outcome of comprehensive governance arrangements and requires the act to apply to a self-governing First Nation.

Migratory Birds

As noted above, Canada has a special interest in migratory birds. Under the Migratory Birds Convention (Convention of August 16, 1916 for the protection of migratory birds in Canada and the United States, in *Migratory Birds Convention Act*, S.C., 1985, C.m-7, as amended and regulations) signed by Canada and the United States in 1916, both parties are responsible for protecting migratory birds and their habitat. The federal *Migratory Birds Convention Act*, 1994 (S.C. 1994, c. 22) establishes mechanisms for the federal government to protect migratory birds. As the *Migratory Birds Convention Act* is an international document, Canada takes the view it has limited negotiating power in this area under comprehensive governance arrangements.

Provincial Wildlife Management

In BC, the Ministry of Forests, Lands and Natural Resource Operations has primary responsibility for wildlife and for administering the BC *Wildlife Act*. The first priority of the ministry under the act is to ensure the long-term conservation of wildlife populations and their habitats. Wildlife under the BC *Wildlife Act* is defined as all native and some non-native amphibians, reptiles, birds, and mammals that live in BC. For some provisions of the act, the definition includes fish, and other BC legislation defines some insects and plants as wildlife. The province identifies 152 wildlife species and sub-species as candidates for endangered, threatened or vulnerable status. Three of these species are legally designated by the provincial government as "endangered" — namely, the burrowing owl, the American white pelican, and the Vancouver Island marmot. The sea otter is designated as "threatened." There are other species under active consideration for listing. The Ministry of Environment's Ecosystems Branch is responsible for biodiversity science, standards and policy for the ministry and is responsible for the preparation of a biodiversity strategy for BC. This work includes the development of specific strategies for "living rivers" and "species at risk."

***First Nations and the* Wildlife Act**

First Nations people are exempted from the application of the *Wildlife Act* in certain circumstances as a result of the recognition of Aboriginal rights protected under section 35(1) of the *Constitution Act, 1982*. The ministry accordingly claims to recognize that First Nations people have Aboriginal rights to harvest wildlife for sustenance (food, social and ceremonial purposes) in their "traditional areas."

However, there is no recognition of any concomitant governmental powers. The provincial policy states that Aboriginal uses of wildlife must be sustainable, and harvesting methods must not jeopardize safety or the use and enjoyment of property. Further, any hunting of wildlife species for sale or barter is illegal, except as authorized by regulation or where there is a demonstrated Aboriginal or treaty right to do so. For the purposes of the *Wildlife Act*, only persons who are registered as an "Indian" under *Indian Act* are recognized as having Aboriginal rights.

The current *Wildlife Act* states that a person who resides in BC and is registered as an "Indian" may:

- hunt wildlife without a hunting licence or any other licence that is required by regulation;
- trap furbearing animals without a trapping licence;
- angle in the non-tidal waters of B.C. without an angling licence or other licence or permit required by regulation; and
- hunt a fur-bearing animal on private land with the written permission of the owner or occupier, and on Crown land with the permission of the Crown or the occupier of the Crown land, despite the fact that they:
    - are not the registered holder of the trapline for the area;
    - do not have written permission of the registered holder of the trapline for that area;
    - do not own or occupy that area; and
    - do not have a permit to trap as required by regulation.

Indians are not restricted to specific seasons or to bag limits when hunting, fishing or trapping for food, social, or ceremonial purposes, subject to limitations for conservation reasons. In situations where conservation of a particular species is of concern and compliance with hunting regulations is required by Indians belonging to a First Nation group, the ministry will consult with the affected First Nation in accordance with its internal policy and procedures. Restrictions can often include the requirement for Limited Entry Hunting (LEH) authorizations. The Province recommends that prior to going hunting, Indian hunters should inquire with their respective First Nation or with the Ministry of Forests, Lands, and Natural Resource Operations regional office about any specific requirements that may apply to them.

When administering its policies, the Province restricts an "Indian" hunter's rights to his or her Nation's "traditional territory." This means that Indians who are residents of BC and wish to hunt outside their traditionally used areas must do so in accordance with the hunting regulations. This includes making application for an LEH authorization via the LEH draws. This can lead to issues between individual hunters, First Nations and the ministry, given differing interpretations of where an Indian hunter can hunt without seasonal restrictions or bag limits. In part, this reflects a lack of clarity or incomplete information when governments try to govern over Aboriginal rights in the absence of agreement. In this case, it is difficult to determine conclusively the geographical boundaries of a Nation's ancestral lands and indeed hunting grounds that may be shared with another tribe. The ministry therefore advises hunters that if they are in any doubt regarding a traditional hunting area or practice, they should contact the "appropriate First Nation's officials" and regional wildlife program staff to discuss the situation. In any case, First Nations maintain that they should rightfully be regulating access as an aspect of wildlife management.

As a result of the Supreme Court of Canada's declaration of Aboriginal title in the *Tsilhqot'in* case on June 26, 2014, citizens of the Tsilhqot'in Nation have the right to exclusive use and occupation of the title lands, as well as the ability to determine the uses to which the land will be put. The ministry notes on its website that those lands, along with surrounding lands, which are subject to "a strong Aboriginal title claim," are not publicly available for hunting, angling or trapping.

Another area of jurisdictional uncertainty related to provincial policy involves the recoding of kills for species management/conservation purposes. The majority of First Nations in BC do not report their harvest practices or total take to the ministry, so the ministry estimates the Indian harvest before determining

sustainable levels for the non-Aboriginal harvest. The ministry has expressed concerns that its estimates may be inaccurate and, consequently, decisions based on these estimates could have an undesirable effect on wildlife species. The sharing of First Nations wildlife harvesting information could result in a better understanding of actual wildlife harvest numbers and lead to improved management of wildlife species. Consequently, the ministry is looking to work with First Nations to improve communication of harvest levels. For example, the ministry has been working with First Nations in various regions on a collaborative process aimed at a greater mutual sharing of information. These processes can include co-operative inventory and research studies, ongoing liaison between First Nations and ministry staff on matters of management, and formalized information-sharing between the Province and First Nations. Through MOUs, protocols and agreements (including comprehensive governance arrangements), First Nations and the province are looking to resolve these governance and management issues.

Interestingly, the Province restricts the individual's Aboriginal right to hunt more than elsewhere in the country. This is because Aboriginal hunting rights, outside of treaty, have been defined as extending only to the hunting area of a person's Nation. The right to hunt is not necessarily limited to the lands over which the Nation has Aboriginal title, but can include areas over which there are Aboriginal rights (which are broader than Aboriginal title lands and potentially ancestral lands). However, this does not extend throughout the province. In other provinces, historical rights under the numbered treaties are interpreted by provincial governments to apply to all unoccupied Crown lands throughout the province, not to a specific Nation's territory or treaty area.

Negotiating Jurisdiction over Wildlife

Geographical Scope

Wildlife is a subject where jurisdiction off-reserve within ancestral lands is the paramount concern, a reflection of the general small size of BC reserves and the fact that, depending on species, wildlife moves within a large geographical area. While some First Nations do regulate wildlife on reserve lands, and there are bylaw-making powers under the *Indian Act* that facilitate this regulation, for the most part hunting, fishing and trapping in BC usually takes place off-reserve — within the boundaries of a Nation's ancestral territory and beyond. All Nations that have entered into comprehensive governance arrangements with the Crown under treaty have reached agreement on wildlife management issues and hunting regulation within their broader territories. Other comprehensive arrangements are restricted to reserve lands. Most, if not all, Nations will want to discuss jurisdiction over wildlife as part of any comprehensive governance negotiations.

Conservation

Conservation is, of course, a key policy consideration in any wildlife and wildlife habitat discussion and is also one of the factors limiting the Aboriginal right to hunt. The approach favoured by Canada and supported by BC in governance arrangements with First Nations is that the province has control over the environment, so that provincial resource-management expertise can be applied to First Nation lands, rather than duplicating provincial machinery. The provincial government, supported by Canada, takes the position in treaty negotiations that First Nations jurisdiction over wildlife should be limited to regulating negotiated First Nations allocations of wildlife and First Nations hunters and not direct management of the wildlife itself. However, the province does see a role for First Nations through management committees and other consultation bodies where applicable. The policy rationale is that there should be a regional or provincial approach to wildlife governance and management and jurisdiction that reflects the fact that animals migrate across large areas without regard for man-made political boundaries and jurisdictions. In addition, certain species require special management or protection.

Canada, it should be noted, does acknowledge a role for First Nations government participation on joint wildlife committees or wildlife management boards that assist the Crown in its responsibility to

manage natural resources. Most of the experience, however, with these committees and boards is outside BC, although some management bodies, as discussed below, are being created in the context of modern treaty arrangements.

INDIAN ACT GOVERNANCE

Section 81(1)(o) of the *Indian Act* provides bylaw-making authority to a First Nation for "the preservation, protection and management of fur-bearing animals, fish and other game on the reserve." Six First Nations have made bylaws under this power.

SECTORAL GOVERNANCE INITIATIVES

There are no sectoral initiatives specifically addressing First Nations jurisdiction over wildlife on-reserve or off-reserve. However, some First Nations are dealing with aspects of the administration of wildlife with the provincial government. In addition to the numerous local arrangements that are made between First Nations and the Fish, Wildlife and Habitat Management Branch regarding the reporting of kills and Limited Entry Hunting (LEH) authorization, more substantive examples of what best can be described as "quasi-governance" initiatives respecting wildlife management are now emerging. These arrangements are set out in Reconciliation Agreements and Strategic Engagement Agreements (SEA) where wildlife is included as a subject matter (See Section 1.3 — Sectoral Governance Initiatives). These agreements may be reached in the context of the parties intending to someday reach a modern treaty or may be negotiated completely outside the BC treaty-making process.

Typically, SEAs/Reconciliation Agreements provide for a process to ensure that the province shares information with and provides notice to a First Nation before important decisions are made with respect to wildlife matters affecting a First Nation or its citizens. They also set out the geographical extent of a First Nation's territory and seek to clarify who can hunt, and so on. In cases where a decision could have a significant impact on a First Nation or its citizens, the Province is required to discuss it with the First Nation first, in accordance with the SEA/Reconciliation Agreement and through the bodies established by that agreement (e.g., a Joint Resource Council, Natural Resources Council, Land and Resources Council). At one end of the "consultation" spectrum, there may be limited requirements (e.g., sharing information regarding guide outfitting quotas, guide and assistant guide licenses, disposal of guide certificate, removal of traplines, summary of trapping returns for previous year, summary of hunting licences and tags); at the other end of the spectrum, the requirements are more stringent (e.g., designating a Wildlife Management Area [WMA], critical habitat or wildlife sanctuary in a WMA, WMA management plans fish and wildlife authorizations, or determining the Annual Allowable Harvest for certain species and any restrictions on the harvest).

For example, the 2012 Strategic Engagement Agreement between the Province of British Columbia and Kaska Dena Council establishes a "Fish and Wildlife Collaborative Management Framework" whose purpose is as follows:

> 3.1 The purpose of this Framework is for the Parties to engage on a government-to-government basis with respect to Fish and Wildlife management that:
> (a) focuses on maintaining healthy and diverse native species and ecosystems;
> (b) allows for the sustainable use of Fish and Wildlife resources;
> (c) places the appropriate higher priority on conservation and on Kaska's Aboriginal Rights and Title before allocating opportunities under an AAH to Licensed Hunters;
> (d) implements Shared Decisions that are an outcome of this Agreement; and
> (e) establishes mechanisms to facilitate positive working relationships between the Parties.

The agreements and the degree of collaboration between the Province and the First Nation can be focused on the management of fish and wildlife species that are most important to both parties. In the

case of the Kaska agreement, there is a focus on "moose, woodland caribou, bison, thin horn sheep, mountain goat, bears, furbearers, wolves, and freshwater fish," as well as "any other species or populations where conservation concerns or management concerns are brought forward to the Regional Fish and Wildlife Manager or the Kaska Fish and Wildlife Manager, or both."

Agreements also set out the process through which collaboration or consultation will take place and when. In the Kaska example, the provincial fish and wildlife regional manager and the Kaska fish and wildlife manager, following input from their a joint "Natural Resources Council", will annually identify and agree upon fish and wildlife management priorities within the Kaska's "traditional territory" for the year. To support this work, the parties have established a Fish and Wildlife Working Group that is tasked with, among other things, developing and implementing workplans that are expected to:

- identify critical ranges, habitats and special features of fish and wildlife species;
- assess population stability and trends of identified fish and wildlife populations;
- analyze harvest data and recommend sustainable harvest levels;
- review or assess impacts of domestic species, invasive species or game farming on fish and wildlife;
- set goals and objectives for species management, including goals for population recovery;
- develop strategies to achieve the population goals and objectives;
- review the effectiveness of the current management unit boundaries for harvest data collection and population management;
- identify areas of habitat loss, decreased function of habitats and range, and loss of habitat quality;
- undertake fish and wildlife inventories or studies;
- complete a review of fish and wildlife regulations; and
- other matters as agreed to by both Parties.

Clearly, there is potential for such SEAs/Reconciliation Agreements to facilitate more co-operative wildlife management practice. To date, there is limited experience with these arrangements, as they are relatively new. While they do not constitute legal recognition of a First Nation's jurisdiction, they nevertheless approximate shared decision-making. Practically, in many ways, they go further administratively and apply more broadly geographically than the administrative and management frameworks for wildlife contained within comprehensive governance arrangements. Moving forward, appropriate coordination and transition between these sectoral "quasi-governance" initiatives and evolving comprehensive governance arrangements will need to be addressed and reconciled.

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

Given that treaty arrangements codify previously uncodified Aboriginal rights, all such arrangements address wildlife management, access and rules respecting Aboriginal hunters. In all of the treaty agreements, jurisdiction over wildlife is generally only recognized with respect to a First Nation's citizens and their entitlements (allocations). The terms and conditions of the wildlife entitlements are quite detailed and are set out in a separate treaty chapter.

Additionally, the Tla'amin and Yale agreements contain sections outlining the rights to not only harvest but also sell fish, wildlife and migratory birds among themselves or with other Aboriginal people in Canada. There is no provision that requires either community to have a "wildlife plan," as is the case in the Nisga'a, Maa-nulth and Tsawwassen agreements. Nisga'a, Tsawwassen and some of the Maa-nulth First Nations have exercised law-making authority in this area.

With the exception of the Tla'amin agreement, each of the treaty arrangements provides for the participation in or establishment of a wildlife council or committee. Nisga'a and the Maa-nulth First Nations have established or must establish a wildlife committee or council to facilitate wildlife

management within their respective wildlife areas. The Maa-nulth agreement explicitly states that the Wildlife Council will develop a Wildlife Harvest Plan and provide recommendations to the Minister on matters such as whether a wildlife species should be or continue to be Designated Wildlife, and the establishment of a Total Allowable Wildlife Harvest. The Tsawwassen and Yale agreements note that these First Nations will be invited to participate in any public regional wildlife advisory management process for an area that includes their respective harvest areas.

Both Westbank and Sechelt have recognized jurisdiction over wildlife on their lands, recognizing, of course, that the extent of their reserve lands is limited. For Westbank, this power is stated quite broadly and deals with conservation and management, including game birds, fur-bearing animals, and their natural habitat, and covers any individual hunting on Westbank Lands (citizen or non-citizen). This jurisdiction also includes migratory birds.

Table — Comprehensive Governance Arrangements

	RIGHT TO HARVEST /ALLOCATION	LAW MAKING POWERS	CONFLICT OF LAWS	WILDLIFE PLANS
Sechelt	No provisions.	Power to make laws regarding the preservation, protection and management of fur bearing animals, fish and game on Sechelt lands. (s. 14(1)(k))	Sechelt laws would prevail. Provincial and federal laws of general application apply so long as not inconsistent with the Act (s. 37 and 38 of *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27)	No provisions.
Westbank	No provisions.	Westbank First Nation has jurisdiction in relation to preservation and management of wildlife, including game, birds, fur bearing animals, and their natural habitat, and the hunting and trapping of wildlife on Westbank Lands. (Part XII, s. 135)	Westbank law prevails. (Part XII, s. 140)	No provisions.
Nisga'a	Nisga'a citizens have the right to harvest wildlife throughout the defined Nass Wildlife Area subject to conservation and legislation enacted for the purposes of public health or public safety. Nisga'a citizens may harvest wildlife under Nisga'a wildlife entitlements on lands that are owned in fee simple off of Nisga'a Lands, in accordance with laws of general application with respect to harvesting wildlife on fee simple lands. Nisga'a wildlife entitlements are for domestic purposes. The agreement does not preclude Nisga'a citizens from harvesting wildlife or migratory birds throughout Canada in accordance with: federal and provincial laws; any agreements that are in accordance with laws of general application between the Nisga'a Nation and other Aboriginal people or any arrangements between other Aboriginal people and Canada or BC. (Ch. 9, s. 1–5, 12)	Nisga'a Lisims Government may make laws with respect to the Nisga'a Nation's rights and obligations with respecting wildlife and migratory birds including: the distribution among Nisga'a citizens of Nisga'a wildlife entitlements; licensing requirements for the harvest of wildlife and migratory birds; the methods, timing, and locations of the harvest of species of wildlife and migratory birds; the designation and documentation of persons who harvest wildlife and migratory birds; the trade or barter of wildlife and migratory birds; and other matters agreed to by the Parties. (Ch. 9, s. 37)	Nisga'a law prevails. Federal or provincial law prevails when in conflict with a law made under s. 37(d) (methods, timing, and locations of the harvest of species of wildlife not included in annual management plan) or s. 39 (sale of wildlife or migratory birds). (Ch. 9, s. 38 and 40)	An annual management plan will specify the level of harvest of each designated species, and any other species that the Minister and Nisga'a Lisims Government agree should be included in the annual management plan, that may be harvested on Nisga'a Public Lands by persons other than Nisga'a citizens, having regard to Nisga'a preferences for harvesting wildlife under Nisga'a wildlife entitlements on Nisga'a Lands, and the availability of that species in the rest of the Nass Wildlife Area. (Ch. 9, s. 55 and 56)

Table — Comprehensive Governance Arrangements... ***continued***

	RIGHT TO HARVEST /ALLOCATION	LAW MAKING POWERS	CONFLICT OF LAWS	WILDLIFE PLANS
Tsawwassen	Tsawwassen First Nation has the right to harvest Wildlife for domestic purposes in the Tsawwassen Wildlife Harvest Area in accordance with the Agreement. Canada and BC will not require Tsawwassen Members to have a license or pay a fee or royalty. The Tsawwassen Right to Harvest Wildlife is held by Tsawwassen First Nation and is limited by measures necessary for conservation, public health or public safety. The Tsawwassen Right to Harvest Wildlife will be exercised in a manner that does not interfere with authorized uses or Dispositions of provincial Crown land, including Provincial Parks and Protected Areas, existing on the Effective Date or authorized in accordance with the Agreement. Tsawwassen First Nation may exercise the Tsawwassen Right to Harvest Wildlife on Private Lands, if the owner or occupant of that land agrees to provide access, and on a Reserve if the Indian band for whom the Reserve is set aside agrees to provide access. Tsawwassen First Nation may exercise the Tsawwassen Right to Harvest Wildlife within Burns Bog Ecological Conservancy Area if harvesting of wildlife is permitted on the lands, and any such harvesting will be in accordance with federal and provincial law, and local government Bylaws. The Minister retains authority for managing and conserving wildlife and wildlife habitat and will exercise that authority in a manner that is consistent with the Agreement. The Agreement does not preclude Tsawwassen members from harvesting wildlife in Canada under federal or provincial law; an agreement, that is in accordance with federal and provincial law, between Tsawwassen First Nation and other Aboriginal people; or an arrangement between other Aboriginal people and Canada or British Columbia. (Ch. 10, s. 1–19)	Tsawwassen Government may make laws with respect to the designation of Tsawwassen Members to harvest Wildlife and the distribution among Tsawwassen Members of wildlife harvested under the Tsawwassen Right to Harvest Wildlife; the Trade and Barter of Wildlife harvested under the Tsawwassen Right to Harvest Wildlife; methods, timing, and location of the harvest of wildlife; and the identification of which wildlife and wildlife parts, may be transported by an undocumented First Nation citizen or by an Aboriginal trading partner who is not a First Nation citizen. (Ch. 10, s. 20) Tsawwassen Government may make laws with respect to the management of Wildlife habitat on Tsawwassen Lands; the sale of wildlife and wildlife parts, including meat and furs, harvested under the Tsawwassen Right to Harvest Wildlife; and the documentation of Tsawwassen Members who have been designated. (Ch. 10, s. 22)	Tsawwassen law made under s. 20 prevails. (Ch. 10, s. 21) Federal or provincial law made under s. 22 prevails. (Ch. 10, s. 23)	The Tsawwassen Right to Harvest Wildlife with respect to a Designated Wildlife Species will be exercised in accordance with an approved Wildlife Harvest Plan. Tsawwassen First Nation will develop a proposed Wildlife Harvest Plan for the harvest of: (a.) a Designated Wildlife Species; and (b.) a wildlife species proposed by Tsawwassen First Nation or British Columbia for inclusion in a Wildlife Harvest Plan in order to adequately manage and conserve the resource. (Ch. 10, s. 39–40) Tsawwassen Government will make laws to require: Tsawwassen Members to comply with a Wildlife Harvest Plan; and all individuals who harvest wildlife or transport wildlife or wildlife parts to carry documentation issued by Tsawwassen First Nation and to produce that documentation on request by an authorized person. (Ch. 10, s. 54)

Table — Comprehensive Governance Arrangements... *continued*

	RIGHT TO HARVEST /ALLOCATION	LAW MAKING POWERS	CONFLICT OF LAWS	WILDLIFE PLANS
Maa-nulth	Each Maa-nulth First Nation has the right to harvest Wildlife for Domestic Purposes in the Wildlife Harvest Area in accordance with this Agreement. The Right to Harvest Wildlife must be exercised in a manner that does not interfere with other authorized uses of provincial Crown land. May exercise its Right to Harvest Wildlife on non-Maa-nulth fee simple lands within the Wildlife Harvest Area, but that harvesting is subject to federal law or provincial law with respect to access to fee simple lands. No Maa-nulth-aht is required to have any federal or provincial licence or pay any fee or royalty to Canada or BC. The agreement does not preclude Maa-nulth from harvesting wildlife in Canada under federal or provincial law; an agreement, that is in accordance with federal and provincial law, between Maa-nulth and other Aboriginal people; or an arrangement between other Aboriginal people and Canada or British Columbia. (s. 11.1.1–11.1.13) A Maa-nulth First Nation may enter into an agreement with another First Nation to allow that other First Nation to exercise that Maa-nulth First Nation's Maa-nulth First Nation Right to Harvest Wildlife. (s. 11.1.14)	Each Maa-nulth First Nation Government may make laws, with respect to the applicable Maa-nulth First Nation Right to Harvest Wildlife and its approved Wildlife Harvest Plan for the distribution of harvested wildlife among its Members; designating its members to harvest wildlife; documenting the Members who have been designated or any individual harvesting in accordance with a Wildlife Sharing Agreement; the methods, timing and location of the harvest of the wildlife included in the Wildlife Harvest Plan or any individual harvesting in accordance with a Wildlife Sharing Agreement; and; trade and barter of wildlife harvested by the Members. (s. 11.11.1) Each Maa-nulth First Nation must also make laws to require its Members and any individual harvesting in accordance with a Wildlife Sharing Agreement to comply with the Wildlife Harvest Plan. (s. 11.11.2)	Maa-nulth law prevails except for a law made under s. 11.11.1(c) in which case federal or provincial laws prevail. (s. 11.11.3)	Each Maa-nulth First Nation Right to Harvest Wildlife is exercised in accordance with an approved Wildlife Harvest Plan. (s. 11.9.1)
Yale	Yale First Nation has the right to harvest Wildlife for Domestic Purposes in the Wildlife Harvest Area in accordance with this agreement. (s. 10.1.1) The Yale First Nation Right to Harvest Wildlife is limited by measures necessary for conservation, public health or public safety. (s. 10.1.2)	Yale First Nation Government may make laws with respect to the Yale First Nation Right to Harvest Wildlife with respect to: a. the distribution of harvested wildlife among Yale First Nation Members; b. the designation of Yale First Nation Members to harvest wildlife; c. identification of wildlife and wildlife parts that may be transported by an undocumented Yale First Nation Member or by an Aboriginal trading partner who is not a Yale First Nation Member; and d. the trade and barter of wildlife under 10.7. (s. 10.2.1)	Yale First Nation Law prevails except to the extent of a conflict with a law under 10.2.4. when the federal or provincial law will prevail. (s. 10.2.2 and 10.2.5) Yale First Nation Law prevails except to the extent of a conflict with a law under 11.2.3 when federal or provincial law will prevail. (s. 11.2.2 and 11.2.4)	No provision.

Table — Comprehensive Governance Arrangements... *continued*

	RIGHT TO HARVEST /ALLOCATION	LAW MAKING POWERS	CONFLICT OF LAWS	WILDLIFE PLANS
Tla'amin	The Tla'amin Nation has the right to harvest Wildlife for Domestic Purposes within the Wildlife and Migratory Birds Harvest Area set out in Appendix P throughout the year in accordance with this Agreement. (Ch. 10, s. 1)	The Tla'amin Nation may make laws with respect to the Tla'amin Right to Harvest Wildlife for: a. the administration of documentation to identify Tla'amin Citizens as harvesters of Wildlife; b. the designation of Tla'amin Citizens as harvesters of Wildlife; c. the methods, timing and geographic location of the harvest of Wildlife; d. the distribution among Tla'amin Citizens of harvested wildlife; e. the trade or barter of wildlife and wildlife parts, including meat and furs, harvested under the Tla'amin Right to Harvest Wildlife; f. the identification of wildlife and wildlife parts, including meat and furs, that may be transported by an individual or by an Aboriginal trading partner who is not a Tla'amin Citizen; and g. other matters agreed to by the Parties. (Ch. 10, s. 32)	Tla'amin Law under paragraph 32 prevails (Ch. 10, s. 33) Tla'amin Law prevails (Ch. 11, s. 28) Federal or provincial law prevails to the extent of a conflict with Tla'amin Law. (Ch. 11, s. 30)	No provision.

Table — Comprehensive Governance Arrangements… ***continued***

	WILDLIFE COUNCILS/ COMMITTEES AND OTHER BODIES	MIGRATORY BIRDS	PUBLIC ACCESS	TRADE, BARTER AND SALE
Sechelt	No provisions.	No provisions.	No provisions.	No provisions.
Westbank	No provisions.	Where there are conservation concerns of either Party relating to migratory birds, Westbank First Nation and Canada shall cooperate to establish appropriate co-management arrangements where necessary to address conservation concerns. (Part XII, s. 137)	No provisions.	No provisions.
Nisga'a	The Parties have established a Wildlife Committee to facilitate wildlife management within the Nass Wildlife Area. (Ch. 9, s. 45)	Nisga'a Lisims Government may make laws with respect to the Nisga'a Nation's rights and obligations with respect to wildlife and migratory birds including: the distribution among Nisga'a citizens of Nisga'a wildlife entitlements; licensing requirements for the harvest of wildlife and migratory birds; the methods, timing, and locations of the harvest of species of wildlife and migratory birds; the designation and documentation of persons who harvest wildlife and migratory birds; the trade or barter of wildlife and migratory birds; and other matters agreed to by the Parties. (Ch. 9, s. 37)	Nisga'a Lisims Government will provide reasonable opportunities for the public to hunt on Nisga'a Public Lands but only Nisga'a citizens have the right to hunt on Nisga'a Lands. Hunting by the public will be in accordance federal and provincial laws of general application, annual management plans, licences or permits, and any laws enacted by Nisga'a Lisims Government regulating public access. (Ch. 6, s. 4–7)	Nisga'a Lisims Government may make laws with respect to any trade, barter or sale of wildlife, migratory birds, or the inedible by-products or down of migratory birds, that are harvested under the Final Agreement. Nisga'a Lisims Government will make laws to require: (a.) that any wildlife or wildlife parts, including meat, harvested under this Agreement, that are transported outside Nisga'a Lands for the purpose of trade or barter be identified as wildlife for trade or barter; and (b.) that Nisga'a citizens comply with the annual management plan. (Ch. 9, s. 37(f) and 41)
Tsawwassen	Tsawwassen First Nation will be invited to participate in any public regional wildlife advisory management process established by BC for an area that includes any portion of the Tsawwassen Wildlife Harvest Area. The Minister may request recommendations resulting from the process before determining: whether a wildlife species will be or continue to be a designated Wildlife Species; and the Total Allowable Wildlife Harvest for any Designated Wildlife Species. Tsawwassen First Nation will be invited to participate in any First Nation regional wildlife harvest advisory body established by BC for an area that includes any part of Tsawwassen Territory. (Ch. 10, s. 50–51)	Tsawwassen First Nation has the right to harvest Migratory Birds for Domestic Purposes in the Tsawwassen Migratory Bird Harvest Area throughout the year in accordance with this Agreement. (Ch. 11, s. 1)	No provisions.	Tsawwassen First Nation has the right to trade and barter wildlife or wildlife parts, harvested under the Tsawwassen Right to Harvest Wildlife, among themselves or with other Aboriginal people of Canada resident in BC, if sale is permitted under federal or provincial law. (Ch. 10, s. 4–5)

Table — Comprehensive Governance Arrangements... ***continued***

	WILDLIFE COUNCILS/ COMMITTEES AND OTHER BODIES	MIGRATORY BIRDS	PUBLIC ACCESS	TRADE, BARTER AND SALE
Maa-nulth	The Maa-nulth First Nations must establish a Wildlife Council that will develop a plan to be proposed to the minister as a Wildlife Harvest Plan; make recommendations to the minister as to whether a wildlife species should be designated or continue to be a Designated Wildlife Species; make recommendations to the minister regarding the establishment of a Total Allowable Wildlife Harvest; negotiate and attempt to reach agreement with BC on the Maa-nulth Wildlife Allocation of a Designated Wildlife Species as contemplated; request that BC vary a Maa-nulth Wildlife Allocation; submit a Wildlife Harvest Plan to the minister; review with BC a Wildlife Harvest Plan; and perform such other functions as BC and the Maa-nulth First Nations may agree to in writing. (s. 11.4.1) The Maa-nulth First Nations have the right to participate in any public Wildlife advisory committee that may be established by BC with respect to the Wildlife Harvest Area. (s. 11.10.1)	Each Maa-nulth First Nation has the right to harvest Migratory Birds for Domestic Purposes in the Migratory Bird Harvest Area in accordance with this Agreement — limited by measures necessary for conservation, public health or public safety. Right to Harvest Migratory Birds in a manner that does not interfere with other authorized uses of Crown land. A Maa-nulth First Nation or a Maa-nulth-aht may enter into an agreement with a federal department or agency to authorize the harvest of migratory birds by that Maa-nulth First Nation or that Maa-nulth-aht on land owned by that federal department or agency in accordance with federal law or provincial law. Each Maa-nulth First Nation may exercise its Maa-nulth First Nation Right to Harvest Migratory Birds on non-Maa-nulth fee simple lands within the Migratory Bird Harvest Area, subject to federal law or provincial law with respect to access to fee simple lands. This Agreement does not preclude a Maa-nulth-aht from harvesting migratory birds throughout Canada in accordance with federal law or provincial law; between a Maa-nulth First Nation and other Aboriginal people; or any arrangements between other Aboriginal people and Canada or British Columbia. The minister retains authority for managing and conserving migratory birds and migratory bird habitat. (s. 12.1.1–12.1.14)	No provisions.	Each Maa-nulth First Nation has the right to trade and barter among themselves, or with other Aboriginal people of Canada resident in British Columbia, any wildlife or wildlife parts, including meat and furs, harvested under its Maa-nulth First Nation Right to Harvest Wildlife. (s. 11.12.1)
Yale	Yale First Nation will have the right to participate in any wildlife advisory management processes established by British Columbia with respect to the Wildlife Harvest Area. (s. 10.6.1) Yale First Nation will have the right to participate in any migratory bird advisory committee established by Canada or British Columbia that addresses matters regarding migratory birds that occur in or impact the Migratory Bird Harvest Area. (s. 11.8.1)	Yale First Nation Government may make laws with respect to the Yale First Nation Right to Harvest Migratory Birds for: a. the methods, timing, and location of the harvest of migratory birds by Yale First Nation Members; b. the distribution of harvested migratory birds among Yale First Nation Members; c. the designation of Yale First Nation Members to harvest migratory birds; d. the trade and barter of migratory birds under 11.3; and e. the sale of inedible byproducts, including down, of harvested migratory birds. (s. 11.2.1) Yale First Nation Government may make laws with respect to the Yale First Nation Right to Harvest Migratory Birds for: a. the management of migratory birds and migratory bird habitat on Yale First Nation Land; b. the sale of migratory birds, other than their inedible byproducts, if permitted by federal and provincial law; and c. the establishment of documentation to identify Yale First Nation Members who harvest migratory birds. (s. 11.2.3)	Yale First Nation will allow reasonable public access to Frozen Lakes Land for temporary recreational and non-commercial purposes, including reasonable opportunities for the public to hunt and fish. (s. 14.7.1) Yale First Nation will consider a request by an individual for reasonable access. In the event that Yale First Nation accepts the request, Yale First Nation will provide the individual with a Permit, or otherwise allow reasonable access to the requested site. (s. 14.8.1)	Yale First Nation Government may make laws with respect to the Yale First Nation Right to Harvest Wildlife with respect to the trade and barter of wildlife. (s. 10.2.1)

Table — Comprehensive Governance Arrangements... *continued*

	WILDLIFE COUNCILS/ COMMITTEES AND OTHER BODIES	MIGRATORY BIRDS	PUBLIC ACCESS	TRADE, BARTER AND SALE
Tla'amin	No provision.	The Tla'amin Nation has the right to harvest Migratory Birds for Domestic Purposes within the Wildlife and Migratory Birds Harvest Area set out in Appendix P throughout the year in accordance with this Agreement. (Ch. 11, s. 1) The Tla'amin Nation may make laws with respect to the Tla'amin Right to Harvest Migratory Birds for: a. the administration of documentation to identify Tla'amin Citizens as harvesters of migratory birds; b. the designation of Tla'amin Citizens as harvesters of migratory birds; c. the methods, timing and geographic location of the harvest of migratory birds; d. the distribution among Tla'amin Citizens of harvested migratory birds; e. the trade and barter of migratory birds harvested under the Tla'amin Right to Harvest Migratory Birds; and f. the sale of inedible by-products of harvested migratory birds. (Ch. 11, s. 27) The Tla'amin Nation may make laws with respect to the Tla'amin Right to Harvest Migratory Birds for: a. the management of migratory birds and migratory birds habitat on Tla'amin Lands; and b. the sale of migratory birds, other than their inedible byproducts, if permitted by federal and provincial law. (Ch. 11, s. 29)	The Tla'amin Nation will allow reasonable public access on Tla'amin Public Lands for temporary recreational and non-commercial purposes, including reasonable access for the public to hunt and fish on Tla'amin Public Lands. (Ch. 5, s.8)	Tla'amin Citizens may, in accordance with Federal and Provincial Law, sell Wildlife and Wildlife parts, including meat and furs. (Ch. 10, s. 24) The Tla'amin Nation has the right to Trade and Barter Wildlife and Wildlife parts, including meat and furs, harvested under the Tla'amin Right to Harvest Wildlife: among themselves; or with other Aboriginal people of Canada. (Ch. 10, s. 25)

Table — BC First Nations' Laws/Bylaws in Force

***INDIAN ACT* GOVERNANCE**			
Bylaws — Section 81(1)(o) Protection and management of fur-bearing animals, fish and other game on reserve			
FIRST NATION	**BYLAW NO.**	**BYLAW TITLE**	**DESCRIPTION**
Da'naxda'xw	2	WILDLIFE	Bylaw Concerning Hunting And Game Protection
Lower Kootenay	1	WILDLIFE	To Provide For Protection, Preservation And Management Of Game, Game Birds And Water Fowl
Moricetown	1	WILDLIFE	To Provide For The Preservation, Protection And Management Of Fish And Game
Nuxalk Nation	11	WILDLIFE	To Provide For Preservation, Protection And Management Of Fish And Game On The Bella Coola Reserve No. 1
Okanagan	2	WILDLIFE	To Provide For The Preservation, Protection And Management Of Fish And Game
Old Massett Village Council	4	WILDLIFE	Bylaw Respecting Protected And Sensitive Species
Stellat'en First Nation	1	WILDLIFE	To Provide For Preservation, Protection And Management Of Furbearing Animals, Fish And Game
Stellat'en First Nation	1	WILDLIFE	To Provide For Preservation, Protection And Management Of Furbearing Animals, Fish And Game
COMPREHENSIVE GOVERNANCE ARRANGEMENTS (CGA)			
CGA	**LAW NO.**	**DESCRIPTION**	
Huu-Ay-Aht First Nation	2011	Resource Harvesting Act	
Huu-Ay-Aht First Nation	16/2011	Wildlife And Migratory Birds Regulation	
Ka:'Yu:'K't'h'/Che:K'tles7et'h'	14/2011	Resources Harvesting Act	
Nisga'a	2000/16	Fisheries And Wildlife Act	
Toquaht	14/2011	Resources Harvesting Act	
Toquaht	7/2011	Wildlife and Migratory Birds Regulation	
Tsawwassen First Nation	Apr 2009	Fisheries, Wildlife, Migratory Birds And Renewable Resources Act	
Tsawwassen First Nation	039/2014	Hunting Regulations	
Uchucklesaht Tribe	14/2011	Resources Harvesting Act	
Uchucklesaht Tribe	7/2011	Wildlife and Migratory Birds Regulation	
Ucluelet First Nation	7/2011	Wildlife And Migratory Birds Regulation	
Ucluelet First Nation	14/2011	Resources Harvesting Act	

RESOURCES

First Nations

National Aboriginal Council on Species at Risk (NACOSAR)
c/o 473 Albert Street, 11th Floor
Ottawa, ON K1R 5B4
Email: NACOSAR-CANEP@ec.gc.ca
www.nacosar-canep.ca/en/contact-us/

Provincial

BC Ministry of Environment, Conservation Officer Services
PO Box 9339 Stn Prov Govt
Victoria, BC V8W 9M1
Phone: 1-887-952-7277
Email: conservation.officer.service@gov.bc.ca
www.env.gov.bc.ca/cos/contacts.html

BC Ministry of Forests, Lands and Natural Resource Operations
Fish, Wildlife and Habitat Management Branch
PO Box 9391, Stn Prov Govt
Victoria, BC V8W 9M8
Phone: 1-250-387-9771
Email: FishandWildlife@gov.bc.ca
www.env.gov.bc.ca/fw/

BC Ministry of Forests, Lands and Natural Resources Operations
Minister's Office
PO Box 9049, Stn Prov Govt
Victoria, BC V8W 9E2
Phone (general): 1-250-387-1772
Email: FLNRO.MediaRequests@gov.bc.ca
www.gov.bc.ca/for

BC Wildlife Federation
Suite 101, 9706 188th Street
Surrey, BC V4N 3M2
Phone: 604-882-9988
Toll-free: 1-888-881-2293
Email: www.bcwf.net/index.php/contact-us
www.bcwf.net

Guide Outfitters Association of BC
Suite 103, 19140 28th Street
Surrey, BC V3S 6M3
Phone: 604-541-6332

Fax: 604-541-6339
Email: info@goabc.org
www.goabc.org

Yukon Fish and Wildlife Management Board
2nd Floor, 106 Main Street
Whitehorse, YT
Mail: Box 31104, Whitehorse, YT Y1A 5P7
Phone: 867-667-3754
Fax: 867-393-6947
Email: officemanager@yfwmb.ca
http://yfwmb.ca/

Federal

Committee on the Status of Endangered Wildlife in Canada (COSEWIC)
COSEWIC Secretariat, Canadian Wildlife Services,
Environment Canada
351 St. Joseph Blvd., 16th Floor
Gatineau, QC K1A 0H3
Phone: 819-938-4125
Fax: 819-938-3984
Email: cosewic/cosepac@ec.gc.ca
www.cosewic.gc.ca/eng/sct5/index_e.cfm

Environment Canada
Inquiry Centre
10 Wellington, 23rd Floor
Gatineau, QC K1A 0H3
Phone: 819-997-2800
Toll-free: 1-800-668-6767
TTY: 819-994-0736
Fax: 819-994-1412
Email: environinfo@ec.gc.ca
www.ec.gc.ca/default.asp?lang=En&n=FD9B0E51-1

- *Wildlife Act Review: What is the Role of First Nations in Sustainable Wildlife Management?*: www.env.gov.bc.ca/fw/wildlifeactreview/discussion/disc_04.html
- Yukon Regional Fish and Wildlife Management Plans: www.env.gov.yk.ca/animals-habitat/Fish-Wildlife-Planning.php

Other

David Suzuki Foundation
Suite 219, 2211 West 4th Ave.
Vancouver, BC V6K 4S2
Phone: 604-732-4228
Toll-free: 1-800-453-1533
Email: www.davidsuzuki.org/about/contact/
www.davidsuzuki.org

SELECT LEGISLATION

Provincial

- *Wildlife Act* (R.S.B.C. 1996, Chapter 488)

Federal

- *Migratory Birds Convention Act* (S.C. 1994, c. 22)
- *Species at Risk Act* (S.C. 2002, c. 29)
- *Canada Wildlife Act* (R.S.C. 1985, c. W-9)

PART 1 /// SECTION 3.33

Wills and Estates

3.33

WILLS AND ESTATES

3.33

WILLS AND ESTATES

BACKGROUND

First Nations historically, as part of their legal systems, had strict rules respecting the disposition of property on the death of an individual. These rules varied, depending on the First Nation, but generally included the transfer of names and the responsibilities associated with those names, as well as other cultural property. In some cases, property was to be held and then divided in a "giveaway" at some future point in time. Rules for inherency often strictly followed either matrilineal or patrilineal lines. Since contact and the imposition of foreign legal systems on First Nations through the *Indian Act* and other laws, the making of wills and the disposition of estates has become quite complicated with respect to reserve lands and persons registered as Indians under the *Indian Act*. Under the *Indian Act*, Indigenous lands and people were governed separate from other Canadians and treated as wards of the state. The role of the Crown as trustee and executor with respect to Indian wills and estates has given rise to many disputes in First Nations communities, with estates sometimes waiting years to be settled.

As a subject matter, wills and estates is linked to lands and land management, citizenship, matrimonial property, solemnization of marriages and financial management, as well as the general power of a government to act as a trustee when a person dies without a will (intestate). Simply stated, a will is the legal document used to set out a person's wishes for disposition of his or her real property (interests in land), personal property (furniture, vehicles, money, etc.) and other matters (burial requests, executor, etc.) following death. Succession of property is one of a will's most important components and relates to the transfer of the deceased person's property to others. In Canada, the provinces have jurisdiction over wills and estates and have passed governing legislation. Indians are the exception. Unless a First Nation is self-governing, jurisdiction for property on-reserve belonging to an Indian is federal and still falls under the authority of the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) and is governed under the *Indian Act* and regulations made thereunder.

Canada's policy is to recognize a First Nation's jurisdiction over wills and estates in comprehensive governance arrangements, but only with respect to the property of its citizens located on-reserve (or on settlement lands in the case of treaty). Therefore, Nations must consider how the exercise of jurisdiction would be coordinated with the jurisdiction of the province over the disposition of assets held by members off-reserve (or off settlement lands). If a Nation is in governance negotiations, it will need to consider the extent to which it wishes to make modern laws in this area, and to what end, within the parameters of the jurisdiction available to the it. Governance over wills and estates and "succession" matters are complicated, given the relationship between provincial and federal laws and the impact of section 91(24) of the *Constitution Act, 1867* and the *Indian Act*. However, for those Nations that wish to provide greater certainty with respect to the descent of property in accordance with rules that historically formed part of their Indigenous legal systems and coordinate those rules with those generally applicable in Canada, having recognized jurisdiction with respect to wills and estates could be very important.

It is important to consider the relationship between the rules of succession and the types of land interests that the Nation has created. The interests in reserve lands that are willable must be compatible with the land management and administration frameworks that are in place. Where Nations have established land codes or assumed jurisdiction over lands in comprehensive governance arrangements and have created private interests in land (similar to a Certificate of Possession under the *Indian Act* or fee simple interests), such instruments typically address the transfer of these

interests by a will (or rules of succession in the absence of a will) to another citizen of the Nation or whoever else is entitled to hold that interest under the Nation's law, including rules regarding the process of registration. It should be noted that while a land code may address succession and registration, this in itself is not considered an exercise of jurisdiction over wills and estates or a drawing down of that power.

Interestingly, despite the federal policy to recognize limited jurisdiction in this area, in all the current examples of modern treaty arrangements in BC, First Nations have chosen not to exercise jurisdiction over wills and estates. Rather, they have deferred to the provincial system once the *Indian Act* no longer applies. Because succession of personal property of "non-Indians" or non-citizens on First Nation land and real property of citizens off-reserve would not typically fall within a First Nation government's authority, either under modern treaty or other comprehensive governance arrangements, the effective implementation of this jurisdiction would be complicated for both First Nations crafting laws and their citizens or their lawyers following them. Where administrative powers are exercised by a "band" or where a First Nation assumes jurisdiction, their administration and rules regarding property would need to be coordinated with the provincial system, including how these matters are dealt with in provincial courts. Because of this complexity, and the significant number of other issues facing First Nations as they move beyond the *Indian Act*, it is not surprising that no First Nations with comprehensive governance arrangements have taken over full jurisdiction for wills and estates on their lands and have forgone this jurisdiction in their agreements.

While no First Nation in BC has exercised direct law-making authority over wills and estates, some First Nations have reserved the right to make laws in relation to the transmission of cultural property or hereditary property to ensure that items or property central to the First Nation's culture are not lost. In these cases, the rights of the collective to intervene only extend to individuals who have left no will (they died "intestate"), and their intentions with respect to the cultural property are not known.

Finally, as an alternative to exercising jurisdiction, a First Nation could seek delegated authority to administer the current regime under the *Indian Act*. There are no examples of this approach, which would have to be negotiated with Canada. There is possible authority under section 43 of the *Indian Act*, but AANDC currently refuses First Nations' attempts to use section 43(e).

INDIAN ACT GOVERNANCE

There is no recognized First Nations jurisdiction over wills and estates in the *Indian Act*. Under section 42 of the act, the Minister has full jurisdiction and exclusive authority with respect to the property of deceased Indians. Wills of "Indians" are processed by the Minister and AANDC officials in accordance with the *Indian Act* and the *Indian Estates Regulations* made under the act. The regulations made under section 42(2) of the act deal with lands in the possession of a deceased Indian at the time of death.

The *Indian Act* does not prevent an Indian from making a will. However, such a will has no legal force or effect with respect to the disposition of property until the Minister has approved the will or a court has granted probate under the act. The Minister may delegate jurisdiction to a probate court of the province under section 44. However, the court cannot make decisions over reserve lands without the consent of the Minister.

Under section 46(1), the Minister also has the power to declare a will void under certain circumstances. This entails quite broad powers, which many First Nations citizens feel are inappropriate and should not, under any circumstances, be exercised by a Minister of the Crown. Under the *Indian Act* system, an Indian's will cannot dispose of any land contrary to the interests of the "band" or the *Indian Act*. Certificates of Possession, where established and forming part of an estate, can be passed on to other citizens who are heirs, either in accordance with a will or subject to the *Indian Act* rules in section 48.

Distribution of Property on Intestacy

Under section 48 of the *Indian Act*, if a registered Indian, ordinarily resident on reserve, dies intestate (without a valid will), that person's estate will be distributed as follows:

- If the net value of the estate does not, in the Minister's opinion, exceed $75,000 in value, the assets go to the surviving spouse or common law partner ("Spouse").
- If the net value of the estate, in the Minister's opinion, exceeds $75,000, the Spouse receives the first $75,000 and:
  - if there is one child, the Spouse and the child split the remainder;
  - if there is more than one child, the Spouse receives one-third of the remainder with the remaining portion divided equally among the children.

The Minister may direct money to surviving children and can issue an order that the survivor retains the right to live in the couple's home.

If the deceased had no survivor or children, the estate is turned over to any remaining parents. The succession then includes siblings, children of siblings, and other next of kin.

Where a person not entitled to reside on the reserve (usually a non-citizen) has a right to a Certificate of Possession or Certificate of Occupancy by a will or through descent, the right is offered for sale to other citizens and the non-citizen receives the proceeds of the sale (see Part 1: Section 50 of the *Indian Act*). Where there is no buyer within six months, the interest reverts to the First Nation and the non-citizen inheritor receives compensation as the Minister determines (section 50(3)).

The *Indian Act* also provides very prescriptive rules regarding the distribution of property if an Indian dies without a will. Again, there are issues about whether these are the appropriate rules and whether a Minister of the Crown should be making the determination.

Not surprisingly, there are many disputes in relationship to the wills and estates of deceased Indians relating to reserve lands, and these can take years to resolve given the nature of the relationship with Canada and the involvement of the Minister. For estates left unsettled for unacceptably long periods, the courts generally have few options for enforcing the will when it is contrary to the provisions of the *Indian Act*. This reality has as much to do with the department's administrative capacity and the often poor manner in which reserve land interests have historically been created and recorded as it does with the *Indian Act*'s property transfer restrictions.

Even when a First Nation does not exercise jurisdiction over wills and estates, clearing up the land tenure systems on-reserve can go a long way to resolving potential disputes over succession and estate planning. Also, encouraging all First Nations citizens to make wills removes the involvement of the Minister, at least to some degree, in determining the descent of on-reserve property interests.

SECTORAL GOVERNANCE INITIATIVES

There are no sectoral governance initiatives with respect to First Nations' recognized jurisdiction over wills and estates. During the 1980s, as part of AANDC's (then INAC's) Lands, Revenues and Trusts initiative, there was talk of a sectoral legislative initiative addressing wills and estates. This did not materialize, as there was little or no First Nation support. Since then, the only changes to the statutory regime generally applicable to Indians and "Lands reserved for Indians" under the *Indian Act* have been through the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20) (FHRMIRA), which received Royal Assent on June 19, 2013. FHRMIRA includes provisions for the inheritance of property that vary and expand on the rules set out in the *Indian Act*. Where a conflict arises, the FHRMIRA provides notes that the particular provision is either "subject to" or "despite" particular provisions under the *Indian Act*. Under FHRMIRA, courts may make orders respecting the provisions in a deceased person's will. Under section 34 of the act, the surviving spouse or common-law partner is generally entitled to an amount equal to one-half the value of the family home and other matrimo-

nial interests. The FHRMIRA also provides that surviving spouses or common-law partners who are non-members are entitled to the same amount as if they were a member of the deceased person's First Nation. (The FHRMIRA is discussed in more detail in Section 3.22 — Matrimonial Real Property.)

COMPREHENSIVE GOVERNANCE ARRANGEMENTS

The *Westbank First Nation Self-Government Agreement* and the Sechelt Act both provide jurisdiction over succession of property of members, where the property is located on-reserve. Westbank has not exercised jurisdiction in this area. The Westbank Constitution land rules provide that *Indian Act* rules continue to apply.

Jurisdiction is recognized in the *Sechelt Indian Band Self-Government Act* (section 14(1)(q) and Sechelt Constitution (section 14)). Sechelt has passed the *Testate Succession Law* (1998-02 September 16, 1988), which provides that unless the executor/executrix of a citizen's estate elects within a specified time to have the estate managed under the *Indian Act*, the estate involving a citizen's interest in Sechelt lands and the personal property of a citizen ordinarily resident on Sechelt Lands will fall under the jurisdiction of the Supreme Court of BC and be addressed under provincial laws dealing with estates listed in the attached schedule.

In the treaty agreements, the *Indian Act* applies to all property and estates of an Indian who dies before the effective date of the treaty. After the effective date, provincial law applies to wills and estates. Under the treaty arrangements, jurisdiction over wills and estates, subject to provisions dealing with cultural property, comes under provincial authority. Canada undertakes to notify all "Indians among the Members" of treaty First Nations that their wills are not valid after the effective date and should be reviewed to ensure validity under provincial law. The Tsawwassen, Nisga'a and Yale agreements have specific provisions that First Nation law will apply to the devolution of cultural property of a First Nation citizen who dies intestate.

Table — Comprehensive Governance Arrangements

	GENERAL JURISDICTION	CONFLICT OF LAWS
Sechelt	*Sechelt Indian Band Self-Government Act* s.14(1)(q) provides the band council with the authority to make laws of succession of real property of band members on Sechelt Lands and personal property of band members ordinarily resident on Sechelt lands. (s. 14(1)(q)) The Sechelt Constitution requires the incorporation by reference of such laws of the Province as are necessary. Sechelt has enacted a Testate Succession Law giving executors of members' estates for interests in Sechelt Lands or for personal property of members resident on Sechelt lands the option of using the *Indian Act* rules. (Part III, Division (I), s. 14(d)(1)–(6))	N/A
Westbank	Westbank has jurisdiction over the wills and estates of Westbank members. Until such time as Westbank enacts a law, the *Indian Act* will apply. (Part VIII, s. 78–80)	Westbank law prevails. (Part VIII, s. 81)
Nisga'a	Nisga'a has jurisdiction over the devolution of the cultural property of a deceased person. (Ch. 11, s. 116)	Nisga'a law prevails. (Ch. 11, s. 116)
Tsawwassen	Tsawwassen has jurisdiction over the devolution of cultural property of a Tsawwassen citizen who dies without a valid will. (Ch. 14, s. 2(f))	Tsawwassen law prevails. (Ch. 14, s. 3)
Maa-nulth	Each Maa-nulth First Nation Government may make laws with respect to the ownership and disposition of estates or interests in the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation owned by that Maa-nulth First Nation, its Maa-nulth First Nation Corporations or a Maa-nulth Public Institution of that Maa-nulth First Nation Government. (s. 13.14.1(b))	Maa-nulth First Nation law prevails. (s. 13.14.2)
Yale	Yale First Nation Government may make laws with respect to the devolution of Cultural Property of a Yale First Nation Member who dies intestate. (s. 3.23.1)	Yale First Nation law prevails. (s. 3.23.2)
Tla'amin	The Tla'amin Nation may make laws with respect to the creation, allocation, ownership and disposition of estates or interests in Tla'amin Lands, including fee simple estates or any lesser estate or interest. (Ch. 3, s. 116(b)(1))	Tla'amin laws under S. 116 prevail. (Ch. 3, s. 118) Federal or provincial law prevails with respect to matrimonial real property. (Ch. 3, s. 119)

Table — BC First Nations' Laws/Bylaws in Force

COMPREHENSIVE GOVERNANCE ARRANGEMENT (CGA)		
CGA	**LAW NO.**	Description
Sechelt Indian Band	1988-02	Testate Succession
Sechelt Indian Band	1993-01	Testate Succession Amendment
Sechelt Indian Band	1999-01	Intestate Succession

RESOURCES

Provincial

BC Ministry of Justice
Wills and Estates
PO Box 9290 Stn Prov Govt
Victoria, BC V8W 9J7
Phone: 250-356-0149
Fax: 250-387-6224
www.ag.gov.bc.ca/courts/other/wills_estates.htm

Federal

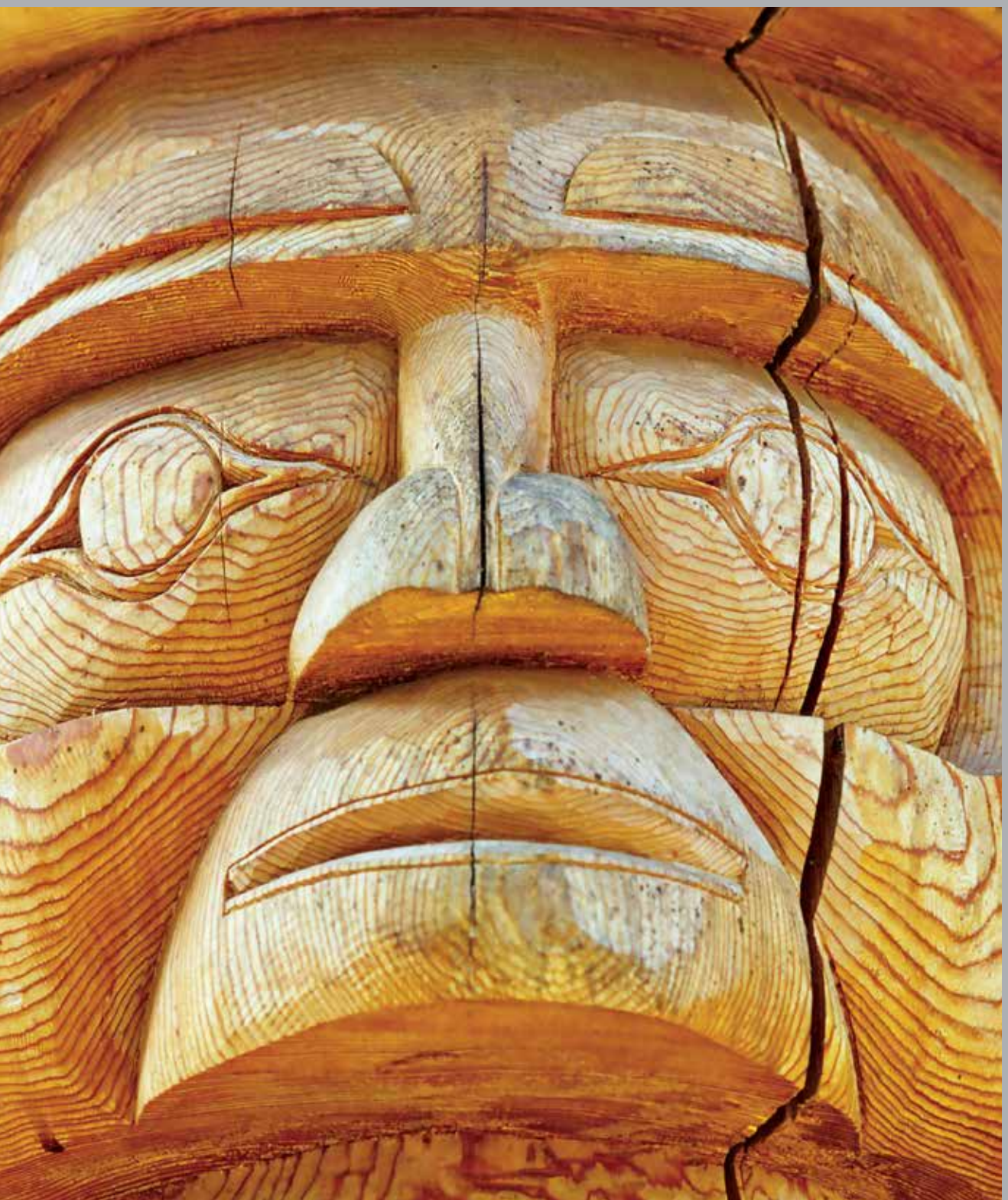
Aboriginal Affairs and Northern Development Canada
Estates and Trusts
10 Wellington, North Tower
Gatineau, Quebec
Postal Address:
Ottawa, Ontario
K1A 0H4
Toll-free: 1-800-567-9604
Fax: 1-866-817-3977
www.aadnc-aandc.gc.ca

SELECT LEGISLATION

- *Indian Estates Regulations* C.R.C. c. 954
- *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20)

PART 1 /// SECTION 4

Financing First Nations Governance



4.0

FINANCING FIRST NATIONS GOVERNANCE

4.0

INTRODUCTION

How will First Nations government be financed and by whom? Will there be adequate financial resources from all sources available to a Nation to undertake and implement the necessary governance reform to move away from governance under the *Indian Act* on-reserve and, where necessary, off-reserve and within a Nation's ancestral lands, including Aboriginal title lands? Will there be sufficient financial resources to exercise broader jurisdiction under sectoral and eventually comprehensive governance arrangements for delivering programs and services (either by First Nation governments or on behalf of other governments) that are comparable to those available to other communities in Canada? What is the role of all orders of government in financing First Nations governance, assuming that financing of First Nations governments is a shared responsibility?

These are the very real and practical questions that every First Nation looking to re-establish self-government in the era of recognition is going to have to ask, and there are no easy answers. The answers to these questions will largely determine whether, realistically, First Nations governments will be reformed and the extent to which each First Nation can rebuild. Despite the best intentions of our leaders, without access to adequate financial resources the vision and hopes of First Nations peoples will not be met. While good governance is a prerequisite for stable and healthy societies, it costs money. Programs and services, delivered to a standard comparable to those delivered to other Canadians, will also need to be paid for.

The answers to these and other questions about financing First Nations governance are ultimately tied to developing a new fiscal relationship between First Nations and the Crown, the evolution of which can, to some degree, be discerned from agreements on fiscal relations that have already been negotiated between the Crown and self-governing First Nations. Fiscal relations agreements between governments set out how money will be transferred from one order of government to another and how those transfers will be calculated. They also cover how First Nations can raise their own money and how this money will be used. The fiscal relations provisions set out in comprehensive governance arrangements typically outline the roles and responsibilities of each level of government in providing for core institutions of governance and the delivery and payment for programs and services, as well as other costs such as building infrastructure. The fiscal responsibilities are based on the costs of governance and the programs and services to be delivered.

The financial questions and the nature of the fiscal relationship with Canada, and where applicable BC, will be among the most difficult and challenging issues any Nation, its governing body, its staff and ultimately the citizens will face in this period of Nation-building. This conversation is one that will be held in every community, regardless of the reform being considered along the governance continuum. It is also a conversation that must continue within the governments of Canada and BC, which have a shared responsibility to support First Nations governments. In Canada, there generally exists a constitutional commitment between the provinces and the federal government to promote equal opportunities for the well-being of Canadians, further economic development to reduce disparity in opportunities, and provide essential public services of reasonable quality to all Canadians. This is achieved with provinces through a program of equalization payments. It will be the subject (as it already is) of ongoing negotiations between the governments of First Nations and Canada and, where applicable, BC, as Nations continue to move into sectoral and comprehensive governance arrangements, or for those governing under the *Indian Act*.

For many citizens of First Nations, the issue of financing their governments will quickly focus on their responsibility to pay for their institutions of governance and the programs and services provided by their governments through the imposition of fees and charges for specific services, as well as, in some cases, taxes. All governments need to raise money and First Nations governments are no different. Taxation of a Nation's citizens is also an issue of accountability, as paying tax strengthens the need for public accountability for finance, which is a fundamental principle of good governance. While all the comprehensive governance arrangements under a modern treaty provide for taxation of citizens and, to a lesser degree, non-citizens, this issue remains a major impediment to advancing First Nations governance. This is because Canada is unlikely to change its current policy approach to taxation, and there is often great reluctance on behalf of other governments to vacate or cede "tax room." Also, given the general unpopularity of a taxation requirement by the citizens of Nations, this could delay the conclusion of further comprehensive governance arrangements that require under federal policy that these fiscal matters be resolved. This is an important issue for First Nations governments; First Nations argue that, for most First Nations, there is very little wealth to actually tax and that in order to significantly improve the lives of their people, fundamental governance reform is needed today. Reform is too important to allow it to be delayed for reasons based solely on the tax exemption under section 87 of the *Indian Act*.

Under the *Indian Act*, First Nations have limited revenue-raising powers, and for the most part they are still dependent on federal transfers to pay for the cost of government and the cost of programs and services provided by or through "band" governments. However, this is changing — as First Nations develop economies under the *Indian Act* to the extent that they can, participate in sectoral governance initiatives, or are eventually recognized as self-governing. As a result, First Nations are raising more own -source revenues than ever before, and this trend is growing. In future, such heavy reliance on federal transfers should no longer be the norm.

While access to revenue sources is, of course, essential for any government, so too is having the institutional framework to ensure sound fiscal policy and financial decision-making. Having well-run finances supported by strong local financial administration policies and systems, preferably established under a Nation's own law (as discussed in Section 3.11 — Financial Administration), is of critical importance as First Nations consider the financial needs of their governments, plan accordingly and negotiate new fiscal relations with Canada. As Nations rebuild, they must have a clear understanding of what government currently costs and will cost before decisions regarding new governance arrangements can be made.

THREE STAGES OF GOVERNANCE REFORM

Bearing in mind the financial needs of First Nation governments, it is helpful to consider the process of Nation rebuilding as three stages of governance reform. In moving along the governance continuum away from the impoverished notion of governance under the *Indian Act*, these stages would apply to the uptake of a specific jurisdiction, to entering into a comprehensive governance arrangement, or indeed when considering governance over Aboriginal title. These stages are:

1. ***Start-up*** — First Nations must create or expand their governing institutions, including the physical structures, the personnel, and the skills and processes, as well as drafting and enacting an initial body of laws, and consulting with those subject to those laws. This is a very resource-intensive period, with both human and financial costs. This stage could even take up to two or three years, based on the experiences of First Nations with comprehensive governance arrangements. Portions of the start-up phase may take place

before the governance arrangement is effective, should the First Nation choose to make preparations in advance to be adequately prepared on the day that it legally takes control (its effective date).

2. ***Catch-up*** — First Nations must develop their processes, infrastructure, economies and the capacity of their citizens to levels that are comparable with the general population. This is also the period in which the institutions of governance established during the start-up phase are stabilized (and, where necessary, modified) to ensure sound processes and a strong operational base, which allows for the primary focus in this phase to be on program and service policy development, reform and delivery. This period may be 10–20 years, and is also resource-intensive, but less so than the start-up stage.

3. ***Ongoing*** — Rebuilt First Nations and their citizens are developed sufficiently to govern effectively and to manage ongoing programs and services. This is forever.

Each Nation's progress through these three stages will be at different speeds, depending on the jurisdiction being drawn down, the scope of the responsibilities assumed, and previous experience. For example, a Nation may have considerable experience in land management prior to assuming more jurisdiction under a sectoral or comprehensive arrangement, and may require less time to move through the three stages in that subject matter. On the other hand, their responsibility over healthcare may only begin with the new governance arrangements, therefore requiring much longer timeframes to reach the third stage. Where core governance reform is the first step in a Nations' rebuilding efforts (e.g., developing core institutions of government and developing a constitution), this may reduce the time required to pass through the stages for each subsequent jurisdiction drawn down.

Nations that have negotiated governance arrangements as part of modern treaties in BC, including the Tsawwassen First Nation treaty, have chosen to move through the start-up phase very quickly, in order to move as quickly as possible away from *Indian Act* governance. Other treaties, including among Yukon First Nation groups, have involved a more incremental approach, where the start-up phase has often been undertaken at different times for different jurisdictions. For example, a First Nation might choose to focus on implementing healthcare jurisdiction, and subsequently education jurisdiction, rather than entering into all areas of jurisdiction simultaneously. The "transformative" and "incrementalist" approaches have different attributes. The transformative approach requires a good deal of resources at the start-up phase, and involves a more immediate and disruptive change process. However, it capitalizes on the momentum of the leadership and available resources during that critical moment in a Nation's history. The incrementalist approach, on the other hand, requires fewer resources up-front, but may be more expensive over the long-term, as project resources need to be maintained for a longer period of time. At the end of the day the objective is the same: strong and appropriate core governance delivering quality programs and services to citizens and others that are at least comparable to programs and services provided to all Canadians.

As economists will confirm, unless there are sufficient financial resources available for First Nations to move through these phases, it will be very difficult for them to move beyond the *Indian Act* in a concerted and organized way that leads to the successful implementation of self-government. Even then, it will be hard to implement all aspects of potential jurisdiction in a comprehensive manner. But this reality should not be used as an excuse to impede progress. In addition to expanded revenue-raising capacity, moving forward on governance reform beyond the *Indian Act* and developing a new fiscal relationship with the federal and provincial governments can result in efficiencies in several ways.

For example:

- Better and more transparent financial administration systems often result in more appropriate expenditures of funds.
- More community planning and decision-making can result in better priority-focused spending.
- A broader range of choices for program delivery than the *Indian Act* system can result in increased efficiencies.

In order to determine the level of financing required to implement governance reform and to provide comparable programs and services, it is necessary to cost governance options.

4.1

COSTING FIRST NATIONS GOVERNANCE

What is the cost of running a Nation's government (its core institutions), exercising its jurisdiction and authority, and providing programs and services? Having a clear picture of the relationship between sources of revenue and the cost of running a Nation's government and associated responsibilities to provide programs and services will be essential in determining whether the model or extent of government contemplated by a group is feasible. It will be equally important in giving a First Nation's citizens the confidence to move forward with governance reform, regardless of where on the governance continuum that reform falls. The current governing body (i.e., chief and council) and the citizens will need the assurance that moving beyond the *Indian Act* will be affordable and that the First Nation will be able to meet its increased responsibilities and obligations under its own laws. More importantly, people will want some assurance that the Nation's "vision" can be achieved.

SETTING PLANS AND PRIORITIES

The cost of running a government and providing programs and services depends on the goals and objectives of that government as reflected in its vision for the future. First Nations, in developing their strategic plans, typically identify priorities based on the Nation's vision and allocate resources accordingly (human, financial and other). This subject is covered extensively in *The Governance Self-Assessment* (Part 2 of the Toolkit), in particular in Module 1 — The Governing Body. (Module 1 explores the role of the governing body in identifying or articulating the long-term vision for the First Nation, and provides guidelines and measurements that the governing body can use to assess both the ongoing work in this area and opportunities to strengthen and build on the existing vision.)

Ideally, the governing body's work identifying the long-term vision for the Nation is then reflected in operational work plans for the various departments within the Nation's administration responsible for carrying out the directions of the governing body. Operational work plans become the basis for costing the activities to be undertaken and are rolled up in the yearly and multi-year budgets of the Nation. (In *The Governance Self-Assessment*, Module 2 — The Administration is designed to assist First Nations in assessing the effectiveness of their administration, which is particularly important during the current transition period as First Nations move away from governance under the *Indian Act* and are re-establishing their own institutions of governance, often with expanded powers.)

Of course, the Nation's success in implementing its vision through the governing body's strategic planning, priority-setting, and reflecting the vision in departmental operational work plans will depend on the degree of spending discretion that the governing body and its administration have in allocating the available resources. Such discretion reflects both the constraints that may be placed on funding transferred by other governments (i.e., the restrictions in funding agreements, often reflecting that government's policy priorities with expected "deliverables") and the amount of discretionary own-sources of revenues a Nation has at its disposal after all its legal and other responsibilities have been met.

To assist a Nation in costing its governance and to have a meaningful conversation on this subject within the governing body and the administration and with citizens, it will be important to estimate as accurately as possible the financial resources required to run a government and pay for its institutions (or proposed institutions). In addition, it will be beneficial to estimate the resources required to administer various jurisdictions that the community might take over and any programs and services delivered in accordance with those jurisdictions. This costing exercise would need to include any

commitments on program and service delivery standards that might be made to other governments (usually Canada, but also now more frequently BC and local governments, and, in some cases, other First Nations) with respect to the programs and services those other governments would continue to support or purchase under new financial transfer arrangements.

When considering the cost of governance and having this conversation in your community, it can be helpful to distinguish between the cost of running the Nation's government (e.g., the cost of the governing body, law-making, core administration, and so on, as described in Section 2 — Core Institutions of Governance of this report) and the cost of the government's exercising specific jurisdictions and delivering programs and services (as described in the various subject matters considered in Section 3 — Powers (Jurisdictions) of the First Nation). Moving forward, it may also be helpful to distinguish between the cost of delivering programs and services provided by the Nation on behalf of another government under that government's jurisdiction (i.e., on behalf of Canada or BC) as opposed to those programs and services that the Nation will be, or is, delivering under its own jurisdiction.

Making these distinctions is important and ultimately tied to the conversation the community will have on which jurisdictions it should take on (e.g., education, health, land management) and which it may not take on at this time. Some areas of jurisdiction cost more to take on than others and there is less opportunity to raise revenues to support the exercise of that jurisdiction (i.e., health, education and social services). In these cases, and for the foreseeable future, the ability to effectively govern in that area and provide programs and services comparable to those provided by other governments will be dependent on the Nation receiving significant financial transfers from other orders of government.

All of this decision-making should, of course, be driven by the vision of the community and its strategic plan. (See *The Governance Self-Assessment* (Part 2 of the Toolkit), Section 1.1. — The Governing Body — Establishing Effective Governance, and its subsections, including Developing a Clear Direction/Vision, Maintaining Positive Relations with Citizens and Stakeholders, and Being Accountable and Realizing the Vision.) There is little point in wasting time or energy or dedicating limited resources to governing areas or running programs and services that have little or no bearing on the Nation's vision or that are not included in the strategic plan. In fact, the strategic planning exercise might identify areas of jurisdiction to avoid or programs and services that the Nation does not want to deliver on behalf of Canada or the province.

Tsawwassen First Nation Strategic Planning

The very first project in Tsawwassen First Nation's (TFN) pre-implementation work plan was the development of a strategic plan for the Nation. Developed in 2007 and approved in 2008, this plan set the groundwork for how TFN developed its legislation and implemented its governance processes. When TFN negotiated its treaty, it recognized that a successful future lay in the tremendous value of the undeveloped land it was to gain through a settlement. It also recognized that there would be significant development pressure on TFN. This was reflected in its vision, which sought to create a "tremendous place to raise a family, and a successful model of a self-sustaining First Nations community." This vision — self-reliance through the development of long-term tax and lease revenues — was reflected in TFN's approach to its Land Use Plan (2008), its Land Act (2009), and the manner in which it operates and funds its Lands Department (2009–present).

At its core, any planning exercise is about making policy choices, setting priorities and then directing resources to meet the priorities. It is also a way to ensure that limited resources are not directed to meeting another government's agenda or priorities. For example, the federal government may prefer a First Nation to in fact take on jurisdiction for health or social services, with that intention that the Nation, having assumed legal responsibility for those areas, will eventually have a concomitant obligation to use its own-source revenues to pay for the delivery of those programs and services. This may not be realistic or preferable. A Nation may, of course, choose to deliver programs and services on behalf of another government, indeed even assume some responsibility for program design, assuming that an appropriate contract for services can be negotiated and that doing so does not compromise its own vision and plan. In this way, from a strategic perspective with fiscal implications, it is often about making decisions not to be self-governing for a particular jurisdiction.

ESTIMATING THE COSTS OF GOVERNANCE

While there is a correlation between the range of jurisdictions a Nation may exercise and the cost of running the institutions of government, they really should be looked at independently. Regardless of whether a Nation ultimately takes on jurisdiction in one, two, three, four or more areas, there will be a fixed cost to running the core institutions of the government. By contrast, when looking at programming, there are a number of innovative arrangements that can reduce the cost of program and service delivery (e.g., service delivery contracts with other governments, partnerships, aggregations or tribal councils; delegation to regional or national First Nation institutions and authorities or to non-Aboriginal institutions). The same cannot be said for core governance: this is indispensable and is internal to an individual Nation.

Starting the process of estimating the cost of governance can be daunting, particularly as there are few examples of modern self-governing Nations, and even for them the data are still relatively limited. There is some evidence of how some Nations, primarily those with governance developed as incidental to a land claim, are faring and the costs of these governments, including the programs and services delivered by them. Most of this experience, however, is in the north and in more remote parts of Canada, where full governance arrangements have not yet been implemented. There are also increasing data from BC, specifically from Sechelt, Nisga'a, Westbank and Tsawwassen.

Tsawwassen First Nation's (TFN) experience is that self-government is undoubtedly more expensive than governing under the *Indian Act*. The core cost of jurisdiction, in particular, drives costs that are substantially higher than in the pre-treaty days, reflecting the increased responsibility and powers of the TFN government. For example, the amount provided to TFN under its Fiscal Financing Agreement for "Local Government" is Canada's approximation of what it should cost to run those core governance services, including land management. Canada provides TFN with slightly over $900,000 for those services; in 2013, TFN spent approximately $5.2 million on them. TFN's Legislature and Executive Council are well supported by the community and represent a much more transparent, accountable governance model than prior to treaty; but they are more expensive.

While First Nations do not have much experience with the cost of comprehensive governance beyond the *Indian Act*, all First Nations under the *Indian Act* have a pretty good idea of what it costs to run their governments today and to deliver programs and services. All First Nations have experience in delivering federal programs and services under funding contracts with Canada and in governing as "band" councils under the *Indian Act*. There are also data from sectoral governance initiatives such as land management, where more detailed information on specific jurisdictions is available. While these data should be considered, caution must also be exercised. The scope of responsibilities under comprehensive governance arrangements is so different from under the *Indian Act* that Nations should not consider this as a starting point, as the TFN experience described above shows. Under the *Indian Act*, program responsibilities often started with program administration (the delivery under a prescribed set of rules) and ended with reporting requirements to AANDC. Under self-government, however, a much broader range is required, starting with visioning, then policy work, then law-making and program planning and design, then budgeting, then program delivery and ongoing administration, and finally, perhaps most importantly, program evaluation, which is internally important for continuing to improve programs. (In *The Governance Self-Assessment*, Module 1 — Establishing Effective Governance and Module 2 — The Administration, and in particular the guides created for each of these modules, provide guidance to a First Nation's governing body and administration in building strong and appropriate governance, including attention to program development and evaluation.) This is the critical chain of program development, approval and delivery. It is undoubtedly more expensive than simple program administration; but it is also the essence of self-government.

As First Nations are raising more and more of their own revenues, they are also developing more stringent internal budgeting processes under their own financial management laws and systems. When followed, these budgetary processes permit a Nation's governing body and staff to consider the true and developing costs of their government and to compare budgeted amounts to actual expenditures. As the own-source revenues of First Nations grow and this revenue is used to run their governments, design and deliver programs and services based on their priorities, and supplement federal and provincial programs and services, so too will an appreciation grow of what it costs to run these new and emerging forms of governments within Canada.

In addition to data from First Nations governments, Nations can look to what it costs to run other governments of similar size or with similar responsibilities and to deliver programs and services. Although the range of powers and structure of First Nations governments is unique within Canada, there are still a number of useful comparisons — for example, the cost to operate the core government institutions, the cost per capita to deliver a particular service or group of services, the cost to maintain capital infrastructure based on the extent and age of the infrastructure, and so forth. Economists are good at making these comparisons, as long as accurate financial and other statistical information is available. These types of comparisons are routinely made for domestic as well as international purposes and are used by analysts in considering the efficiency and quality of governance.

In BC, the Nations that have entered into comprehensive governance arrangements generally did estimate the cost of their governance in varying degrees of detail, prior to entering into those arrangements. They did this in part to support the negotiation of ongoing funding from Canada, but also to ensure that they could actually afford to assume the added responsibility when all sources of revenue were taken into consideration. Tsawwassen, for example, undertook a Program and Service Treaty Related Measure (TRM) in 2004/05 that was a costing exercise. This is particularly important in the "start-up" and "catch-up" phases described in Section 4.0 — Introduction, where a Nation is developing and growing its internal governance processes, its economy and the capacity of its people to levels comparable to other Canadians. This is a time when core institutions are being re-established, when new or expanded jurisdictions are being considered and implemented, and when the intensity of activity will be greatest.

Bearing in mind the need for "start-up" and "catch-up," self-governing Nations looked at their current governance costs, their increased responsibilities and their ability to raise additional revenues. This is typically done for core institutions of government and on a jurisdiction-by-jurisdiction basis, where comparisons with other governments, including other First Nations, were and are considered. This work was also undertaken as part of some of the sectoral governance initiatives. For example, a significant amount of work was undertaken by the First Nations Lands Advisory Board with respect to Nations operating under the 1996 *Framework Agreement on First Nation Land Management* ("Cost/Benefit Analysis of Future Investment in the *Framework Agreement on First Nation Land Management*," January 27, 2010).

There are also ongoing discussions between some First Nations and Canada and/or BC with regard to other sectoral governance initiatives that are at an earlier stage of their implementation, including the BC education initiative (Section 3.7 — Education). Part of the reason there are no examples of jurisdiction being exercised under this initiative at the time of writing this report lies in the Nations' concern that they will not have sufficient resources to carry out their responsibilities.

To assist communities that are considering governance beyond the *Indian Act* as part of the BC treaty-making process, the First Nations Summit has developed a Fiscal Arrangements User Model. This is a Microsoft Excel–based spreadsheet that enables a First Nation to input its own demographic, government, financial, economic and other data, so that it can examine the financial implications of proposed fiscal arrangements (transfers as well as internal revenue-raising capacity) over a 20-year timeframe. Tsawwassen First Nation has developed its own model, built on a complex series of Excel

spreadsheets. The TFN model forecasts all expenditure and revenue sources for a 10-year period. It has been extremely helpful for TFN's elected officials and staff in modelling and contemplating cash-flow scenarios, particularly in years when infrastructure expenditures are significant.

In addition, a number of reports and studies have also looked at the issue of costing governance. Some of these are listed below and may be useful to your Nation in estimating the costs of its governance:

- Price Waterhouse (16 September 1997). *Study on the Cost of the Legislative Components of Governance*. http://publications.gc.ca/pub?id=94930&sl=0

- Robert L. Bish (June 1999). *The Cost of Municipal Elected Officials in the Capital Region of British Columbia*, Local Government Institute, University of Victoria. www.uvic.ca/hsd/publicadmin/assets/docs/BBish/cost_municipal_elected_officials.pdf

- Price Waterhouse Coopers (2006). *A Comparative Analysis of INAC Funding for the Five Large First Nations and All Other First Nations in Ontario*.

- Allan M. Maslove (June 2008). *An Approach to Costing Core Government for First Nations*. www.ainc-inac.gc.ca/ap/gov/igsp/accgfn-eng.asp

- Fiscal Realities Economists (2000). *The True Cost of First Nation Government*. www.ainc-inac.gc.ca/ap/gov/igsp/tcfng-eng.asp

- Indian and Northern Affairs Canada (2006). *Funding of First Nations Basic Services: Cost Drivers Project — Indian Government Support Programs*. www.ainc-inac.gc.ca/ap/gov/igsp/ffn-eng.asp

- Elias Karagiannis (30 September 2003). *The Cost of Government in Small Size Municipalities*. www.ainc-inac.gc.ca/ap/gov/igsp/cgssm-eng.asp

- Implementation Working Group (October 3, 2007). *Yukon First Nation Final and Self-Government Agreements Implementation Review.*

- Roslyn Kunin & Associates (December 22, 2010). *Analysis of Cost and Revenue Models Submitted to the Westbank First Nation.*

4.2

FIRST NATIONS REVENUES

It is one thing to estimate the costs of government (as discussed in Section 4.1 — Costing First Nations Governance), based on statutory obligations and the plans and priorities of the governing body, but it is quite another thing to pay for them. The running of government and the delivery of programs and services requires a source of funds sufficient to actually pay for it. A simple model of government financing would be that sources of revenue available to each level of government should be adequate to fund the cost of running that level of government and the programs and services that it is expected or required to provide. Of course, it is not that simple. In the first place, it would assume that there are sufficient revenues from all sources available from the public purse to all levels of government — something that is never certain. Revenues go up and down in accordance with the state of the economy (i.e., when the economy is weak the ability to raise non-borrowed revenue decreases). Further, some governments, for many reasons, can provide services at less cost (e.g., they are more efficient, there are fewer users, they are not remote). Moreover, and perhaps for more than any other reason, the amount of revenue a government can raise is ultimately a political question of the public's tolerance for paying for government (i.e., through taxes, fees, charges and so on) and differences of opinion on what governments should or should not do. However, and notwithstanding the revenue constraints that all levels of government face, First Nations are confronted with an added challenge and potentially crippling reality: under the current model of "fiscal federalism" in Canada, the different levels of government have already divided up the so-called and available "revenue-source pie."

AN ALREADY DIVIDED "REVENUE-SOURCE PIE"

For the most part, the "revenue-source pie" (i.e., the power to raise taxes, collect royalties, etc.) has already been divided constitutionally between the federal and provincial governments, leaving little room for Aboriginal governments. These two levels of government guard their sources of revenue, and their ability to determine how the moneys raised are spent, very closely. In this environment, where the revenue-source pie has already been carved up, access to sufficient funds for First Nations to carry out their functions of government, whether under the *Indian Act*, sectoral governance initiatives or comprehensive arrangements, remains a serious challenge. To remedy this situation, Aboriginal people have been calling on the two other levels of government in Canada to more equitably divide up the revenue-source pie — in accordance with a new fiscal relationship leading to a different model of fiscal federalism that includes First Nations governments. The fundamentals of this new relationship are discussed in Section 4.4 — Developing a New Fiscal Relationship.

Today, and in large part as a result of the fiscal financing models currently in play that reflect how the revenue-source pie has already been divided, and with few but notable exceptions, most First Nations in Canada, regardless of where they may be on the governance continuum, remain heavily dependent on financial transfers from Canada and still have insufficient revenues (from all sources) to meet their needs. Currently, given the revenue-raising capacity of First Nations and the levels of fiscal transfers, First Nations governments are woefully underfunded in comparison with other levels of government (see textbox), even without taking into account the need to "start up" and "catch up," as discussed in Section 4.0.

As a result, where First Nations governments are providing programs and services (either under their own jurisdiction or on behalf of Canada), they typically have significantly less money available than other governments do to provide the same type of service; consequently, the services provided are

First Nations Per Capita Expenditure/Revenue Comparisons

In 2011/2012, AANDC spent an average of $9,056 per First Nations citizen living on reserve compared to the federal government spending an average of $7,316 for non-First Nations. It is necessary to understand that almost all the costs of all programs and services to First Nations on reserve are paid from one source — AANDC. This is in contrast to non-First Nations who receive services from three levels of government.

In 2010, it was estimated that all government spending per resident in Toronto was estimated to be $24,000 (including federal, provincial and municipal funding sources), while all programs and infrastructure for residents on a nearby reserve amounted to $11,355 per capita. (Land, 2011)

usually inadequate and certainly of lower quality. The impact of significant underfunding is having a profound impact on the future prospects of First Nations children, First Nations and indeed of the country. The 2005 Kelowna Accord was an attempt to rectify this situation and close the funding gap by increasing transfers in the short-term and a longer-term vision of self-government with greater First Nation access to their own revenue streams.

Kelowna Accord, 2005

The Kelowna Accord was an agreement between Prime Minister Paul Martin's Liberal government and provincial governments and First Nations leadership resulting from 18 months of consultations and round-table meetings. The following goals were included in the Kelowna Accord:

- Address social inequalities through a $5-billion investment over five years.
- Work collectively to bring high school completion rates on par with the non-Aboriginal population.
- Reduce youth suicide rates (the highest in the world) by 50 per cent.
- Provide potable water and improved housing conditions to First Nation reserves.
- Invest $200 million in community economic development.
- Provide resources for training in financial accountability.

It is clear that the funding and investments promised under the Kelowna Accord were a significant investment in First Nations people and an acknowledgement that closing the quality-of-life gaps in First Nations communities is important for the financial well-being of this country.

It is recognized by most First Nations that transfers from Canada or the provinces are not the answer. They will never be, nor should they be, sufficient to provide for the full exercise of the powers that First Nations are seeking and to provide the services that are needed. It is also recognized that under the current fiscal models, the federal government will never transfer sufficient funding to meet the goals, hopes and dreams of First Nations people, and First Nations do not expect this. As a result, and like any government, First Nations must raise their own revenues to survive and flourish.

Today, while Canada still pays for most of the cost of providing the programs and services that First Nation governments deliver to their citizens through fiscal financing agreements (reflecting federal priorities) this is changing. As a result of new revenues, many programs and services (whether supported in part by funding from Canada or not) are increasingly paid for using First Nations' own revenues.

Eventually, changes to federal and provincial policy will be needed to ensure that First Nations have adequate access to stable revenue streams, with reliance on transfers only to address fiscal capacity limits. While the situation to some degree is already changing for some First Nations, the situation will not be changed significantly for all until there is a fundamentally new fiscal relationship between First Nations and the Crown, with recognition of First Nations revenue-raising powers through an appropriate division of the revenue-source pie. However, it is in the context of the current fiscal reality that we now consider the revenues that First Nations have access to today, and from what sources and on what terms. And it is certainly not all discouraging.

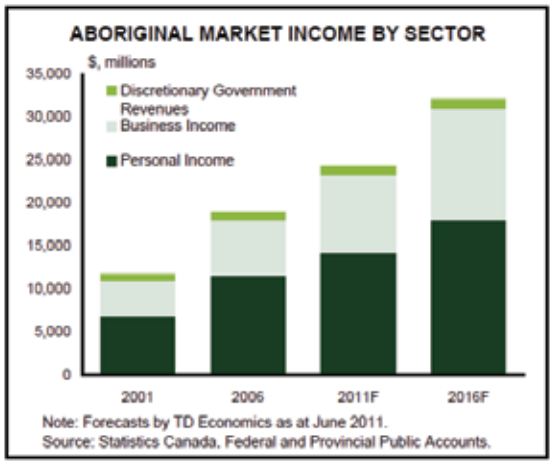
GROWTH AND DIVERSITY OF ABORIGINAL INCOME

Despite the current environment and the systemic problems with fiscal federalism in Canada, what is very encouraging is that incomes for First Nations peoples are growing, and growing significantly (for citizens, First Nation governments and for Aboriginal businesses). First Nations' own sources of revenues are increasing as local economies grow and communities become stronger and healthier — attributable largely to improved governance and the reforms discussed in this report. In many cases, this increase in revenues is predominantly from non-governmental sources and is a result of successful business activities.

TD Economics Report

In celebration of National Aboriginal Day on June 21st, TD Economics has built a tradition of conducting Aboriginal-related research to raise awareness of issues confronting Aboriginal people, business and communities.

In June, 2011, TD Economics released a report titled: *Estimating the Size of the Aboriginal Market in Canada*. TD estimated that the combined total income of Aboriginal households, businesses and government sectors will reach $24 billion in 2011 — which is double the $12 billion recorded just 10 years earlier in 2001. It is estimated that this could be over $32 billion by 2016. If this is achieved, total Aboriginal income would be greater than the level of nominal GDP of Newfoundland and Labrador and Prince Edward Island combined.



Canada refers to funds generated by First Nations communities themselves as "own-source revenues" (OSR). OSR is a term neither used in accounting nor defined precisely, but it is rapidly becoming a part of the vocabulary of evolving First Nations governments. Canada specifically uses this term as part of a policy that seeks to reduce federal transfers by a formula that takes into account the revenue-raising capacity of First Nations. OSR is becoming an increasingly important source of revenue for First Nations as they begin to lessen their dependence on federal transfers. In 2012/13, the federal government transferred $5.69 billion to First Nations. As this report has described, First Nations are already raising government revenues from a number of sources, whether under the *Indian Act*, through sectoral governance arrangements or under comprehensive governance arrangements. While hard and fast numbers are not readily available, as statistics are not collected, the OSR of First Nations across Canada was conservatively estimated by the First Nations Finance Authority (FNFA) to be $5.667 billion in 2014. A significant portion of this is from BC First Nations. It is also coming not simply from income generated by activities on-reserve (governmental or otherwise) but from activities within the broader ancestral lands of the Nations and beyond.

Geographical Scope

Despite the fundamental problems with the fiscal relationship, the revenues being generated by BC First Nations are both growing and coming from an increasing number of sources, not only from the lands over which they exercise recognized governance powers (e.g., on-reserve lands or treaty settlement lands), but also from Aboriginal title lands, as well as from their broader ancestral lands and indeed beyond. Accordingly, Nations are increasingly financing the cost of government using revenues derived from within their broader ancestral territories, including supporting core institutions of governance. This includes not just funding the *Indian Act* band councils, but also the re-emerging tribal institutions that in many circumstances are the more appropriate and legitimate governing bodies with respect to the proper title-holder and that are tasked with decision-making/governance over ancestral lands.

The increase in revenues from ancestral lands is a direct outcome of court decisions respecting Aboriginal title and rights. As a result of these decisions, it is now possible for Nations to ensure some form of revenue-sharing where Aboriginal title exists or must be presumed to exist or where Aboriginal rights may be affected by development and resource-extraction activity (the inescapable "economic component" of Aboriginal title [*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010]; the right to derive a "moderate income" [e.g., *R. v. Marshall*, [1999] 3 S.C.R. 456, and *Tsilhqot'in Nation v. British Columbia*, 2014 S.C.C. 44]; and the requirement for consultation and accommodation [e.g., *Haida Nation v. British Columbia* (Minister of Forests), [2004] 3 S.C.R. 511, and *Taku River Tlingit First Nation v. British Columbia* (*Project Assessment Director*), [2004] 3 S.C.R. 550]).

Revenues from ancestral lands typically come in the form of transfer resource rents or royalties, by way of reconciliation and other agreements with the provincial government that include a revenue-sharing component or by way of impact benefit agreements with third parties. It is important to bear in mind that revenues coming from British Columbia are really transfers, as it is still the provincial government exercising jurisdiction to collect the revenues from third parties and then transferring a portion of that revenue to the First Nation or First Nations. Income from revenue-sharing and/or impact benefit agreements include revenues from oil and gas development, mines, power projects (water, wave, wind, etc.) and forestry activities (e.g., forest consultation and revenue sharing). Each of these areas is discussed in their respective sections throughout this report.

With respect to Aboriginal title lands, there are additional considerations. While there is no issue regarding who has the full beneficial interests in the lands (including all the resources located on or below those lands), given that the property rights rest with the proper Aboriginal title-holder, there are questions regarding the coordination of revenue-raising powers between all levels of government (First Nation, British Columbia, Canada) — namely, to what extent are the revenue-raising powers of BC and Canada diminished and to what extent are those of the Aboriginal title-holder enhanced? Regardless, First Nations have great expectations that increased access to resources from ancestral lands and, in particular, Aboriginal title lands (both as property-holder and as a government) will mean a far greater probability that they will have enough revenue to meet their government funding needs and to close the quality-of-life gap between First Nations and non–First Nations people by ensuring that their citizens receive services comparable to those enjoyed by other Canadians. Where such increased resources are directly available to the Nation and are not coming in the form of a "tied" fiscal transfer, this revenue will allow the funds to be used by the Nation to provide programs and services to its citizens and other persons subject to First Nations laws, based on First Nations priorities.

Finally, with respect to geographical scope and source of revenues, a related and important question is whether or not all the moneys received by way of reconciliation agreements and other arrangements respecting ancestral lands, including Aboriginal title lands, should be used to cover the operational costs of a First Nation government. Or should some be viewed as "compensation" to the First Nation for past wrongs, including the taking of lands and resources, and therefore be treated as a capital "asset" of the First Nation, like the cash component in a land claims settlement? The answer depends on the nature of the revenue stream. Is it a one-time payment (e.g., for an alienation of land or an infringement) or is it ongoing revenue generated from development activities on the land (e.g., mining, forestry, oil production), as discussed below, under "Transfers from Other Governments."

Thinking about OSR

Before discussing in some detail the different types of revenue available to First Nations today, and recognizing that the implications of the federal policy with respect to OSR are discussed in Section 4.3 — Own-Source Revenue Impact on Transfer Payments, there are a number of important points to keep in mind about own-source revenue.

First, while the ability to raise revenues is determined by a number of factors, there is a correlation between a First Nation's ability to raise revenues and where it falls along the continuum of governance. First Nations seek clear and explicit, and in some cases exclusive, jurisdiction to raise revenue in a broad array of areas. However, while still within the limitations of the current fiscal model, it is only after moving away from the *Indian Act* that broader revenue-raising capacity can be realized. Nations under comprehensive governance arrangements typically have significantly stronger government revenue-raising capacity than those under the *Indian Act*.

Second, and in part reflecting the current fiscal models, when considering the revenues available to each First Nation, it is important to keep in mind what discretion a First Nation actually has in spending its revenues. In many cases, revenue may be for a specific service or activity, and the First Nation has little or no discretion on expenditures. In others, there may be more spending flexibility. An objective of any government is to have the greatest flexibility to ensure that it can respond to changing circumstances and needs in a timely manner.

Third, a First Nation may not be able to raise the revenues it needs or as quickly as it wants, even if it has the power, because the citizens and the local economy cannot bear it. Exercising powers could actually be counter-productive to the long-term objective of increased self-sufficiency. As some commentators have pointed out, and as discussed in Section 4.0 — Introduction, a balance must be struck between the implementation of new governance arrangements and revenue-raising, given the need for "start-up" and "catch-up." The full extent of First Nations' revenue-raising powers will only be realized once First Nations have "caught up" and the first two stages are complete. That is, if First Nations attempt to raise revenues too early in the development period, it could hinder their economic growth and social reform, particularly where other governments seek to reduce their transfer based on the revenues raised. This is one of the reasons why First Nations that are negotiating or implementing sectoral or comprehensive governance arrangements maintain that they require clear jurisdiction over revenue-raising powers, including the ability to choose, for valid policy reasons, to delay or not implement a particular revenue-raising power during the "start-up" and "catch-up" phases.

Fourth, and reflecting the way the "revenue-source pie" has already been divided in Canada, there is often an imbalance between a First Nation's revenue jurisdiction and its expenditure jurisdiction. While Canada and British Columbia are willing to transfer the full jurisdiction for "expenditure powers" (e.g., for jurisdictions such as education, health and administration of justice, which require the expenditure of funds), they will not recognize the full jurisdiction for "revenue powers" (e.g., those jurisdictions that raise funds, such as taxation and resource rents/royalties), preferring to negotiate "revenue-sharing agreements" that leave ultimate control with Canada or British Columbia. This leaves First Nations that are seeking to achieve or that have achieved significant recognition of jurisdiction in an extremely exposed and difficult situation: they have the full powers and ability to spend money, but raising revenues depends on the continued good faith of the federal and/or provincial governments. This problem is compounded because First Nations are already and will increasingly be under considerable pressure to develop capacity and the financial wherewithal to assume jurisdiction over a significant number of subject matters. This pressure comes from the citizens, other persons receiving or expecting services from the First Nation government, and the federal and provincial governments themselves. Indeed, Canada and British Columbia often see First Nations' assumption of jurisdiction as a convenient way to devolve responsibility to govern in that area of jurisdiction and certainly to finance it (whether in part or in whole). Ways to address this problem are discussed in Section 4.3 — Own-Source Revenue Impact on Transfer Payments.

Fifth, business income in a First Nations context must be viewed differently than for other governments in Canada. In considering the source of First Nations' revenues, it is important to keep in mind that while First Nations' revenues are a combination of typical governmental revenues (e.g., taxes, fees, charges, royalties), revenues almost always include business income from corporate and commercial for-profit activities. Part of the explanation for this can be found in the collective nature of First Nations societies, and the manner in which property is held collectively though First Nations institutions (i.e., there is less individual property ownership), where the community through its core institutions of governance tends to be directly involved in business activities to a degree not expected or contemplated (or indeed in many cases even allowed) by other levels of government in Canada. This creates its own challenges and opportunities for First Nations governments considering financing. Below, we consider the different types of revenues that First Nations typically may have, including business income.

TYPES OF FIRST NATIONS REVENUES

For the purposes of this report, we have divided First Nations revenue sources into four broad categories: revenues raised under the exercise of jurisdiction (e.g., fees, charges, taxes, etc.); borrowed moneys (i.e., public-debt financing); revenues received as a result of business activities (whether carried on directly by the First Nation government or by a related entity); and revenues received from other governments by way of transfers (ongoing transfers to support the running of government and provision of programs and services by the government, as well as compensation for past wrongs).

Revenues Raised under First Nation Jurisdiction/Authority

Fees and Charges for Services

Provision of local services: Some Nations raise revenues through fees and charges to cover the cost of specific services. A number of these have been considered in Section 3 — Powers (Jurisdictions) of the First Nation of this Report in the context of specific subject matters and jurisdictions. Typically, the exercise of jurisdiction over any subject matter could include the incidental power, if it is not explicitly stated, to levy fees and charges. As discussed in Section 3, the power to raise fees and charges is quite distinct from the general power to raise taxes. Some First Nations under *Indian Act* bylaws levy fees and other charges under those bylaws, for dog licences, business licences, building permits, and so on, to cover local government expenses that are not covered under transfers from other governments. Because fees and charges are usually for specific purposes, governments should be accountable to those who pay the fees and ensure that they are used for the purposes for which they were collected (e.g., a "water levy" should fund the water system, development cost charges/off-site levies should be used to pay the costs associated with servicing lands). Consequently, fees and charges do not provide discretionary revenue to the governing body.

One of the challenges that some First Nations face as they consider the application of fees and charges is the distinction between citizens of the First Nation and non-citizens. Many citizens expect that services, such as business licensing, animal control, or water and sewers, will be provided without any fees or charges by the government of their First Nation. This is in part because of the collective nature of how people view "community," and also partly a result of the legacy of paternalistic provision of services (though limited) by the federal government through the *Indian Act*, and the "accountability gap" that this has created. First Nations governments therefore often provide fee exemptions for citizens, in areas where the federal government has never historically provided funding or services, while charging non-citizens full-cost fees and charges. This is a delicate approach; while we are not aware of any successful challenges to it, it could be susceptible to a *Canadian Charter of Rights and Freedoms* challenge on the basis of discrimination, if it is not carefully implemented using the appropriate regulatory language and communication techniques. In some cases, to ensure payment for service, and as a reflection of how assets are collectively held and deployed in First Nation societies, the governing body will simply pay the fees or charges on behalf of the citizens from the "private" revenues the collective has generated from its non-governmental business activities. Regardless of the legality of these various approaches, they have the potential to cause communication difficulties between citizen and non-citizen populations. However, it is also important for non-citizens to understand the collective nature of First Nations societies and what is essentially a different way of organizing modern society.

Consultation and accommodation: In some cases, First Nations are charging administrative fees for consultation with third parties and/or the government with respect to proposed land use activities or decisions being made with respect to ancestral lands — for example, to process applications for land use or to conduct archaeological and traditional use investigations, and so on. Examples of shared decision-making and revenue-sharing regarding natural resource activities are also discussed in the

Section 3 chapters on minerals and precious metals, forestry, oil and gas, and so on. It is expected that over time these revenue streams will grow and become an increasingly important source of funds for First Nations.

Direct Taxation

Taxation for the provision of local services: As discussed in Section 3, many BC First Nations collect property taxes either under the *Indian Act* or through the *First Nations Fiscal Management Act* (S.C. 2005, c. 9). Many of the revenues collected through property taxes are, like fees, tied to the provision of specific programs and services. Consequently, only some portion of the tax will be left for general revenue purposes, while most of it will be put back into specific services. For Nations with significant economic development on their lands, over which they have direct governance control, revenue generated from property taxes is very important and often a substantial percentage of the Nation's budget.

For example, with respect to self-governing First Nations, in 2013/14, property taxation accounted for 30 percent of the Westbank First Nation's revenues. Similarly, Tsawwassen First Nation (TFN) is planning on property taxes, over time, funding the operations of its entire government administration, for both citizens and non-citizens. Under its *Real Property Tax Coordination Agreement* (RPTCA) with BC, TFN taxes in a similar manner to other property tax jurisdictions in BC. The "local government" portion of its property tax is spent on government administration and services common to all residents of Tsawwassen Lands, citizen and non-citizen alike (such as land management, parks, policy, and legislative and governance support). The "school tax" portion of its property tax is kept by the Nation, and is directed exclusively to fund services for citizens — such as health, education, and so on. The Nisga'a Nation, which has historically not relied on property taxes because of the relatively small size of its non-citizen population, has recently entered into a RPTCA with BC. While federal and provincial legislation is still required in order to bring the provisions of the RPTCA into effect, Nisga'a tax revenues will likely be through the taxation of hydro interests, industrial properties and projects related to the oil and gas industry (pipelines).

Consumption taxes: As discussed in Section 3, some First Nations are collecting the First Nations Goods and Services Tax (FNGST), which replaces the GST or that portion of the HST otherwise collected by the federal government, and others are collecting the First Nations Tax (FNT) on the sale of alcohol, tobacco and fuel. There is also one Nation collecting the provincial portion of taxes on the sale of tobacco products. The FNGST is calculated on the basis of formulas that do not simply consider the location of the purchase but rather take into account the number of persons living on-reserve and the average per capita tax paid (regardless of where the purchase was made); the FNT is based on purchases made on-reserve. Consumption taxes enable greater spending discretion than taxes collected for the provision of local services.

In the case of the FNT, which is not available to any more First Nations, the First Nation's revenue is all of the FNT collected (from citizens and non-citizens). Unfortunately, this is not the case for the FNGST. Current Department of Finance templates for both sales and income tax agreements reimburse smaller amounts of tax to the First Nation government as the level of non–First Nation investment or consumption increases relative to the First Nation's citizen population. The taxation structure for First Nation self-government — certainly with respect to income and sales — does little to encourage real economic development efforts within First Nations jurisdiction. To increase any tax base, a government must attract investment to its jurisdiction. In any other jurisdiction, increased investment is rewarded; in First Nations communities, at least in some cases, it is penalized.

Income tax: First Nations with comprehensive governance arrangements as part of modern treaties have direct taxation powers over their citizens and have entered into arrangements to share the tax room over non-citizens. In this way, the tax powers are split: there is the power to tax citizens of the

First Nation community itself, which is a constitutionally protected power, and the power to tax non–First Nation people living on First Nation lands, which is not constitutionally protected. It is expected that, over time, these taxes will become an increasingly important source of revenue for the First Nation. Like consumption taxes, these funds are for the most part discretionary.

The major source of tax growth in Aboriginal jurisdictions, at least in the near term, will be through non–First Nation taxpayers. However, while taxing these individuals remains a delegated authority from the federal or provincial government, it allows the federal or provincial government to apply parameters to First Nation taxation. These parameters can be destructive. For example, as discussed above, the federal government has applied perverse rules to its tax-sharing agreements that provide disincentives to development.

Royalties/Resource Rents

Some First Nations are fortunate to have access to royalties from development and the use of resources on their reserves or treaty settlement lands (see the chapters in Section 3 — Powers (Jurisdictions) of the First Nation dealing with natural resources, including oil and gas, forestry and minerals and precious metals). However, royalties and resource rents are, increasingly, more likely to come from Aboriginal title lands or from the broader ancestral lands of the Nation through reconciliation and other agreements that include revenue-sharing. Royalties and resource rents should not be confused with the fees and charges collected from resource users and associated with standard-setting, permitting and approvals processes and enforcement and compliance functions. Royalties/resource rents are for the most part discretionary and are more like a tax.

As discussed above, resource revenues could be an important source of funds for First Nations self-government. However, royalties and resource rents are also an important source of income for provincial and federal governments. Consequently, the federal and provincial governments have steadfastly refused to negotiate the constitutionally protected transfer of rights to resource revenues. As a result, these governments are often loath to allow the full transfer of this revenue-raising power to the First Nation — even on settlement lands, let alone within ancestral lands. In land claims settlements, federal and provincial governments generally only transfer full ownership of land, including subsurface resources, over smaller areas directly surrounding First Nations communities. To date, federal and provincial governments have been reluctant to transfer full subsurface resource control to larger areas of territory, or to areas that contain proven resources.

While BC has recently experimented with resource revenue-sharing, this has been done through agreements that do not have constitutional protection. That is, resource revenue-sharing is for non-self-governing First Nations on lands that are not treaty settlement lands (i.e. Aboriginal title is claimed or presumed but not legally proven) and where BC is looking to open up resource exploration/development. The result of not having broad access to royalties/resource rents nor clear constitutional protection for them is that First Nations governments are deprived of what could be their most critical source of funds, given the remote yet resource-rich location of many self-governing First Nations. It should be noted, however, that the Nisga'a look to be making some progress with respect to revenues from mines and other development from their category "B" settlement lands, (some 2.5 square kilometres of lands) where the Nisga'a, unlike their category "A" lands, do not own the mineral rights. Further BC will extend the programs it has in place with respect to revenue sharing with non-treaty First Nations (through strategic engagement agreements and other reconciliation agreements) to treaty First Nations.

In the north, the situation is somewhat different although instructional. Northern First Nations in the Northwest Territories and Nunavut are working with Canada and the territorial governments to achieve increased jurisdiction and benefits within their settlement lands. While large swaths of the north, as in

BC, are not owned in fee simple, the self-governing entities do have some rights over those broader territories. In the north this issue is tied up in the larger debate over full devolution of resource revenues to territorial governments rather than the federal government. The most obvious example is Nunavut where full devolution to the government of the Northwest Territories would be significant to the Inuit Tapiriit Kanatami (the primary beneficiary of the *Nunavut Land Claims Agreement*) and its ability to benefit and receive royalties/resource rents.

Land Sales/Leasing

Some First Nations are generating income by leasing lands or by selling assets. In many cases, corporations at arm's length from the governing body conduct land development activities. Revenues from leasing activities often accrue to the general account of the First Nation. If properly managed through sound financial systems, leases can lead to long-term revenue through reinvestment, and so on. While leasing land is a good way for First Nations to generate economic development and raise revenues where the opportunities present themselves, some First Nations have cautioned against becoming reliant on the sale or long-term lease of assets to cover operational costs of the government, because this is not sustainable. Rather, the capital generated from long-term leases and sales should be reinvested to ensure the long-term sustainability of revenue streams. Financial planning is all-important.

For example, Tsawwassen First Nation is using land lease revenues to assist in the ongoing transition between government transfers and own-source revenues as the main revenue source. However, Tsawwassen characterizes its land lease revenues as being "owned by its Citizens" — and therefore, all government expenditures of land lease funds are being tracked as a loan to the First Nation, to be repaid once property taxes are sufficient. Land lease revenues are to be used for citizen expenditures, and are generally intended to accumulate over time to provide sufficient investment returns for other Tsawwassen goals.

Public Debt Financing

First Nations can also receive loans to finance their government's activities. In some cases, loans are taken out to meet operating costs (i.e., deficit financing); in other cases, they are taken out to build infrastructure (capital). Most First Nations have lines of credit with their bankers for covering shortfalls, but as a general rule First Nations look to avoid deficit financing, in accordance with their financial administration rules. Inevitably, though, and depending on the jurisdiction a First Nation is responsible for (both to provide the service and to pay for it), in certain economic times (i.e., a downturn in the economy or a recession) there may be a requirement for deficit financing. There is no difference between this and such financing undertaken by the federal and provincial governments.

Typically, governments issue debentures (government bonds) to meet their public financing needs. For non-deficit financing, this option is available to all First Nations in Canada through the not-for-profit First Nations Finance Authority (FNFA), which is discussed in Section 3.11 — Financial Administration. On satisfying certain conditions, First Nations governments can raise financing through the FNFA to support infrastructure construction, though not to cover their operational costs. Most sources of a First Nation government's revenues can be used to secure financing through the FNFA. The FNFA bundles the borrowing requests of the participating Nations (borrowing members of the FNFA) and issues bonds (debentures) and then re-lends the proceeds of the debenture to the participating First Nations. Acting co-operatively through the FNFA, with economies of scale and diversification and shared risk, makes access to the bond market possible for individual First Nations.

Given their legal status and capacity, Nations with comprehensive governance arrangements could also issue their own bonds (for both capital and operational purposes). None has done so to date,

as it has not yet (if it ever could be) proven feasible for a Nation to do so on its own. Nations with comprehensive governance arrangements are also looking to borrow through the FNFA; however, this has proven difficult because of coordination issues with federal legislation. Canada has thus far been unwilling to make the appropriate changes that would permit these Nations to fully participate in such borrowing. As a result, some Nations with comprehensive governing arrangements have sought financing from private sector institutions, and have negotiated rates and terms individually with these institutions.

Business Activities

Many First Nations are engaged in business activities (often on reserve lands or on treaty settlement lands, but also on Aboriginal title lands and ancestral lands and beyond), either directly through their governing body or through development corporations, limited partnerships, joint ventures and so on, and are generating revenues though these business activities. There is a tendency for First Nations to try to compensate for not having access to typical government revenues or not wanting to raise these revenues (through fees, charges, taxes, etc.) by going into business in order to raise revenues to support governance. This is occurring to a much greater degree than among comparably sized governments and with more risk than to other governments in Canada. The practice is in part also a result of views respecting collective property — that assets belong to the community as a whole and not necessarily to individual citizens. This is not to say that government or collectively owned commercial enterprises are a bad idea, but the risks must be fully understood by everyone involved.

Experience has shown that First Nations should be very mindful of expecting or relying on business income to provide stable and predictable funding for running governments and delivering programs and services, as should other governments when negotiating transfer payments. Given the cyclical nature of the business environment, there will always be lean years in almost any business, particularly those that are resource-dependent or not very diversified. Revenues will, as a result, be less predictable. Worse, the failure of a business can drain community resources if other revenues are required to prop up the business.

While corporations and businesses can go bankrupt and come and go all the time, governments should not. Because of this, the finances of business enterprises are often kept separate from government finances. The implications and risks must be carefully considered before a First Nation uses its credit or other financial resources to support business initiatives. The First Nation's business activity should, for the most part, be run at arm's length from its government. The separation of business activity from government activity is one area where legal and accounting advice is invaluable; business activity presents real risks that, if a First Nation is not sufficiently protected, can swamp its finances.

Transfers from Other Governments

Despite increasing OSR, most Nations still rely heavily on federal transfers to provide for the cost of governance and the delivery of programs and services in communities. Transfers are very important because they provide much-needed funding to allow First Nations governments to meet basic needs. Whether self-governing or not, First Nations governments must rely on these transfers, which immediately create a control-and-dependency relationship with other governments; ironically, this is the very relationship all parties claim they are seeking to resolve through recognition of self-government. Practitioners have identified three major problems with transfers: insufficiency of funds, own-source revenue, and the dependency and accountability structure they create.

Transfers to First Nations are mostly from Canada and to a much lesser degree from the provinces. Accordingly, the focus here is on transfers from Canada.

AANDC's budget for 2013/14 is $8 billion (Main Estimates). Eighty percent of these funds are designated to be transferred to First Nations or others and for the delivery of programs and services that would ordinarily be provided by other levels of government in Canada. Transfers are provided through a variety of funding agreements, depending on the recipient and the purpose of the funding. The agreements are basically contracts signed by both parties and include specific terms and conditions. In some cases, these contracts are grants, and in others contribution agreements. The types of financial arrangements differ between *Indian Act* bands and other bodies (tribal councils, First Nations institutions or representative bodies, such as the BCAFN) and according to whether a First Nation is party to a sectoral or comprehensive governance initiative recognized and funded by Canada.

In the case of *Indian Act* First Nations, if the terms and conditions of funding agreements are not met, AANDC can and does intervene through its Default Prevention and Management Policy (formerly Intervention Policy). Canada has five levels of default management: 1) recipient-managed ninety-day plan, 2) withholding of funds, 3) requirement to prepare a management action plan (MAP) — this is recipient-managed when the First Nation is willing and has the capacity to remedy the default, and when the recipient lacks the capacity to develop or implement the MAP, a recipient-appointed advisor (RAA) is required, 4) third party funding agreement manager (TPFAM), and 5) termination of agreement. Out of all the BC First Nation recipients (e.g., bands, tribal councils, First Nation institutions and other organizations), as at October, 2014, there were 13 recipients under the Default Prevention and Management Policy. Nine of those recipients have recipient-managed MAPs, two have MAPs with RAA, and two have an appointed TPFAM. This says something about the state of BC First Nations in comparison to other regions in the country, where a significantly higher percentage of First Nations are under some form of financial intervention by AANDC. Throughout Canada, 74 communities were under default management, 69 were under an expert resource support management action plan, and 12 were under third-party management as at May 2014.

Budgeting and Appropriations in the Federal Government

In order to understand how federal funding to a First Nation is determined, it is important to have a basic appreciation of how the federal government's budgetary process works and how AANDC operates. In Canada, all federal government funding must be in accordance with a budget approved by Parliament. While AANDC's program authority and its responsibilities are determined by the *Indian Act* and other pieces of legislation that the department administers, this authority does not provide the department with money or any spending authority. Each year, AANDC and every other department within the government of Canada prepare their "estimates" for carrying out their responsibilities and the government's priorities. The Standing Committee on Finance considers these estimates. At the same time as this process is taking place, the government makes its economic forecast and estimates its revenues. This information, along with the government's priorities, is all rolled up into the budget.

The budget is usually tabled in February, estimates are provided on or before March 1, and budgets are confirmed no later than June 23. The budget itself is not the mechanism by which funds are appropriated by Canada. After the budget has been tabled, Parliament passes a supply bill or appropriations bill that is based on the main estimates. Each line in the estimates represents a series of "votes" or resolutions that are voted on at the committee stage of the process. Each vote includes the dollar amount for and purpose of the expenditure. It is these authorities that are the key to funding, and there must be a specific authority for any expenditure made by any department. Treasury Board, which is one of the most powerful, if not the most powerful, cabinet committees in Ottawa, is responsible for overseeing this process. Each year there are dozens of votes or authorities relating to AANDC. Those interested in understanding how the federal AANDC allocation is spent can look at the annual main estimates as well as the department's report on plans and priorities, where its program activities are detailed.

Once the plans and priorities have been put into place, the department's deputy minister is ultimately responsible for the budget. Under the deputy are associate deputy ministers and dozens of other employees, reporting in a strict ministry hierarchy, who, in AANDC, have a role to play in how funding ultimately reaches First Nations. The deputy minister must put a plan in place and have budget funds released through a submission to Treasury Board. In BC, core funding is administered and flows through the Regional Office in Vancouver. So, at the other end of the chain from the deputy minister are funding officers in each region who have a direct relationship with BC First Nations and with whom those communities interact on a regular basis and become well acquainted.

For First Nations operating under the *Indian Act*, the funding authorities and the programs and services developed by AANDC in line with their funding authorities do not require negotiation or a specific mandate to expend moneys. While there may be some discussion with a First Nation's staff and council, there are no negotiations, and for the most part funding is strictly formula-driven. This is not the case for Nations with comprehensive governance arrangements. For these Nations, specific authorities and a mandate are required and a funding arrangement is entered into before federal civil servants can negotiate funding amounts. Depending on the sectoral governance initiatives, this may also be the case.

As there is a continuum of governance options, so too is there a developing continuum of federal approaches to financing governance. Generally speaking, reporting requirements are less for self-governing Nations, given increased accountability and reporting between the Nation and its own citizens. Also, as Nations develop their own financial administration policies/laws and supporting systems and administer and control an increasing percentage of OSR, they can enter into different financial arrangements.

Under the federal transfer models, there has historically been a tacit assumption by Canada that the support it provides to deliver its programs and services covers the cost of running the institutions of the First Nation's government. Rarely is this the case, though, and many First Nations rely increasingly on revenues they have generated themselves to cover the costs of their government institutions and, in fact, to supplement the grants from Canada for programs and services. Where a First Nation does not have sufficient resources, the quality of government suffers.

These shortfalls are notable in areas such as education and child and family services and are a matter of public record and subject to much debate (in the case of child welfare, the First Nations Child and Family Caring Society of Canada actually brought a complaint against Canada to the Canadian Human Rights Tribunal). These shortfalls really must be addressed by Canada, whether governance is under the *Indian Act*, sectoral or comprehensive. Unfortunately, many believe that unless court decisions place legal pressures on the federal government to comply, the principle of comparability will likely never be honoured. This is in part a result of the federal government's fiscal policies, which have forced AANDC to adopt harsh mandates: federal funding for AANDC's program spending has been locked at 2 percent (the rate of inflation, so zero growth in real terms) since 1996/97, while other federal program spending has increased well above the rate of inflation.

While there may not be enough money, AANDC is constantly assessing and reviewing its funding arrangements with First Nations, in accordance with federal guidelines and Treasury Board requirements, and in response to reports tabled by the auditor general and AANDC's own internal program and management audits. Given the complexity of financing First Nations, it can often be quite confusing to navigate what funding is available to the First Nation, for what purposes and how it is calculated.

While there have been changes in the way funding is provided, and more changes are proposed (as discussed below), for the most part First Nations governing under the *Indian Act* accept, often under protest, and make do with what they are given. They are compelled to administer the various

programs and services delivered on behalf of Canada and, to the extent that they can, try to meet the general terms and conditions of the funding arrangements (contracts) and reporting requirements. The various funding arrangements for First Nations are discussed below.

Indian Act *Transfers:* For First Nations whose core governance is under the *Indian Act*, AANDC has developed generic funding arrangements through its Transfer Payments and Financial Policies Directorate. Funding arrangements are created using the Grants and Contribution Information Management System, which includes the Indian Government Support Program (IGSP) for use with the First Nations and Tribal Councils and The Funding Agreement (TFA) National Model for use with recipients other than First Nations and Tribal Councils.

The IGSP is a program-budgeted funding arrangement that AANDC enters into with recipients for one year. It contains programs funded by means of a contribution, which is a reimbursement of actual expenditures. Flexible Transfer Payment (FTP) is formula-funded, and any surpluses may be retained, provided all of the terms and conditions of the contract have been fulfilled. Any cost overruns are to be covered by the recipient. Grants are unconditional.

The funding arrangement or agreement models contain terms and conditions that AANDC uses to manage the moneys transferred. These include the general requirement for financial statements; provisions for records, accounts and ministerial audit; provisions for reporting and data quality; provisions for default and remedial management; and a requirement for representation and warranties and indemnification, and so on. There are also recipient-specific terms, such as project requirements (e.g., training, policy development or other capacity development activities), as well as program requirements relating to minimum program delivery and reporting.

The type of funding instrument used with a particular First Nation or other recipients (whether it is an IGSP, FTP or grant) depends on how the recipient is viewed by AANDC. To meet government-wide Treasury Board policy on transfer payments, all recipients of federal funding through AANDC require a General Assessment that asks a number of questions about how the recipient is governed and how its finances are administered. For those First Nations that are in financial difficulty or under block agreements, the General Assessment determines the length of the agreement. Those that are in financial difficulties have a shorter term than those under a block funding agreement. However, as a matter of AANDC policy, the General Assessment should not have a bearing on the type/level of funding (set, fixed, flex and block). Generally speaking for recipients that are well established and well run, there is more flexibility in the funding arrangements and the types of funding instrument used. Greater flexibility usually equates with increased spending discretion by the recipient and less oversight and reporting to AANDC. Block funding with more flexibility and control is normally preferable to an IGSP.

While Canada provides support for a number of specific programs and services, the IGSP, first established in the early 1980s, is noteworthy. The purpose of this funding is ostensibly to assist First Nations in meeting the costs of local government functions and to administer programs and services developed and funded by AANDC. This support is expected to provide a stable funding base to facilitate effective community governance and the efficient delivery of services under the legal framework of the *Indian Act*. There are five components of this support. Band Support Funding (BSF) is the primary component; the others are Band Employee Benefits Program, Tribal Council Program, Band Advisory Services, and the more recently created Professional and Institutional Development program. These programs operate under a range of authorities.

BSF is formula-based and is provided to all First Nations if they are constituted in accordance with the *Indian Act*. Funds are provided in the form of a grant that can be used to help pay for the core institutions of governance. The grant does not stipulate how a First Nation should organize its local administration and the operation of its governing body (i.e., chief and council), although, of course, it

should be operated in accordance with the *Indian Act*. The grant's focus is on the accountability of the governing body to its citizens rather than on compliance with terms and conditions that might be outlined in a contribution agreement.

The funding formula for BSF considers a range of elements, including support for the governing body costs (based on the registered citizenship), basic overhead, unit costs for major services, location costs, audit and professional fees, and service employee office costs. The formula has been developed to provide more equitable support between communities and is not based on relative need. It takes into account the population, geographic location and the programming responsibilities of individual First Nation governments. BSF also includes provisions to support the administration of sub-offices in "subsidiary" communities. However, all funds must, flow to the governing body, which in turn determines and manages community-specific arrangements.

Overall, according to AANDC, the grant funding is designed to provide a reasonable contribution to the costs of governance, comparable to other local jurisdictions of similar size, with a specific focus on the costs associated with the administration of departmentally funded programs and services. It is not intended to accommodate all circumstances, and AANDC assumes that citizens will also contribute to the cost of community governance. The policy is set out in the BSF program policy.

While AANDC's stated intentions appear sound, the reality is that the programs are operationally flawed and underfunded. Consequently, Canada has been redesigning its IGSP on the basis of an evaluation of the program that was conducted in 2009. Not surprisingly, the evaluation found that there was, in fact, limited IGSP funding to provide effective governance and that the IGSPs were out-dated and the formulae too complex. The evaluation showed that there were opportunities to align the IGSP with other AANDC programs and to streamline AANDC's reporting requirements. The 2009 evaluation also highlighted the lack of a results-oriented performance system. The evaluation was relied upon by AANDC to provide the federal Treasury Board with program evaluation results to assess the relevance, performance and effectiveness of the IGSPs. However, other than issuing several open letters to First Nations (the last in 2011), meeting with some First Nations representatives and issuing recommendations, as of October 2014 there had been no significant action or changes to the program.

AANDC is in the process of substantially redesigning the IGSP as a part of the internal process to obtain Treasury Board approval for new program authorities for IGSP. Renewal of the program authorities took place in 2010/11. To date, AANDC has shifted the focus of funding for tribal councils and band advisory services away from the requirement to deliver specific advisory services in order for the resources to be directed towards delivery of essential programs and services. AANDC has already consolidated four governance spending authorities into one and are currently looking to consolidate even further. Also, the Professional and Institutional Development program has been moved from a proposal submission process to a capacity development funding on the projects and initiatives contained in a recipient's capacity development plan. This redesign is still ongoing and considerable work remains to be done in finalizing and implementing any program changes and, more significantly, there is no new money.

The following federal documents may help people better understand Canada's approach to financing First Nations governments that are governing under the *Indian Act*:

- *General Assessment Workbook* — www.aadnc-aandc.gc.ca/eng/1390855955971/1390855996632
- *Year-End Reporting Handbook: Funding Agreements Covering 2013–2014* — www.aadnc-aandc.gc.ca/eng/1382122006020/1382122098262
- *Year-End Financial Reporting Handbook* — www.ainc-inac.gc.ca/ai/arp/trp/pubs/yrh01/yrh01-eng.asp

- Funding arrangements and agreement models — www.aadnc-aandc.gc.ca/eng/1322746231896/1322746482555
- Policy and directive on transfer payments — www.aadnc-aandc.gc.ca/eng/1322834716389/1322834808136
- Frequently Asked Questions — Implementing the TBS Policy and Directive on Transfer Payments — www.aadnc-aandc.gc.ca/eng/1100100010065/1100100010066
- Details of Transfer Payment Programs — www.aadnc-aandc.gc.ca/eng/1389719028854/1389721274755
- Report by Region on List of Recipients with Default Management Under Way — www.aadnc-aandc.gc.ca/eng/1308848096847/1308848167117
- *Recipient Reporting Guide* — www.aadnc-aandc.gc.ca/eng/1385559716700/1385559777677?utm_source=ReportingGuide&utm_medium=url
- Grants and Contribution Information Management System (GCIMS) — www.aadnc-aandc.gc.ca/eng/1100100010038/1100100010039

Sectoral and Comprehensive Governance Arrangements Transfers: Canada provides support for sectoral governance initiatives on the basis of AANDC's plans and priorities with respect to those initiatives and as authorized under specific funding authorities. These include appropriations to support the implementation of the *First Nations Oil and Gas and Moneys Management Act* (S.C. 2005, c. 48), the *First Nations Fiscal Management Act* (S.C. 2005, c. 9) and the *First Nations Land Management Act* (S.C. 1999, c. 24). The funding for these initiatives can be provided to a First Nation institution established under these sectoral initiatives or to a First Nation directly. The type of funding instrument used — IGSP, FTP or a grant — will depend on the institution or the First Nation and will reflect the assessment of the recipient by Canada.

Canada provides support for Nations with comprehensive governance arrangements under the authority of the acts that ratified the self-government agreements, which AANDC administers. There are separate funding authorities for each of these arrangements. Financing principles are typically set out in the agreements themselves and are informed by Canada's policy on supporting self-governing Nations. These agreements may be called a Fiscal Financing Agreement (FFA) in the case of a modern treaty First Nation or a Fiscal Transfer Agreement (FTA) in the case of others.

Canada's Inherent Right Policy, as discussed in Section 1 — Options for Governance Reform, suggests that self-government should not result in enriched programs. In reality, Canada has provided additional resources to support First Nations in the exercise of jurisdiction under sectoral or comprehensive governance arrangements, not for "program enrichment." Canada recognizes that self-governing First Nations need additional resources. Good governance costs money and money is needed to carry out functions previously undertaken by AANDC or not undertaken at all. This includes responsibility for a full range of jurisdictions contained within the arrangements, including legislative jurisdiction, regulatory frameworks, policy development and design, decision-making, program delivery, administration, appeals and reviews, and program evaluation. Good governance also necessitates enforcement of Nations' laws.

When funding was negotiated for existing comprehensive governance arrangements, the model was essentially whatever the Nation would have received under its previous funding arrangements plus an increment of up to 8 percent for increased governance responsibility. There were also small amounts for one-time start-up costs. More recently, the federal government has indicated a willingness to discuss local government costs and has provided a "bump" for core governance for those self-governing First Nations. The formula on which this "bump" is based has not been made public and is currently unknown although it is being implemented with respect to renewals of existing FTAs/FFAs for self-governing First Nations and in new self-government funding agreement. The basic question everyone asks is, "Is it enough?" The simple answer, in most if not all cases, is that it is not nearly enough.

Assuming that base funding has been agreed to with the Nation, the formula for calculating the actual federal transfer to Nations with a modern treaty is currently set out in OSR agreements. Canada is seeking to extend OSR agreements to Nations outside the modern treaty process, including Nations with self-government agreements, and even those with sectoral arrangements. Once the amount of federal transfer has been calculated and negotiated, the offsets as set out in the OSR agreement are applied to Canada's share of financing the Nation's governance. The existing agreements do not take into account the actual cost of the Nation's government or what the Nation may be raising its revenues for, although some revenues can be excluded. What is not excluded and is counted as the Nation's revenue is then included in a formula through which, incrementally and over 20 years, 50 percent of that revenue will eventually be applied to offset the federal transfers. There is a floor that funding cannot drop below, namely $100,000 plus $100 per citizen living on First Nation land. To put it simply, once fully implemented, Canada reduces its federal transfer by 50 cents on every dollar of income a First Nation is brave or organized enough to earn on its own. From the First Nations perspective, this is viewed as a 50 percent "tax" — higher than any tax currently in place in any jurisdiction or taxation category in Canada.

First Nations have expressed concerns with this model. Calculating simple offsets is problematic for a number of reasons, including the complexity of a First Nation's government, the nature of collective property ownership where property is held by the government and not by individual citizens, the limitations on revenue-raising powers, and the type of responsibilities a First Nation has assumed under its comprehensive governance arrangements. For example, revenues may be raised by a First Nation to provide certain services to one group of people, but Canada expects those revenues to be used to offset its contribution to provide other services to a smaller group, which in some cases the Nation has no or limited jurisdiction over and is responsible for providing only on behalf of Canada. A more detailed discussion of OSR treatment and the complexity of issues to be aware of is provided in Section 4.3.

Canada is looking at how it provides support to *Indian Act* First Nations, as well as to First Nations falling under sectoral governance initiatives (with respect to the area of jurisdiction the sectoral initiative addresses) and having comprehensive governance arrangements, both in terms of type and amount of funding and also respecting the arrangements for delivering that funding. Federal efforts seek to streamline and simplify the manner in which financing is provided to First Nations under comprehensive governance arrangements.

When Canada enters into the negotiation of either an initial or renewed fiscal agreement, pursuant to a self-government agreement or treaty, federal negotiators develop funding offers based on internal, confidential processes. As appropriate, negotiators may discuss specifics of fiscal offers with their respective negotiating partners.

With respect to start-up costs, Canada, as we understand, has been internally developing a new costing methodology for calculating the incremental costs of a Nation going into a comprehensive governance arrangement. The costing methodology follows a formulaic approach and is based on a municipal expenditure model that takes into consideration factors such a size, remoteness, complexity and responsibility of the Nation. There are three components to this approach:

1. *Core governance* — provides a comparable level of funding for executive, legislative and administrative functions as expended by Canadian municipalities of a similar size that exercise similar level of local government responsibilities

2. *Policy* — provides capacity for provincial-type jurisdictions (i.e., education, social development and lands and resource management)

3. *Jurisdiction gaps* — meant to support the cost of administration of justice, public works, regulatory function, land management and school board functions.

As discussed below, Canada has also conducted an engagement process with First Nations on the overall design of fiscal arrangements at which the potential to adopt more transparency in funding methods was discussed. Canada has stated it is committed to continuing to review potential options for improving fiscal relations with First Nation governments.

Fiscal Harmonization: With respect to ongoing funding and the fiscal relationship generally, Canada is not keen on negotiating funding arrangements every five years with Nations under comprehensive governance arrangements. So there is another initiative to try to create a more uniform and stable funding model for fiscal transfers for self-governing Nations. Potentially, it could result in federal fiscal transfer legislation for First Nations. In late 2010, Nations with comprehensive governance arrangements, and those involved in negotiations, received a letter from AANDC indicating that it was contemplating a new national approach to determining financial support for self-governing Aboriginal groups. The federal government remains in the consultation stages of this proposal, but has issued policy papers providing a high-level description of the program and its purpose, which is stated as creating consistency, timeliness, transparency and fairness in funding for Aboriginal self-governments. The federal government completed its second round of engagement in 2012 and has been undertaking an internal review of potential policies in light of the feedback received. The real effect of this proposal is to fix what was a clearly predictable mistake: as agreements continue to be settled, AANDC simply does not have the capacity — financial or human — to deal with the variety of agreements. As a result, AANDC now wants to standardize funding flows. The adequacy of current funding, as well as the own-source revenue mandate — two critical problems that require fixing — are not part of the federal proposal. The substance of the change is process-oriented.

The heart of the proposal involves replacing negotiated, individual fiscal financing agreements with a formula that will determine annual funding amounts for each First Nation government. This formula will have adjustment factors to reflect differences in community realities, although these specific factors have not yet been determined. Input into the formula would be provided by First Nations governments through an advisory process, which would supposedly aggregate all distinct and unique First Nation self-government entities across Canada — entities used to negotiating their own levels of funding, though against inflexible negotiating mandates — into one common voice. Negotiation would be entirely replaced by this "advisory process." The federal government is also proposing reporting requirements that would be more detailed than those in current fiscal financing agreements in order to capture the data required of the formulas, and would issue a "public national report" showing these amounts and statements.

Canada has not released more specific details on this proposed approach for some time, and self-governing Fist Nations are unsure whether Canada intends to follow through with this approach. The initial consultation process resulted in significant opposition from First Nations who were asked to comment. Self-governing First Nations have many questions and concerns. They are concerned that the harmonization project is process-oriented and does not address the key problems of the fiscal relationship. In this light, self-governing First Nations have concerns around losing any existing First Nation control through the replacement of negotiation with federal formulas; the reduction of input from individual First Nation groups, forcing them into one national advisory process; and ultimately, increased dependence on unilateral federal decisions, rather than on negotiation. A working group of First Nations has been established to discuss the various fiscal initiatives of Canada in light of their experiences in negotiating and implementing governance arrangements beyond the *Indian Act*. These matters are also being addressed by the Land Claims Agreement Coalition.

Settlement Moneys: Financial transfers to First Nations as compensation for past wrongs, namely infringement of Aboriginal title and rights or for previous actions or AANDC actions on the part of the Crown, are quite distinct from other financial transfers that First Nations might receive. The funds First Nations receive to settle outstanding grievances are often compensation for land and other assets

that were taken away from them or that they have been denied access to. All modern treaties include a financial component, which really means compensation, although for legal reasons the Crown has been reluctant to label it so. This is First Nations "capital" and is distinct from other financial considerations, such as specific resource revenue-sharing agreements and funds transferred to support the delivery of programs and services.

Compensation should therefore not be used to pay for the operations of governance — namely, to provide essential public services that for other Canadians are paid out of operating revenues. This is something First Nations that have received compensation from the Crown are very mindful of despite the urge to do so because of community needs. While investment of compensation to meet public policy objectives is warranted, simply dipping into the proceeds from a settlement to top up inadequate program money is a recipe for future fiscal challenges. If First Nations were to use their capital to pay for operating costs, it would be a bit like mortgaging a house to pay the utility bills: in the long run it is an unsustainable approach. Most First Nations invest and keep the capital of these compensation funds intact and, allowing for growth to combat inflation, only expend a portion of the investment income but never the principal. The investment income is budgeted and expended in accordance with a Nation's policy and laws. Many First Nations feel that compensation funds should also not be seen as a replacement for funds to be directed toward start-up costs or for catch-up costs.

4.3

OWN-SOURCE REVENUE IMPACT ON TRANSFER PAYMENTS

Self-governing First Nations are expressing considerable concern about the current treatment of First Nations own-source revenue (OSR) by Canada (and in the context of modern treaty arrangements with British Columbia) when financial transfers to self-governing First Nations to support new governance arrangements are being calculated. At present, significant First Nation expenditure obligations are not matched by appropriate revenue-raising powers and transfers from other governments are inadequate to make up the difference. Yet under its own-source revenue policy, Canada seeks to include OSR in the calculations of the ability of a Nation's government to pay for what self-government arrangements define as "agreed-upon programs and services," with the purpose of reducing the federal contributions to the Nation's government.

The evolving formulas for these revenue offsets to the federal transfer are already proving to be very problematic for all self-governing First Nations and, accordingly, OSR treatment is the single biggest threat to self-government and therefore reconciliation between First Nations peoples and the Crown. Indeed, the current OSR policy and how it is being implemented by Canada has the potential to seriously jeopardize the long-term success and viability of First Nations self-government. If this is not addressed, OSR policy could lead to the failure of some fledgling First Nation governments who have begun to move away from governance under the *Indian Act*. If any of these governments fail, other First Nations, for political and other reasons, will find it even more difficult to move significantly beyond the *Indian Act* system. This would be tragic.

Given the significance of OSR, it is important to consider how OSR is currently addressed in comprehensive governance arrangements, the issues that need to be considered moving forward, and how OSR will ultimately be treated as an important aspect of the broader and evolving fiscal relationship between First Nation peoples and the Crown. We have devoted an entire section of this report to this issue and we hope that this will not be needed in future editions of the report.

From the outset, it should be made clear that while we talk of a federal OSR policy as though it exists as a single and public document, it is in fact multi-faceted, is not public, and is treated as an aspect of confidential federal negotiation mandates. First Nations' understanding of the OSR policy comes from the precedent OSR agreements in comprehensive governance arrangements that have already been reached, PowerPoint decks provided by AANDC officials, and funding offers made at the negotiating table when fiscal transfers are being negotiated. The policy is best described as a "work in progress."

A COMMITMENT TO COST-SHARING

All comprehensive governance arrangements provide that the cost of First Nations self-government is a shared responsibility between the First Nation and the Crown. From the perspective of First Nations, this legally confirms Canada's ongoing financial commitment to the First Nation and, where it is a party to an agreement, a province, to provide financial and other support to ensure that the First Nation has sufficient resources to carry out its responsibilities and meet its obligations in accordance with the terms and conditions of its self-government agreement. From the provincial perspective, it is an acknowledgement that British Columbia not only has a role to play, but perhaps has a significantly greater role than it has played historically. From the federal perspective, it is an acknowledgement that the First Nation will be collecting and using its own revenues to pay for its own government, as discussed in Section 4.2 — First Nations Revenues.

On one hand, there is no question that both Canada and British Columbia would like First Nations to raise sufficient OSR from their own citizens in order to reduce their transfers to First Nations, as this is seen as an untapped revenue source. On the other hand, citizens and other persons subject to First Nation jurisdiction want First Nations governments to provide levels of programs and services comparable to those in the surrounding areas, but with as little financial impact as possible on the individual. While self-governing First Nations agree with the principle of increased self-sufficiency, it is the implementation timeline and the existing rules around OSR structure that make it difficult and that often penalize self-governing First Nations.

It is important to note that no self-governing First Nation disagrees with the single core principle behind the application of OSR — that First Nations should contribute to the cost of their own governance as their capacity to contribute increases. It is the practical application of this principle to date that is the source of contention. Put simply, self-governing First Nations feel that the current iteration of the federal OSR policy is not fair and does not adequately consider the capacity and development requirements for First Nations as they move away from governance under the *Indian Act*.

CANADA'S APPROACH TO OSR

Where British Columbia is a party to comprehensive governance arrangements, it does contribute to the cost of self-government in various ways, but it is Canada that has the primary responsibility to negotiate and provide ongoing transfer payments to a self-governing First Nation. This is a reflection of Canada's constitutional responsibility and a carry-over from the *Indian Act* system. To guide Canada's approach, and notwithstanding what might have been agreed to in specific self-government arrangements, for the purposes of actually negotiating fiscal financing agreements with self-governing First Nations, Canada has developed its own internal policy approach to OSR. Some officials claim that this approach is based on the federal-provincial fiscal relationship. While aspects of the federal OSR approach may be loosely based on how people think the federal-provincial fiscal relationship works, and perhaps even a desire to emulate that model, in reality there is no resemblance. When one considers the historical relationship between First Nations and the Crown, the nature of First Nations self-government and the division of powers, First Nations access (or lack of access) to revenue streams, and the current global economy and resultant federal fiscal austerity in Canada, which has led to increased government off-loading, such comparisons are of little practical use at this time.

The existing federal OSR policy is not about "equalization" in a federal/provincial sense, but rather revolves around a much narrower question of what Canada actually wants, and is willing, to pay for. Canada will not negotiate what it is willing to pay for. In theory, the self-government arrangements set out what Canada will pay for, and these are referred to as "agreed-upon programs and services" (either under the exercise of jurisdiction of the First Nation or on behalf of Canada). However, the way in which the actual transfer amount is calculated has very little relationship to "agreed-upon programs and services," which are, for the most part, far more all-encompassing and comprehensive than the funding could ever be expected to provide for. Programs and services and corresponding funding levels are not, therefore, really agreed to. Rather, these are dictated by federal policy, and related expenditure decisions largely reflect an *Indian Act* view of the world.

Under the OSR policy, when a First Nation government generates certain levels of OSR, the federal government will claw back transfer payments that were made for "agreed-upon programs and services." It will do so without meaningful consideration of the actual cost of First Nations government, or, in some instances, what the own-source revenue may have been be collected for in the first place. This is because Canada's OSR policy assumes, incorrectly, that historically Canada (under the *Indian Act*) has been paying for the "full" cost of government provided to Aboriginal peoples (whether it was Canada governing over "Indians and reserved for Indians" or in the limited ways that First Nations governed themselves before self-government) and that today First Nations should contribute to those costs that

Canada has been paying. From this paternalistic perspective, as a starting point to negotiations Canada always sees the First Nation's "contribution" as necessarily a reduction to Canada's contribution. This approach fails to recognize a First Nation's own contribution to its government apart from Canada's already limited contribution. This is not indicative of a good fiscal relationship and certainly not a "sharing" of the fiscal responsibility of government as most reasonable people would see it. While some fiscal financing agreements use creative ways to get around the obvious negative implications of the federal approach, the fundamental basis of the OSR policy remains the same: all revenues are "in," regardless of source or purpose, unless they are specifically "out" (excluded revenues), and the excluded list is narrow (see Current OSR Arrangements — Self-Government Agreements as discussed below).

Additionally, the federal policy assumes that, over time, the First Nation will have the ability to actually raise the revenue it needs to meet its expenditure obligations. However, federal officials negotiating the fiscal financing agreements in accordance with the OSR policy have no authority to speak for the federal government with respect to how the "revenue-source pie" (e.g., the sharing of tax room, royalties) is divided and to account for any limitations placed on a First Nation's access to a portion of that pie. For Canada, when approaching fiscal financing negotiations there is an obvious disconnect between the revenue side and the expenditure side of the fiscal equation, which is not the case for the First Nation.

In the opinion of most of First Nations, the approach that Canada is currently taking with respect to OSR and negotiating fiscal financing agreements is dangerously naïve and needs to be reconsidered. Somewhat ironically, it leaves those First Nations that are actually generating significant OSR in the potentially precarious position of being unable to meet their broader governmental obligations (that Canada has historically not paid for), because they need to use those revenues to essentially "offset Canada's offsets." The whole federal premise of calculating the First Nation's contribution to the cost of its own government as a contribution to Canada's costs is simply wrong.

While the inherent problems with the OSR policy are well known to federal officials, Canada has been extremely reluctant to revisit any aspect of its strict OSR policy. However, a recent announcement by AANDC gives some hope for an ability to consider practical aspects of own-source revenue. In a press release on July 28, 2014, AANDC announced, "The Government of Canada is moving forward with important changes to how own source revenues are treated in determining federal transfers to self-governing Aboriginal groups. For example, program transfers for health, education and social development will not be reduced based on Aboriginal government's OSR." While no further details have been released since this announcement, it will likely have the effect of raising the "floor" of federal transfers that a First Nation could keep before OSR is applied.

Given the ongoing significance of OSR and the issues it raises, it is important to understand not only how OSR is currently addressed in agreements, but also some of the considerations that should be taken into account in and guide future negotiations. Equally important is the need to continue those conversations with the federal government that may lead to a more reasoned federal approach to OSR, reflecting what is needed to give meaning to a new fiscal relationship and to ensure the success of self-government and all the positive change that self-government can bring to First Nations, their citizens and Canada generally.

CURRENT OSR ARRANGEMENTS

Self-Government Agreements

All of the comprehensive governance agreements in BC, with the exception of Sechelt, provide specific provisions regarding OSR. Sechelt has no specific provisions dealing with OSR in the federal legislation (as there is no final agreement), but OSR is now taken into consideration in Sechelt's most recent (2014) transfer agreement.

The modern treaties negotiated under the BC treaty process provide common principles respecting fiscal relations, including treatment of OSR and negotiating the OSR contribution of the Nation (for an example, see the textbox containing Chapter 20 of the Tla'amin Final Agreement). They also include a short list of excluded revenue items not to be considered as OSR offsets in fiscal arrangements. Common revenue items to be excluded for OSR considerations include:

- the capital transfer set out in the treaty (the "compensation"), but not the interest on it
- the proceeds from the sale of lands
- any federal or provincial payments under fiscal financing agreements or other agreements for programs and services
- the interest or income on funds received from Canada or British Columbia for a purpose related to implementation and held in a special purpose fund as set out in the agreement with respect to own-source revenues, or as agreed by the parties from time to time, provided that the interest or income is used for a purpose or activity that is intended by the parties to be funded from that special purpose fund
- gifts or charitable donations
- the amounts received as compensation for specific losses or damages to property or assets
- any specific claim settlement
- other sources agreed by the parties

Tla'amin Final Agreement (2014) Chapter 20 — Fiscal Relations

1. The Parties acknowledge that they each have a role in supporting the Tla'amin Nation, through direct or indirect financial support or through access to public programs and services, as set out in the Fiscal Financing Agreement or provided through other arrangements.

3. In negotiating a Fiscal Financing Agreement, the Parties will take into account:

   a) the cost of providing, either directly or indirectly, Agreed Upon Programs and Services that are reasonably comparable to similar programs and services available in other communities of similar size and circumstance in southwestern British Columbia;

   b) efficiency and effectiveness, including opportunities for economies of scale, in the provision of Agreed Upon Programs and Services, which may include, where appropriate, cooperative arrangements with other governments, First Nations or existing service providers;

   c) the costs of operating Tla'amin Government;

   d) existing levels of funding provided by Canada or British Columbia;

   e) prevailing fiscal policies of Canada or British Columbia;

   f) the location and accessibility of communities on Tla'amin Lands;

   g) the jurisdictions, authorities, programs and services assumed by the Tla'amin Nation under this Agreement;

   h) the desirability of reasonably stable, predictable and flexible fiscal arrangements;

   i) changes in price and volume, which may include the number of individuals eligible to receive Agreed Upon Programs and Services; and

   j) other matters as agreed to by the Parties.

4. In negotiating the Tla'amin Nation's contribution to the funding of Agreed Upon Programs and Services from its own-source revenues … the Parties will take into account:

   a) the capacity of the Tla'amin Nation to generate revenues;

   b) the existing Tla'amin own-source revenue arrangements negotiated under this Agreement;

   c) the prevailing fiscal policies with respect to the treatment of First Nation own-source revenue in self-government fiscal arrangements;

   d) that own-source revenue arrangements should not unreasonably reduce incentives for the Tla'amin Nation to generate revenues;

   e) that the reliance of the Tla'amin Nation on fiscal transfers should decrease over time as it becomes more self-sufficient; and

   f) other matters as agreed to by the Parties.

The comprehensive governance arrangements also commit the parties to reviewing and renegotiating the fiscal contributions to the First Nation, taking into account the contributions of OSR. The time between renegotiations ranges from five to 10 years, and in some cases is an indefinite period.

Of particular note is that when OSR and contributions toward programs and services are being negotiated or renegotiated, comprehensive governance agreements typically contain provisions for:

- consideration of the impact of prevailing fiscal policies on the treatment of the Nation's OSR in self-government fiscal arrangements and
- OSR arrangements not unreasonably reducing incentives for the Nation to generate revenues.

The first provision identified above could result in Canada or British Columbia setting their own OSR policies to limit contributions to First Nations without negotiations with the Nation. The second provision seems to negate the entire exercise, as any reduction in fiscal transfers resulting from OSR generation must be seen as a disincentive for the Nation to use its usually very limited capacity and resources (at this time) to generate revenue on the one hand, only to lose it on the other. Whether the terms of these agreements will be properly reflected in subsequent OSR agreements and subsequent actual fiscal financing agreements (FFA) is a matter of contention between self-governing First Nations and the Crown. The source of contention being the federal policy with respect to calculating OSR is contrary to the agreed-to terms in the comprehensive governance agreements.

OSR Agreements and Fiscal Financing Agreements

For Nations with modern treaties, the details regarding OSR are included in an own-source revenue Agreement that does not form part of the treaty. These agreements are required by the federal government and take the form of a companion document to a fiscal financing agreement. For non-treaty First Nations, these agreements are also required, but are included in the fiscal financing agreement (e.g., Westbank and Sechelt). It is though these OSR and/or fiscal financing agreements that the premise that all revenues are included unless they are specifically excluded is laid out in detail, along with the formula for how the First Nation contribution is calculated over time.

As discussed in Section 4.2, OSR agreements provide that as a First Nation government develops its own revenue streams, through economic development, taxes, or any other type of revenue, those revenues will reduce the amount of funding transferred through the fiscal financing agreement. This clawback, which the federal government prefers to call an "inclusion amount," is implemented over 20 years from the effective date of self-government. In the sixth year of an agreement, the clawback rate is 3.3 percent, and it increases by that same amount annually until, after 20 years, the clawback rate is 50 percent. For example, at a full clawback of 50 percent, if the federal government was scheduled to transfer $2 million to a First Nation government under a fiscal financing arrangement, but the First Nation government had generated $1 million in own-source revenue, 50 percent of the $1 million in own-source revenue would be "clawed back" against the $2 million transfer, for a total transfer of $1.5 million. There is a floor below which the clawback cannot drop (i.e., a minimum transfer), which in effect ensures that the federal government will always be making a "contribution" (e.g., $600 per member of the Nation who is a registered "Indian"). However, this amount is so low as to be insignificant, and for most self-governing First Nations would have no material impact on their finances.

FIRST NATIONS ISSUES AROUND OSR

It is imperative that each self-governing First Nation and all Nations aspiring to self-government closely examine and understand the impacts of OSR on their overall vision, specific goals and annual budgets. First Nations are getting together in various forums to exchange information about OSR and to develop common approaches to discussing this issue with Canada. Indeed, First Nations have

completed significant work looking at the impacts of OSR and developing OSR policy, including participation on the "Common Table" initiative as part of BC treaty negotiations. Nations with comprehensive governance arrangements are working to address these issues with the Crown under initiatives that Canada has with respect to fiscal relations with First Nations. Others Nations that have modern treaties and that participate in the Land Claims Agreement Coalition have also been looking at these issues through that body. And, of course, the issues are being raised and discussed when individual First Nations are actually negotiating or renegotiating their fiscal financing agreements under existing comprehensive governance arrangements. Some of the issues being raised in the various forums are described below. (This list is not exhaustive.)

Appropriate fiscal financing is required before applying OSR

OSR clawback is a direct reduction in the fiscal financing that a First Nation's government receives. Before OSR is applied in any situation, an absolute prerequisite is that an appropriate level of fiscal financing be in place. The approach favoured by Canada assumes that its fiscal transfer is the starting point for any discussion on OSR clawbacks. This does not account for the real or actual cost of a First Nation's government or the programs and services delivered by its government. These real costs often already require a Nation to use its OSR to pay for its government.

Adequate financing based on an agreed and fair method of costing a Nation's government is a necessary precursor to considering OSR offsets. Unfortunately, current funding mandates do not allow AANDC officials to negotiate appropriate levels of base funding. The funds simply have not been appropriated from Parliament and the funding envelope is limited. Moreover, AANDC officials have little flexibility to fund at appropriate levels irrespective of the stated desire or intention of AANDC.

Clawing funding back from a Nation's government whose initial funding level is inadequate will encourage a cycle of continued dependence and poverty, and defeat the purpose of governance reform and will undermine Nation-building. It would be extremely damaging to apply an OSR calculation to a self-governing Nation whose fiscal financing arrangement is based on an *Indian Act* "band" programming comparison.

Delay consideration of OSR for financing a First Nation's government until agreed-upon economic development measures have been reached post "catch-up"

A period of "catch-up" should be required before OSR is taken into consideration. First Nations are committed to moving toward greater self-sufficiency, but any OSR model should not become active until a Nation has reached agreed-upon levels of health, education, employment and quality of life. Standards such as agreed economic levels or measurements (metrics) similar to gross domestic product, such as a First Nations domestic product might help determine when a Nation has the fiscal capacity to take into account internal revenue-raising. At this point, to the best of our knowledge, no such metrics have been developed. Otherwise, without using some clear measurement to determine when OSR should kick in, transferring the financial burden to First Nations (whose citizens are, for the most part, still the poorest in Canadian society) will only delay the opportunity to create and sustain financial self-sufficiency.

Implementing OSR in the "start-up" or "catch-up" stages could actually result in greater fiscal dependence on Canada and British Columbia. If the goal of all parties to comprehensive governance arrangements is to reduce or even eliminate fiscal transfers, then OSR considerations should only be implemented once the "start-up" and "catch-up" stages are completed.

The revenues of a First Nation's government that is subject to OSR should be limited to a more appropriate definition of "government revenues" based on the fiscal capacity of the Nation's government

OSR capacity should refer solely to the revenue capacity of a First Nation government, which needs to be more precisely described and understood in relation to the First Nation government's fiscal obligations and its discretion to actually use those funds. It is perhaps more appropriate to limit the categories of revenue and to describe them more clearly. These could be restricted primarily to governmental income, such as the tax-generating power of the First Nation government, where the OSR subject to offsets would include only the tax room vacated by Canada and/or BC and the tax room occupied by the First Nation.

If this is not agreeable to Canada, the list of exempted OSR should be expanded and should specifically exclude the income (revenues and profits) from business activities undertaken by the Nation's government or related development corporations, which should be treated like Crown corporations and universities. Without this specific exemption, there will be a disincentive for First Nations to create, expand and support commercial activities undertaken collectively within their communities on behalf of the First Nation. The direct involvement of a Nation's governments in building the community's economic base is an essential tool that First Nations governments are using, particularly with regard to collectively held and community-owned resources.

Where businesses are operated at arms length by independent legal entities separate from the Nation's government, it is expected that revenues will not be considered to be part of the First Nation government's OSR for the purpose of fiscal transfers from Canada. Revenues from such business activity would only be considered when transferred to the First Nation's government account. This is because, according to AANDC officials (at least, in theory), the OSR model is supposed to be a "remittance model" where it is only cash received or actual proceeds that are considered. However, it may not be so straightforward. Given the terms of OSR agreements, and combined with the requirement that the accounts of First Nation governments must be kept and audited in accordance with the standards set by the Canadian Public Sector Accounting Board (PSAB), some "non-cash" items may need to be treated as "income" for OSR purposes (e.g., "equity pickup" or "fair values" recorded for the disposition of land — allotted/granted, sold, leased or otherwise disposed of below market value). Nevertheless, and with all the cautions noted above, the only time business revenues should be considered as OSR is where the money is actually transferred into the general revenues of the Nation.

The treatment of business income is very difficult to follow. Accountants working for First Nations have advised their clients to be wary of OSR language in respect of business income, because it is not clear and, with the accounting principles that need to be followed, could result in revenue such as equity pickup and fair market values for assets that have been disposed of at less than fair market value being deemed income. Also, the federal government is afraid that in order to get around OSR offset provisions, a First Nation may look to provide governmental-type programs and services through a corporation. Accordingly, complicated provisions in agreements provide for the expenditures of any company that provides any public services to be included as OSR. How these provisions would ever work in practice remains to be seen, given that in Canada private companies often provide government-type services, although not necessarily on behalf of a government (e.g., garbage collection, bus services, recreational facilities).

Notwithstanding the issues with the current federal OSR policy, this approach to addressing business income can be compared in some ways to how Canada and British Columbia treat their corporate income when they do get involved in the commercial mainstream. The federal and provincial governments have on occasion created community-owned commercial and investment ventures through Crown corporations and given some of these special treatment as a means of creating economic development (e.g., the BC Lottery Corporation). These bodies have been subject to special tax and

revenue regulations that can act to keep them outside of the government's general revenue. Some First Nations are looking to this model when considering ways to treat their revenues derived from business ventures as they move along the continuum of governance.

Revenues that are collected for a specific purpose and for which there is no corresponding federal contribution should be excluded from OSR calculations

It is expected by Canada that First Nations funds that are raised to pay for a specific purpose will still be counted in the OSR calculation for offsets. If these funds are actually needed by the Nation to pay for programs and services to offset federal reductions in contributions, the Nation will have insufficient funds to meet the purposes for which the moneys were intended in the first place. Today, some of these revenues are not being included in OSR calculations (e.g., some fees and charges, development cost charges, and certain property tax revenues); this is not done as a matter of principle, but is negotiated on a case-by-case basis.

If this issue is not properly addressed at a more substantive policy level, the implications at some point in time could be very challenging to justify for both First Nations and Canada. For example, today Canada provides no funding for the provision of services to non-Indians living on-reserve. But, of course, there are many non-Indians living on-reserves in BC that need services. Accordingly, First Nations collect property taxes and other revenues from these people (to the extent that they can in accordance with the limitations on their revenue-raising authority) to provide local services. From Canada's perspective, these revenues, as a matter of policy, are "own-source revenue" and in theory could be used to reduce federal contributions for the "Indian" programs and services that the government does fund (at least in part). Of course, if local ratepayers thought that their property taxes which were collected for one purpose and were going to be used for another, namely to offset federal legal responsibilities for programming to "Indians" (e.g., social services, education, health care, and so on, and not necessarily to the citizens of that self-governing Nation), there could be serious political and economic consequences.

OSR should not be applied to all fiscal transfers to First Nations government

OSR capacity should only be taken into account in the determination of funding set out in the fiscal financing agreement for those jurisdictions that a First Nation government has drawn down (exercised) under its governance arrangements. Programs and services that a First Nation government delivers on behalf of Canada in areas where the Nation either has no jurisdiction or has not drawn down jurisdiction should be delivered in accordance with the terms and conditions of separate funding agreements negotiated for the delivery of those federal programs and services.

As a matter of federal policy, where a Nation's government has contracted to provide programs and services on behalf of Canada or where a Nation is not exercising its jurisdiction, these funding arrangements should not be subject to OSR offsets. This is because the Nation is not responsible for using its limited revenue-raising capacity to provide that service or to pay for it. There should be different treatments of OSR, depending on whether the transfer is in support of First Nations government and its exercise of jurisdiction or reflects simple contracting with Canada, not an exercise in jurisdiction.

The most negative effects of this policy become evident where First Nations are developing local economies and becoming successful and have OSR, and the erroneous assumption is that they can now afford to pay for the lion's share of programs and services themselves (whether delivered under their own jurisdiction or under Canada's) — that being 100 percent of the cost when Canada or British Columbia makes no contribution (i.e., they are not "agreed-upon programs and services") and 50 percent at full OSR inclusion, where Canada is making a contribution (i.e., they are "agreed-upon programs and services").

If this issue is not addressed, it is conceivable that a self-governing First Nation could end up with the most responsibility to provide comprehensive government of any government in Canada (with some responsibility based on the exercise of its own jurisdiction but also carrying Canada's and British Columbia's responsibilities as well), and proportionally making the largest contribution toward those programs and services of any government in Canada. There is no comparably sized government in Canada that is expected to pay for 50 percent of the cost of such a basket of programs and services (costs including local schools, social services, health care, land management, administration of justice, and so on) and certainly not when they do not have the corresponding revenue-raising power to pay for it. This is obviously not the intention of self-government agreements and in practice would never occur, as a First Nation would be in financial crisis well before it could ever begin to meet its obligations.

OSR calculation should not be overly complex and energy and efforts of the Nation's government and the Crown should not be wasted on unnecessary analysis and negotiations

OSR will be a significant burden on First Nations. The current maximum clawback level, 50 percent, introduces significant decision-making distortions that will affect the attempts of many Nations to build strong local economies. OSR in some ways acts as a "tax" and in many cases will effectively tax revenue that is already taxed when revenues from corporate entities are brought under the control of the government or may be required to be considered income of the First Nation under PSAB rules. This is because, depending on the business structure, economic development revenues are also taxable through the normal tax laws.

The interaction between the application of OSR and the Canadian tax system generally creates a complex web of outcomes that are very costly and inefficient. While the Canadian tax system is itself complex, with many different measures and interactions, it is constantly challenged and clarified by Canada Revenue Agency rulings and court judgments. OSR has no such clarifications. The complex terms and conditions require First Nations to take considerable care in planning their OSR as a corporation or an individual would for taxation. ORS agreements already provide some of the most difficult language for accountants, lawyers and negotiators to understand. First Nations will test and define the applicability of the evolving OSR regime. They are quickly becoming the "experts" in OSR, given that millions of dollars may be at stake in OSR calculations and discussions. Already, First Nations moving into comprehensive governance arrangements or negotiating fiscal financing agreements are spending significant resources to analyze agreements and determine the most efficient ways of proceeding.

AANDC must take OSR determination more seriously and recognize its impact on collective efforts to improve the lives of First Nations people. AANDC should establish a well-understood, formal process for OSR evaluation and calculation, with neutral third-party arbitration of disputes in interpretation. If this is not undertaken, it is very likely that OSR disputes will trigger significant disruption in the implementation progress of self-governing First Nations and will be extremely expensive to resolve, from both the federal and the First Nations perspectives. Unlike tax law, which is well-developed and tested, ORS law is just beginning.

OSR should not operate as a disincentive to Nations to move beyond the *Indian Act*

In the opinion of many experts, the maximum OSR inclusion rate currently being used in comprehensive governance arrangements should be revisited. A 50 percent clawback level is extremely challenging for First Nations to contemplate. Given the OSR issue, some communities may even choose to stay with the status quo, which would be tragic and counter-productive to creating healthy and sustainable First Nation communities. The policy rationale for OSR should be re-evaluated. As described above, it acts as a "tax" on a First Nation's revenues, which is both costly and inefficient. If this does become a disincentive for First Nations to move beyond governance under the *Indian Act*, it is certainly not in the long-term interest of either First Nations or Canada. Federal OSR policy, it can be

argued, is contrary to the broader Canadian government policy objective in support of First Nations moving beyond federal regulatory control and becoming stronger and more valuable contributors to Canada's overall economy. The increase in GDP and reduction in the cost of providing programs and services to First Nations that will result from governance reform, would certainly outweigh any savings Canada might make through OSR offsets. Moving beyond the *Indian Act* can and should be financially better for First Nations and for the country generally.

A number of options for OSR should be considered, including the following:

- *Graduated OSR levels:* There could be OSR "brackets," similar to the personal income tax brackets. The current OSR structure effectively has one graduated level already — the OSR "floor," or the amount of federal funding the Nation will continue to receive. Consideration could be given to several more brackets at different levels. For example, the first amount of OSR could be clawed back at a 0 percent rate until some defined level of self-sufficiency is realized, and the next at a 15 percent rate, until average incomes meet the regional average for the general population. After that, the next amount of OSR could be clawed back at a 25 percent rate. The highest bracket could be anything above amount of OSR, which would be clawed back at 35 percent. This would introduce smaller disincentives to earning income at lower revenue levels and fewer incentives to avoid clawbacks, and would encourage investment, employment and economic activity generally.

- *Revenue targets before OSR is applied:* Consideration could be given to setting minimum revenue targets that a Nation's government must achieve before the OSR regime begins to operate. The current provision is for an OSR "floor." However, this floor is extremely low, and does not represent what may be a legitimate target approaching self-sufficiency. A trigger point for beginning OSR should be some revenue point at which there is a reasonable expectation that the Nation's government might be able to govern with a reduced federal transfer.

OSR Exemptions/Credits to Promote Policy Objectives

The same principle that applies to tax policy where governments use targeted tax credits to meet valid policy objectives could also apply to OSR policy. Tax is a key instrument in changing individual or organizational behaviour. Like assigning certain tax advantages to expenditure activities that the government sees as desirable, OSR could be used as a tool to encourage the types of investments First Nations and Canada wish to see transfers being used for.

Using OSR in this manner would be far more acceptable than strict regulation or reporting requirements, both of which are tools that AANDC uses with respect to *Indian Act* "bands." The concept has two distinct options: OSR spent on either social infrastructure (e.g., investments in health and education) or physical infrastructure (e.g., water treatment, and roads) that fits into mutually agreeable priorities would not be included in any OSR calculations.

4.4

DEVELOPING A NEW FISCAL RELATIONSHIP

THE RELATIONSHIP CHALLENGE

The source of jurisdiction for Aboriginal self-government is inherent, not delegated, and is recognized under section 35 of the *Constitution Act, 1982*. These powers may arise as a consequence of the jurisdictional aspect of unextinguished Aboriginal title, be a free-standing right of self-government affirmed by the court, or be recognized though comprehensive and/or sectoral governance arrangements. With the inherent right constitutionally protected, a First Nation's self-governing powers and responsibilities cannot be removed unilaterally by the federal or provincial government.

The powers and responsibilities of self-government carve deeply into the division of powers set out in sections 91 and 92 of the *Constitution Act, 1867*, extracting jurisdiction from both provincial and federal governments and assigning it to the First Nation government. The most obvious extraction is the diminishing of federal jurisdiction under section 91(24) and the power over "Indians, and Lands Reserved for the Indians." With respect to section 92 core provincial powers, and as confirmed in some comprehensive governance agreements, constitutionally protected First Nation jurisdiction also includes areas such as education, social services and health care. It almost always includes the full range of municipal responsibilities, including utilities, zoning and development, and local law/bylaw enforcement. Further, it sometimes includes ancillary federal responsibilities, such as administration of justice. The powers of self-government have been comprehensively considered in Section 3 — Powers (Jurisdictions) of the First Nation. What is emerging in Canada as First Nations rebuild, and as described in Section 1, is a unique level of First Nation government adding to the multi-governance mix that is redefining Canadian federalism.

This is also a problem. Recognized First Nation self-government in the modern era has really only been around since 1984 — first in a delegated form, beginning with the *Cree-Naskapi (of Quebec) Act* of 1984, which implemented provisions of the *James Bay and Northern Quebec Agreement* (1975) and the *Northeastern Quebec Agreement* (1978) and then in a constitutionally protected form, since the Nisga'a Treaty of 2000. First Nation governments were not invited to the 1864 constitutional conferences in Charlottetown and Quebec that led ultimately to the 1867 Constitution, when the "revenue-source pie" was divided between the federal and provincial levels of government. Today, therefore, while Aboriginal groups assume sovereign-type responsibility for the provision of programs and services through negotiated agreements and modern treaties, they have also had to seek sources of revenue through those same instruments, to raise revenues sufficient to provide services. In other words, they have had to seek access to a share of a revenue pie that has already been divided between the federal and provincial governments.

The failure of federal and provincial governments to recognize Aboriginal governments in self-government agreements and modern treaties and to provide them with an adequate source of revenue and complete control over that revenue source, is problematic. Ironically, it forces the creation of an ongoing dependency relationship with the Crown, where Aboriginal governments must continually seek the Crown's permission to raise revenues or ask for transfers when revenues from other sources are insufficient to meet obligations. This ongoing dependency relationship, evidenced by complex and one-sided fiscal financing agreements, as described in Sections 4.2 and 4.3, threatens to derail self-government agreements and creates significant policy and other obstacles that get in the way of economic development and self-sufficiency.

Comprehensive governance arrangements have attempted to address the problem of the already-divided-up revenue pie. However, the only way in which guaranteed and real control over funding could be recognized and then transferred to a First Nation would be the transfer of the jurisdiction over that funding source — not in a delegated form, but in a manner in which the First Nation government exercises control under its constitutionally protected rights. Generally speaking, the only major source of revenue that federal and provincial governments have been prepared to recognize and transfer in this way is the power of direct taxation over citizens of the First Nation government itself. This includes the power to tax income, sales, businesses and property. In the case of comprehensive governance arrangements, any other significant revenue source has been provided to Aboriginal governments in a delegated form, through various side-agreements that are not constitutionally protected and that come with strict conditions. In the case of sectoral agreements for First Nations that are not comprehensively self-governing, access to non-constitutionally protected revenue streams is achieved through very specific federal or provincial legislation dealing with a particular revenue stream. Federally, this includes property tax and consumption (sales) tax; provincially, it includes resource rents/royalties and tobacco tax. While these sources of revenue are critically important to many First Nations today, like the comprehensive governance arrangements, they nevertheless ensure that to some degree the federal or provincial governments maintain control and can place parameters around the exercise of the jurisdiction, and ultimately (however unlikely) remove the revenue-raising power of the First Nation government.

The net result of this situation is that while self-government agreements involve the recognition and transfer of what are often constitutionally protected jurisdiction to govern and provide programs and services, they do not recognize the First Nation's jurisdiction to raise the revenues needed to govern and provide programs and services. Consequently, revenue sources are mostly delegated, which results in restricted access to the revenue source, power imbalance in fiscal harmonization, and revenue-sharing/tax-room discussions between levels of government, and, in the worst-case scenario, major revenue sources being removed or cancelled because of breaches of agreements. This in turn results in a significant and ongoing imbalance in the fiscal relationship, where the federal and provincial governments retain funding authority over the governments of self-governing First Nation peoples, yet the First Nation government acquires service obligations, contributing in no small way to the serious hurdles faced by First Nation governments in matching their revenue-raising capability with their expenditure requirements. A new fiscal relationship is needed.

EFFORTS TO DEFINE THE RELATIONSHIP

Some may ask why, more than 30 years into the modern era of Nation rebuilding among First Nations, we still have a dramatic fiscal imbalance. Part of the reason is that as a country, we have failed to resolve these questions at a national level. There are still no underlying national principles guiding the fiscal relationship between the Crown and First Nations that have been agreed to by First Nations, Canada and the provinces, other than the limited provisions found in comprehensive and sectoral governance arrangements. There have been serious attempts to set out such principles at the highest level. The most significant of these attempts was the failed attempt to amend the Canadian Constitution through the 1992 Charlottetown Accord, which included recognition of Aboriginal governments and set out principles respecting the Crown/First Nation fiscal relationship. While critics felt that the provisions did not go far enough, the Charlottetown Accord would have made a difference and remains instructive today.

The Charlottetown Accord would have committed the federal and provincial governments to the principle of ensuring that First Nation governments had the fiscal powers to raise and expend their own revenues. Further, it would have extended the concept of "equalization" to First Nation governments, where transfers to First Nation governments would take into account both the levels of service generally provided in the region and the First Nation governments' ability to raise revenues from their own sources.

Fiscal "capacity" in this context referred primarily to the tax-raising powers of First Nation governments and the amount of tax they might be able to raise compared to the taxes levied by other governments with similar tax powers (i.e., not the actual revenues raised). The Charlottetown Accord was voted down by the Canadian public, and there have been no further attempts at constitutional reform.

Charlottetown Accord, 1992

50. Financing

Matters relating to the financing of governments of Aboriginal peoples should be dealt with in a political accord. The accord would commit the governments of Aboriginal peoples to:

- promoting equal opportunities for the well-being of all Aboriginal peoples;
- furthering economic, social and cultural development and employment opportunities to reduce disparities in opportunities among Aboriginal peoples and between Aboriginal peoples and other Canadians; and
- providing essential public services at levels reasonably comparable to those available to other Canadians in the vicinity.

It would also commit federal and provincial governments to the principle of providing the governments of Aboriginal peoples with fiscal or other resources, such as land, to assist those governments to govern their own affairs and to meet the commitments listed above, taking into account the levels of services provided to other Canadians in the vicinity and the fiscal capacity of governments of Aboriginal peoples to raise revenues from their own sources.

The issues of financing and its possible inclusion in the Constitution should be on the agenda of the First Ministers' Conference on Aboriginal Constitutional Matters...

It is important to note that there are similarities between the Charlottetown principles and the financing arrangements that are already in place between provinces and Canada in terms of "equalization" and that are addressed in section 36 of the *Constitution Act, 1982*. Section 36 sets out that:

> 36 (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
>
> (a) promoting equal opportunities for the well-being of Canadians;
>
> (b) furthering economic development to reduce disparity in opportunities; and
>
> (c) providing essential public services of reasonable quality to all Canadians.
>
> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

Provisions similar to those suggested in the Charlottetown Accord and found in section 36 of the *Constitution Act, 1982* were included in Bill S-212 (2012), the proposed *First Nations Self-Government Recognition Act* (see Section 1.1 — A Brief History of Evolving First Nations Governance within Canada), and would have applied to a recognized self-governing First Nation had Bill S-212 become law. While these principles would not have been constitutionally protected, developing a new fiscal relationship between Canada and a recognized First Nation was an important aspect of that legislative initiative. A recognized First Nation would have the fiscal powers to raise its own revenues, and Canada would be required to enter into a self-government financial transfer agreement with a recognized First Nation. Bill S-212 would also have provided principles similar to those respecting provinces that are found in the *Constitution Act, 1982*, which result in "equalization" and "stabilization" payments being made to provinces. The federal transfers would have to ensure that a recognized First Nation could provide public services at levels reasonably comparable to those available to other Canadians, and to reduce disparities in opportunities, and so on.

Bill S-212 *Self-Government Recognition Act* (2012)

Federal transfers

36. (1) The Minister must enter into a self-government financial transfer agreement with a recognized First Nation under which funding is provided by the Government of Canada to the recognized First Nation over such period of time, and subject to such terms and conditions, as are specified in the agreement.

Comparable programs and services

37. (1) The purposes of the federal transfers are to

(a) promote equal opportunities for the well-being of the citizens of the recognized First Nation;

(b) further economic, social, cultural and linguistic development in the First Nation to reduce disparities in opportunities among Aboriginal peoples and between Aboriginal peoples and other Canadians; and

(c) ensure that the recognized First Nation can provide public services at levels reasonably comparable to those available to other Canadians.

Capacity to raise revenues

(2) The capacity of a recognized First Nation to raise its own revenues must be taken into consideration in determining and administering the federal transfers, after a reasonable transition period that allows the recognized First Nation to make substantial progress on the objectives set out in paragraphs (1)(a) to (c).

EQUALIZATION AND STABILIZATION

How provincial equalization and stabilization payments are determined and what for, and how they are calculated is set out in the *Federal-Provincial Fiscal Arrangements Act* (R.S.C. 1985, c. F-8). The fiscal financing agreements negotiated as part of comprehensive governance arrangements are sometimes described as an attempt to mirror those between federal and provincial governments under this act. In reality, however, they are not. The act is drafted on the understanding that all provinces have the power to raise revenues and will do so to the extent they can. The approach also assumes that governments know what it costs to govern, and so no "costing" exercise is needed (i.e., equalization and stabilization is calculated as between and for governments, rich and poor, that are already well established and governing). For First Nations, as discussed in Sections 4.2 and 4.3, no such assumptions can be made. The revenue streams are limited and the federal approach to "costing" is based on determining what Canada is willing to pay and then reducing the amount of federal transfer by taking into account a First Nation's own-source revenues (OSR). This is categorically not an exercise of "equalization" or "stabilization" — as those terms are understood in the federal/provincial context — between First Nation governments and Canada.

Nevertheless, and moving forward in developing a new fiscal relationship, some of the central policy objectives and characteristics of the federal/provincial model, based on the constitutional principles of equalization, would also be applicable to First Nation governments — even if the current approaches to implementation and the formulas used in the legislation are not easily transferable. It is therefore important to understand, at a very high level, how the federal-provincial fiscal model and its key characteristics works. Also, it should be noted, the act already does make administrative provisions for agreements respecting tax sharing between First Nations and Canada in accordance with comprehensive and sectoral governance arrangements.

The first characteristic of equalization is that transfer payments are used to redistribute funds from the federal government to provincial governments so that provincial governments have enough money to deliver services under their jurisdiction. Second, the federal government provides additional money to "have-not" provinces to ensure equality and standardized access to programs and services across the country. Third, resources are distributed across the country to account for regional differences in both expenditure needs and fiscal capacity. In this way, more money is transferred to provinces with greater

need, where the costs of providing programs and services are higher (i.e., because of economies of scale, remoteness, etc.), and less is transferred to those with greater fiscal capacity. Finally, Canada transfers money on an "unconditional" basis, where the recipient provincial government can decide how to spend the money, or on a "conditional" basis, requiring the receiving provincial government to limit spending to a particular subject area or jurisdiction. In some cases, there are even more restrictions on the spending. Conditional transfers are a mechanism by which the federal government has influenced policy decisions of provincial governments in areas that are usually outside its jurisdiction. Health care funding is perhaps the most significant example of this approach: while health care is a provincial responsibility, Canada transfers significant amounts of money to the provinces for health care, but in order to get this money the provinces have to agree, contractually, to a follow the national health care system and the rules set by Ottawa.

Under the federal-provincial transfer model, one of the fundamental determinants of equalization is the capacity of the receiving government to raise its own revenue (by taxes) and whether it is using this capacity. This partly determines whether the province is eligible for transfers and also affects whether the transfers are conditional or unconditional. Because of the limited fiscal capacity of First Nation governments, as reflected in the state of their economies during the current "catch-up" phase, and the constraints on their powers under all governance arrangements, their ability to raise their own money through tools such as taxation is considerably less than that of provincial governments. Because of this and the fact that provincial fiscal capacity is such an integral part of the federal-provincial transfer model, some commentators (see Kunin, 2008) have suggested that this model may not be applicable to First Nations. Given the wide range of jurisdictions that First Nations are looking to exercise or services they are seeking to provide under the authority of another government, the ability of First Nations to raise money may not match the responsibilities included in comprehensive governance arrangements.

FISCAL RELATIONSHIP — GUIDING PRINCIPLES

Based on the foregoing, and building on the work undertaken by some First Nations that already have comprehensive governance arrangements, the following are principles that a First Nation may wish to consider and raise with the Crown regarding its fiscal relationship with Canada. While these principles should be considered in any effective, stable fiscal financing relationship with the Crown, they do not necessarily capture every issue that each Nation may feel is important or agree with.

1. **The financing of First Nations governance is a shared responsibility between First Nations governments and Canada and, where applicable, the government of British Columbia.**

First Nations have a shared responsibility to provide for their own governments, keeping in mind that Canada — by assuming control of First Nations people's lives — has certain legal responsibilities and in some cases fiduciary obligations. However, the degree to which Canada remains responsible and retains jurisdiction, the levels of funding that are available, and the degree to which a First Nation's government has access to its own sources of revenues or the capacity to raise revenues, must all be factored into the provision of stable, predictable and appropriate government. This becomes the real issue when determining how the responsibility is shared. To put it another way, what is the share and the share of what? This principle is perhaps the hardest to come to a resolution on and is in part affected by outcomes of discussions regarding many of the other principles set out below.

2. **Fiscal arrangements must comply with the terms and conditions of governance arrangements (sectoral and comprehensive).**

As discussed above, the Charlottetown Accord in 1992 would have led to the establishment of the principles of the First Nation fiscal relationship with Canada and the provinces in the highest law of the land. This was not to be. Subsequently, self-government recognition legislation setting out similar

principles for a new fiscal relationship with recognized self-governing First Nations has also been proposed but not taken up.

In the absence of such provisions, constitutionally provided or otherwise, First Nations must rely on the terms and conditions negotiated nation-by-nation in sectoral and comprehensive governance agreements. Fiscal financing agreements should be part of the governance arrangements so that the relationship is not subject to unilateral decisions by one level of government.

In order to operate with certainty, First Nations governments require assurance that their place in the fiscal financing model is secured, as would have been the case if the Charlottetown Accord had been ratified. This is not the case if agreements have to be negotiated every five years outside of the governance arrangements. Where they are not included in the agreements, the terms of governance arrangements must be clear and fair and must guide and take precedence over any fiscal financing agreements arising from those arrangements.

Given the way in which the fiscal relationship is evolving, every comprehensive governance agreement, while similar, is unique to the Nation(s) entering into it. These agreements are usually the result of a complex and vigorous negotiation process that often addresses specific requirements. Approaches to fiscal financing and funding agreements must comply in all respects with sectoral and comprehensive governance arrangements, and must be sufficiently flexible to accommodate the differing circumstances of First Nations.

3. Funding for First Nations with sectoral or comprehensive governance arrangements is different from those for First Nations governing as "Indian bands" under the *Indian Act*.

The scope of jurisdiction of "Indian bands" as discussed in this report is quite different from that of Nations with comprehensive governance arrangements. It is therefore not appropriate to base funding on the aggregate of basic AANDC programming and band support funding that was provided to the predecessor "Indian band." In addition to looking at the levels of support provided by governments to the Nation before self-government, the favoured approach in seeking to determine an appropriate level of funding is to examine provincial or municipal jurisdictions and levels of support provided to other First Nations by Canada, depending on the type of service. The costing analysis discussed above will be critically important in this exercise. As First Nations gain more experience with self-government, the base data used for comparisons will expand.

4. Financing should be flexible, to account for differing circumstances among First Nations and between First Nations governments and other governments in Canada.

The approach taken by Canada and First Nations and any federal policy and related formula for fiscal financing must recognize the uniqueness of each Nation's government in terms of its geographical location, areas of jurisdiction, population size, revenue-raising capacity and other significant factors. A one-size-fits-all approach does not work.

The existing model for financing comprehensive governance arrangements is loosely based on the federalist approach to provincial-federal fiscal relations. However, this model does not easily accommodate the varying circumstances of First Nations and the need for flexibility, given the different forms of government emerging post–*Indian Act*. While it is conceivable that the federalist model could accommodate three orders of government (each of them equal within their own sphere of jurisdiction), it is less clear that this model could accommodate more than 30 or 40 orders of government. Assuming that each Nation is treated as a separate order of government, the potential number of governments emerging in this period of Nation building would be far higher than this.

First Nations will likely require additional transfer payments to establish their governments, bearing in mind the need for "catch-up," so that communities can start to improve their fundamental living conditions and have parity with the rest of the country. However, there are aspects of the federalist model, namely "horizontal equalization," that could be considered, with provisions that specifically address bringing subject matters such as infrastructure, programs, services or economic conditions up to comparable levels. This aspect of the federalist model has not been fully explored or developed with respect to First Nations and is not reflected in any current fiscal arrangements.

5. Financing must recognize the responsibilities and jurisdiction of First Nations governments.

When considering the range of jurisdictions to be undertaken by a Nation (see Section 3 — Powers (Jurisdictions) of the First Nation) and the extent to which these jurisdictions extend well beyond what is possible when governing under the *Indian Act*, existing funding models and amounts will not be an acceptable baseline for a First Nation moving into sectoral or comprehensive governance arrangements. The legal jurisdiction in sectoral and comprehensive governance arrangements requires a different funding basis. Under such arrangements, First Nations are responsible for a full range of jurisdictions, including legislative jurisdiction, regulatory frameworks, policy development and design, decision-making, program delivery, administration, appeals and reviews, and program evaluation. Prior to self-government, First Nations are, in large part, responsible for a much narrower scope of activities — some policy development, administration, and program delivery, but not jurisdiction or legal authority. The additional costs of jurisdiction and liability should be recognized. Many of the jurisdictions that a Nation may take on under comprehensive governance arrangements have not even been considered by AANDC. Consequently, there is no existing AANDC funding authority for these activities and they do not form part of the department's plans and priorities with respect to governance.

6. First Nations governments must be able to provide programs and services comparable to the programs and services provided by other, similar jurisdictions.

The principle of "comparability" for programs and services is set out in all comprehensive governance arrangements and would have been included in the political accord to follow the proposed recognition of the inherent right of self-government through amendments to the Canadian Constitution as part of the Charlottetown Accord. However, it is not always clear what is meant by "comparability."

There are at least three optional meanings. The first is comparability of inputs (i.e., funding — meaning, given the jurisdictional responsibilities set out above and the activities being pursued, what is the comparable level of funding provided to non–First Nation receivers of programs and services?). Secondly, there is comparability of outcomes (i.e., what is the expected cost to have a Nation's citizens reach outcomes similar to those reached by others?). The third is comparability of access (i.e., do a Nation's citizens have access to programs and services that are of comparable quality to those accessible by other Canadians?).

The choice of comparison will have significant impacts on the cost calculation assumptions. Some Nations are conducting (or have conducted) their own analyses of comparability.

7. Transfer funding should allow for the build-up of a First Nation's jurisdiction, where governance arrangements between the First Nation and Canada provide for it.

Many Nations have agreements that allow for additions to the funding base when a Nation chooses to enter into an area of jurisdiction with which it was not previously involved. Assuming additional powers and responsibilities often carries significant additional costs. Any financing relationship should recognize those additional costs by allowing for ongoing additions to fund the build-up in areas of jurisdiction that are provided for under an agreement but are exercised midway through a financing

agreement. Funding arrangements may consider the jurisdictions of the Nation and the authorities, obligations, programs and services that are assumed, or that may be assumed, throughout the duration of the particular funding agreement.

8. The fiscal transfer to support a First Nation government and the exercise of its jurisdiction may be separate from additional federal funding that a First Nation receives for continuing to provide programs and services on behalf of Canada and where the First Nation is receiving funding as part of "start-up" or "catch-up."

Where a First Nation has limited or no jurisdiction, but continues to provide agreed-upon programs and services on behalf of Canada under federal jurisdiction, the funding for this activity should be separate from the self-government fiscal transfer and would be subject to different conditions, including no OSR offsets.

Where a First Nation provides programs and services on behalf of Canada or participates in certain programs that AANDC offers that are supported by funding, its self-government capacity to raise revenues, or moneys that it perhaps received as settlement funds or one-time implementation funds, should not have any bearing on funding determinations for those specific programs.

Further, First Nations should remain eligible for funding for programs that are not replaced by a fiscal financing agreement. This is important because some existing arrangements provide for a blend of funding to the First Nation, regardless of whether the funding is in support of the comprehensive governance arrangements, or is provided even if the First Nation has no jurisdiction, or it is delivering a program on behalf of Canada where it has no jurisdiction or limited jurisdiction under its arrangements and Canada is currently responsible for that area of jurisdiction. "Start-up" and "catch-up" funding should also not be confused with ongoing funding requirements.

9. Financing should be based on the true service population.

There are two aspects to this principle:

a) While many First Nations assume responsibility for all persons who live on the lands they govern and to provide programs and services for them, they also have an overarching responsibility to their own citizens. The true service population includes all citizens as determined by the Nation (not simply "status Indians"), wherever they live. Under the laws of a self-governing Nation and through whatever process is required by those laws, the Nation's government has the jurisdiction to decide who is and who is not a citizen. Many First Nations that determine their own citizenship have established a class of citizenship that is broader than the definition of who may be registered as a "status Indian" under the *Indian Act*. As discussed elsewhere in this report, Canada views its funding obligation as tied to those who are registered as "Indians" and to programs and services that may be delivered to this category of people in accordance with federal policy prior to self-government.

   "Indian status" is an uncertain legal definition that has been under constant legal challenge and was revised most recently in the *Gender Equity in Indian Registration Act* (S.C. 2010, c. 18). This act created new registration challenges that have implications for financial resources.

   Some Nations have developed membership codes under the *Indian Act* under which the class of "member" citizens is broader than the class of "status Indians." Nations with comprehensive governance arrangements have generally adopted an even more stable legal framework to define citizenship. When providing services, it is also considered inequitable by First Nation governments to discriminate between "status" and "non-status" citizens,

regardless of whether a First Nation is under the *Indian Act* or a comprehensive government arrangement. However, this commonly results in underfunding in the fiscal transfer, as in some cases funding to citizens with status is divided among the larger pool of citizens, which includes those who are non-status.

It is not reasonable for AANDC to provide funding on the basis of status for programs delivered by the government of a Nation that defines its own citizenship, particularly where the Nation is generating revenues from these individuals. The determination of funding based on status and not citizenship as defined by Nations is a contentious issue. It has become even more contentious with the 2013 Supreme Court of Canada ruling in *Daniels* that extends the definition of "Indian" under 91(24) of the *Constitution Act, 1867* to Métis peoples. Much more discussion in this area is required, particularly for First Nations under comprehensive governance arrangements or looking to complete agreements.

In any case, when funding is provided on the basis of "status," it may be necessary to amend a fiscal financing agreement during its term in light of court and tribunal decisions that significantly increase the number of eligible recipients of programs and services funded through the agreement. This is particularly true where the Nation is delivering programs and services on behalf of Canada and not under its own jurisdiction.

For example, Canada's amendment of the discriminatory sections of the *Indian Act* in response to the *McIvor* case (*McIvor v. Canada [Registrar of Indian and Northern Affairs]*, 2009 BCCA 153) resulted in an increase of 45,000 persons eligible to be registered as "status Indians." If the service population increases significantly because of statutory changes over which First Nations have no control, the funding agreements must have provisions that address the issue even partway through a funding agreement. Otherwise, a larger annual inflator is required to cover that risk. To reiterate, this provision would not be required if First Nations were funded on a per-citizen basis rather than on the basis of status.

b) A further issue arises because Canada does not share the costs of providing services to non-Indian residents living on First Nation lands. Conversely, in some arrangements Canada expects revenues raised from others living on First Nation lands to be OSR and used to calculate clawbacks. This is particularly problematic when taxes, fees or charges are raised for particular purposes and are clawed back, but Canada is unable to provide funding for that purpose to offset the clawback.

   As discussed in more detail in section 4.3, this is an area where Canada's approach to calculating core funding for a Nation's government is very problematic because it is not based on the real cost of the Nation's government. Instead, it assumes that existing levels are the base from which deductions to funding can be made through OSR clawbacks.

   It is particularly problematic where a Nation has major residential developments. Over time, significant resources are devoted to providing these residents with services. The services are paid for mainly with property tax revenues collected from those residents — revenues which, outside of the treaty process, may be included in OSR calculations. If OSR is deducted using these revenues as part of the calculation, the revenues available to the Nation are markedly reduced, as is its ability to provide services to the residents paying the tax. The ultimate impact is that the Nation and these residents are effectively penalized by the OSR cutbacks, but receive no benefit from the federal financial transfer, as it does not apply to them.

   If Canada seeks to claw back from revenue streams intended to provide services to non-citizen residents, it should also provide support for those populations. Not doing so will

impede First Nations' success in developing their economies on their lands. It could also lead to political instability, with non-citizen residents being taxed at higher rates or charged increased fees to pay for programs and services that Canada will support or has a legal responsibility to provide to citizens. This is an area that requires more discussion between First Nations and Canada.

10. Remoteness factors influencing the cost of service provision must be recognized.

Costs of service provision differ depending on a number of factors, including availability of "human capital" and distance from goods and services. One of the most significant cost factors is population size. A population that is insufficient to support permanent program-delivery resources (e.g., doctor, multi-class school, nurses) will significantly inflate the need for financial resources. Such is the case for most of the northern Nations, whose territories are often remote from major population centres. The costs of providing comparable resources to relevant jurisdictions must be taken into account.

11. Financing must consider geographic jurisdiction.

First Nations governments differ from provincial and territorial governments in that their definition of "citizen" is not restricted by location choice. AANDC's policy is in some circumstances to provide funding to persons who may not live on-reserve or on treaty settlement land, as in the case of post-secondary funding. However, fiscal financing arrangements should also consider funding other services for citizens not living on lands directly governed by First Nations (reserves and treaty settlement lands), either within the ancestral lands or further afield. Limiting funding to persons living strictly on lands directly governed by a First Nation may create inequities across the Nation's citizenship base. This principle should not operate to involve or require any transfer of funding responsibility from the provincial government to the federal government, but to take into account the way in which First Nations jurisdiction is being developed under comprehensive governance arrangements.

Some Lessons Learned from Tsawwassen

Tsawwassen First Nation (TFN) has now experienced one full five-year cycle of treaty implementation, and is seeking to renegotiate its Fiscal Finance Agreement (FFA) with Canada. TFN has volunteered a number of specific but important points that First Nations should keep in mind when they are negotiating their fiscal financing arrangements. These are not principles — rather, they are lessons learned in relation to specific aspects of the way AANDC has chosen to interpret agreements, which are different from the intention with which the agreements were entered into. They are worth noting in the context of ongoing negotiations for any First Nation.

1. *Bias and misunderstanding:* AANDC officials, who are not deeply involved in self-government, do not understand the nature of the jurisdiction. There is a fundamental disconnect between the training and understanding of these AANDC staff and the understanding and knowledge necessary to support self-government. AANDC officials are often of the view that TFN is no longer eligible for any capital or other operational funding, despite specific provisions that state otherwise, and must be corrected with calls from the treaty implementation team. TFN has also found an increasing bias against any capital funding applications it makes to AANDC; TFN suspects this is because capital officials view TFN as less "needy" than *Indian Act* nations. Given these concerns, a First Nation should seriously consider how it approaches ongoing eligibility for discretionary capital funding, and may wish to examine opting instead for annual funding based on a formula.
2. *Double-stacking provisions:* Canada has used the "double-stacking" argument to render TFN ineligible for applications to federal funding programs, stating that TFN's Implementation Fund already provides funding for that specific activity. First Nations should use caution and perhaps consider inserting specific provisions concerning the construction of their Implementation Fund, to ensure that the description of the fund will not be used to deny applications for other federal funding for which they would ordinarily be eligible.
3. *Implementation Fund:* The Implementation Fund in the FFA is specifically intended to provide funding for implementation-related activities. It is a one-time fund that does not renew. Many First Nations view this fund as assistance with the "transition period" — the "start-up" and "catch-up" phases — until the First Nation's revenues can catch up with expenditures required under self-government. AANDC has stated, in the context of a discussion with TFN, that the list of activities cited in the Implementation Fund's purpose is intended to cover federal funding for such activities into perpetuity. First Nations should consider ways to protect against the negative impacts of such an interpretation, perhaps by giving consideration to specific wording that clarifies the intent of the fund.

12. Financing should provide for "start-up," "catch-up" and "ongoing" needs.

"Start-up": Also called implementation funding, start-up costs need to be factored in and provided to First Nations to assist them in reforming governance structures, including taking on significant new legislative, regulatory and policy roles. The developmental work that is associated with building new institutions of government is a massive and distinct exercise that is unprecedented in most other jurisdictions in Canada, where governance traditions and institutions are already in place. That exercise is costly. Many Nations that have recently developed their institutions can provide accurate budgets and timelines that can assist in cost determination.

"Catch-up": Meaningful levels of ongoing programs and services can be implemented and financed only after First Nations governments and their citizens have caught up with comparable economic and social levels found among the general population. Some allowance for First Nations to "catch-up" is needed. This should be included in the list of factors that First Nations and Canada, and where applicable British Columbia, consider when negotiating fiscal financing arrangements. Failure to make such an allowance will only keep First Nations governments and people in an economic and social deficit, thereby further delaying any chance of financial self-sufficiency.

"Ongoing": This is funding to provide agreed-upon programs and services (whether on behalf of the federal government or through the policies and directions of a Nation) on an ongoing basis. This funding should allow the provision of programs sufficient to attain the relevant goals of each community, comparable to surrounding areas and meeting or beating the standards that apply to similar government programs at the provincial level.

13. Risk-based reporting and conditions of reporting should be appropriate to a Nation's status as a government.

Canada should consider the level of sophistication of a Nation's financial management and accountability requirements when it sets reporting requirements and conditions on funding. The federal government's "blue-ribbon panel" on transfer payments recommended that Canada consider providing different access to funding for those who have met certain financial management requirements. Canada should consider the Nation's own laws and financial management systems and standards as well as those established by bodies such as the Financial Management Board (FMB) (and its certification process) as a useful measure of the strength of a Nation's financial management and reporting system.

CONCLUSION

Despite the stated political desire of all levels of government for a "new relationship" and for "reconciliation," and the hope of all Canadians that First Nation governments can find a way to succeed on their own, the structure of the financing of First Nation governments represents a persistent and overarching obstacle.

At the core of this issue is a federal and provincial reluctance to "give away" fiscal revenue-raising powers that have been hard fought for and maintained over many years and upon which they now rely. From this perspective, neither the federal or provincial level of government wants to relinquish control over property taxes, income taxes, sales taxes, royalty revenues, or other major sources of federal and provincial revenues to First Nation governments. At the same time, however, First Nation jurisdiction and the concomitant service responsibilities may be recognized and constitutionally protected under self-government agreements — though without the sources of revenue to actually govern and provide those services. The consequences of this current policy approach will contribute to continued dependence, restrict economic development and potentially lead to the failure of Aboriginal governments.

Many policy solutions to this problem have been discussed throughout this report, each requiring a change to an existing federal or provincial mandate. In summary, these solutions include

- providing for the complete transfer of substantive sources of revenues to self-governing First Nations, including resource royalty revenues and full property, income, and sales tax, including from non-Aboriginal citizens, and protect these sources of revenue from other levels of government;
- under transitional Fiscal Financing Agreements, providing adequate funding to ensure program and services comparable to those enjoyed by other Canadians;
- and changing OSR mandates to provide for more accommodating mechanisms that correspond to economic reality and that encourage investment in goods and services in areas that have suffered from years of underfunding (e.g., education and health).

Fundamentally, it must be appreciated that while taxes can and should be levied by First Nation governments from the citizens of First Nations, this in itself will not generate sufficient revenue without the changes discussed in this report.

In the short term, the situation could be turned around quite quickly if the federal and, where applicable, provincial governments were to move away from their current negotiating positions and mandates and actually provide the resources that are required to begin to close the fiscal gap — something that the Kelowna Accord sought to begin to address. In the medium term, having re-engaged with First Nation peoples, and to support First Nations in this transition period as they rebuild, sound policy parameters regarding the fiscal powers and associated transfer responsibilities of the Crown should be confirmed, which would probably require legislation. Finally, and in the longer term, with regard to the bigger question of redefining, once and for all, fiscal federalism in Canada and what is required fiscally to support First Nations societies and their governments, as a country we seek constitutional amendments that confirm the fiscal powers of First Nation governments and the principles of “equalization.”

If these steps are not taken and implemented, self-governing First Nations will continue to fight an uphill battle for independence and financial sustainability. Those that do succeed will do so despite the fiscal relationship, their success perhaps as a result of where they are geographically situated or their access to valuable resources, or perhaps as a result of strong and extraordinary leadership. Success might also result from just a healthy dose of good fortune and luck or, cynically, a federal or provincial partner treating a Nation as “special” or “unique” to ensure that it does not fail under current policy. At the end of the day, a new fiscal relationship has to ensure that the fiscal financing model that is put into place is designed to support all First Nation governments, based on an assumption that, at some point and to some degree, all will ultimately be self-governing. The failure of those Nations that are already self-governing would cost the federal and provincial governments much more than the revenue they are seeking to protect, and if others do not follow to become self-governing, the ongoing costs will be significantly greater.

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PART 1 /// NOTES

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