Assembly of First Nations Report to the United Nations Special Rapporteur on the Rights of Indigenous Peoples

October 14, 2013

ASSEMBLY OF FIRST NATIONS • ASSEMBLÉE des PREMIÈRES NATIONS

AREAS FOR FOCUS AND ATTENTION

INHERENT & TREATY RIGHTS AND THE HONOUR OF THE CROWN

IMPLICATIONS OF STATE ACTIONS ON COLLECTIVE AND HUMAN RIGHTS & QUALITY OF LIFE

JUSTICE AND COMMUNITY SAFETY & SECURITY

INHERENT & TREATY RIGHTS AND THE HONOUR OF THE CROWN

TREATY IMPLEMENTATION

Article 37 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states: 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.

HISTORY AND CONTEXT

Indigenous Nations have occupied our territories since the beginning of time and have elaborate systems of governance to care for our lands and resources for future generations. When the non-Indigenous Peoples arrived, they met many Indigenous Nations and entered into diplomatic relations and Treaties with Indigenous Peoples based on the principles of peace and friendship.

What is a Treaty? A Treaty is a sacred covenant, a solemn agreement that is binding as long as the sun rises, the grass grows and the rivers flow. Treaties were entered into using Indigenous laws and overseen by the Creator through sacred Indigenous ceremonies and protocols, to provide on a daily basis for the lives of the Indigenous Peoples and non-Indigenous people within Indigenous territories. The Crown asked the Indigenous Peoples that their subjects be allowed to co-exist within the territories of Indigenous Peoples in peace and friendship without interference. Even though Indigenous Nations have lived in peace and friendship, settler governments have assumed jurisdiction over Indigenous lands and resources, contrary to the spirit and intent of Treaties and without compensation to our Nations. This must end.

The Royal Proclamation of 1763 obligated the Crown to prevent “frauds and abuses” against the Indigenous Nations, to stand between the Indigenous nations and the colonial governments, in order to protect the integrity of its commitments, and to ensure that the interests and rights of the Indigenous nations were protected, to restrict non-Indigenous settlement to specific areas of land, and to establish a protocol for Treaty-making with Indigenous Nations for obtaining access to lands and resources, founded on free, prior and informed consent. The Royal Proclamation of 1763 is part of the

Constitutional laws of Canada. Treaties are fundamental constitutional instruments that require full implementation.

A year after the Royal Proclamation of 1763, Sir William Johnson gathered with over 24 Indigenous Nations to reaffirm the principles contained within the Royal Proclamation through wampum belts. A key aspect of both the Treaty of Niagara and the 24 Nations Wampum belts was the Covenant Chain. The Covenant Chain embodies the political relationship between Indigenous Nations and European settlers, including the intent to co-exist, and tied them together based upon the metaphor of men linking arms as a show of peace. The Chain was also a political tool and used to "wipe the slate clean" should there be transgressions. In order to renew the commitments made in both belts, it was agreed that the Covenant Chain would be "polished" to remove any rust or dirt, a metaphor for bad conduct, as a way of renewing the spirit and intent of the agreement. As the Covenant Chain has not be "polished" in centuries, contrary to the Royal Proclamation, Treaty of Niagara and the 24 Nations Belt, there is a call for an actual implementation of the Treaty relationship. Canada is illegally using our lands and resources without compensation to the Indigenous Nations. This is a daily and continuing violation by the state. Treaty First Nations consider that it is inappropriate for the First Nations –Canada relationship to have been framed and controlled by unilaterally imposed law, policies and programs that are a violation of the Treaty relationship and manifestation of dishonourable Crown conduct. It is the desire of Treaty First Nations to advance the First Nations-Canada relationship on the basis of the existing Treaties. It is in the best interest of the Canadian state to build on the treaty relationship.

It is recognized that the Indigenous Nations on Turtle Island exercised our inherent of self-determination to enter into Treaty relations with the Crown. In January 1897, The Hon. J.J. Curran, Q.C., Solicitor General for Canada stated in a Treaties arbitration case involving the Robinson Treaties:

> *"We contend that these treaties are governed by international, rather than municipal law. They were made with the tribes under the authority of the Sovereign, and the faith of the nation was pledged in dealing with those annuities. The Crown is a trustee in those matters, and occupies a special relationship towards those Indians, and is bound to watch over their interests and enforce their rights, and will not be allowed to set up its own laches as a defense against these claims. All these claims are safeguarded in a manner that is quite a different manner from any claim that would arise between two subjects of her Majesty who might come before any Court to have their matters adjudicated upon."*

On July 5, 1973 Queen Elizabeth affirmed the Treaties in an address to the Chiefs in Alberta, stating

> *"You may be assured that my Government of Canada recognizes the importance of full compliance with the spirit of your Treaties".*

On January 28, 1982, Justice Lord Denning, Court of Appeals for the United Kingdom affirmed the integrity and durability of the First Nation – Crown relationship by proclaiming that

> *"There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown, originally by the Crown in respect of the United Kingdom, now by the Crown in respect of Canada, but, in any case, by the Crown. No Parliament shall do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada 'as long as the sun rises and the river flows'. The promise must never be broken."*

The International character of Treaties led to the United Nation conducting a study on Treaty in 1999. Miguel Alfonso Martinez studied the issue of implementation of Treaties with an emphasis in the area of conflict prevention or conflict disputes. In the end, he suggested the creation of a special jurisdiction at a national level incorporating a fourfold system: advisory; legislative; judicial; and administrative.

Moving forward with Martinez's proposed 'special jurisdiction' at a national level underscores a number of inherent problems. Canada has a history of hiding behind policies, or lack of policies, to address Treaty implementation. From an Indigenous perspective, Treaty rights cannot be subject to policies within the existing Canadian framework. Martinez acknowledged this in (para 309) of his report that only "strong political determination" of non-indigenous leaders could facilitate such a process.

CURRENT STATUS

For centuries, Indigenous Peoples have been engaged in examining all methods to implement their respective Treaties. They have used the Canadian legal system as a method to implement certain provisions of the Treaties, such as hunting, fishing and gathering, protection of their traditional territory form resource development, protection of their identity and way of life as well as protection of their inherent right to Trade and Commerce.

Canadians do not often think of their occupancy or possession of land as being rooted in Indigenous consent, through Treaties. Yet the notion that Indigenous and non-Indigenous peoples both have Treaty rights is important to understanding the legitimacy of land holding and resource use in Canada. In those areas where Indigenous peoples have agreed to allow non-Indigenous peoples to live on their land and share its resources, there is no question about the validity of non-Indigenous titles, if the enabling Treaties were signed in good faith. In such circumstances, a situation of peace, friendship and respect should abide because the first and legitimate owners of the land have given their consent to the use of their land by non-Indigenous people. However, in those parts of the country where there are no Treaties dealing with land use and possession, non-Indigenous peoples does not have any Treaty rights to occupy the lands they are on. They are not there through the consent and permission of the first and legitimate owners of the land. As such, they are trespassers until such time as First Nations give them authorization by agreeing to such an arrangement through negotiation.

On April 17, 1982 the *Constitution Act, 1982* came into force which includes the recognition and affirmation of Treaty rights as part of the supreme law of Canada. Section 35 recognizes and affirms “existing Aboriginal and Treaty rights.” In 1990 the Supreme Court of Canada determined that “Treaties and statutes relating to First Nations should be liberally construed and uncertainties resolved in favour of the Indians.” In the same case, the court ruled that Treaties “must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.” Further, section 52 directs that all laws in Canada cannot violate the provisions of the *Constitution* which includes the treaty rights set out in section 35. The restriction within section 52 takes up the legal decision of Lord Denning in 1982. On January 28, 1982, Justice Lord Denning, Court of Appeals for the United Kingdom affirmed the integrity and durability of the First Nation-Crown relationship by proclaiming that “[t]hey will be able to say that their rights and

freedoms have been guaranteed to them by the Crown, originally by the Crown in respect of the United Kingdom, now by the Crown in respect of Canada, but, in any case, by the Crown. No Parliament shall do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada 'as long as the sun rises and the river flows'. The promise must never be broken."

MOVING FORWARD

In relation to Treaties and Treaty implementation the Assembly of First Nation (AFN) supports First Nation governments by coordinating, facilitating and advocating for new mechanisms to achieve change. The leaders, drivers and beneficiaries of this change are the First Nation leaders themselves and the communities they serve. The AFN has always maintained and continues to maintain that any discussion on Treaty must be Treaty-by-Treaty and nation-to-nation. For the necessary change to occur, new space must be created to enable each Treaty region/area to establish Treaty implementation tables directly with the Government of Canada. This is the supportive role that the AFN continues to play, believing that Treaty regions and rights holders must drive their own solutions and decisions.

In its advocacy role, the AFN has continued to advance the position of Treaty First Nations for new mechanisms and a high-level working process on Treaty implementation. On January 11, 2013, the Prime Minister met with Indigenous leadership and committed to establishing a high level mechanism for Treaty implementation to occur on a Treaty-by-Treaty basis. Based on this commitment, the AFN along with Treaty leadership have been engaged in a number of conversations to determine how to best position themselves in the establishment of Treaty tables – one for each Treaty region.

RECOMMENDATIONS

1. The Government of Canada should be committed to establishing Treaty processes to clarify or implement Treaties and, where the parties agree, to rectify the terms of the Treaties, and should be committed, where requested by the Indigenous peoples of Canada concerned, to participating in good faith in the process that relates to them.
2. It is recommended that the governments of the provinces and territories are committed, to the extent that they have jurisdiction, to participating in good faith in the processes, where jointly invited by the Government of Canada and Indigenous peoples or where it is specified that they will do so under the terms of the Treaty concerned.
3. The participants in the processes respect and adhere to the spirit and intent of the Treaties, as understood by the Indigenous peoples concerned.
4. The Government of Canada must provide financial resources to each Treaty region so that they can actively participate in Treaty negotiation tables.
5. The Government of Canada must secure a Cabinet mandate that will enable the establishment of new mechanisms, such as a National Treaty Commission to ensure Treaty implementation occurs on a Treaty-by-Treaty basis – and Nation to Nation.
6. The Government of Canada must appoint representatives with the proper authority to establish the new mechanisms and process to ensure Treaty implementation occurs on a Treaty-by-Treaty basis.
7. The Government of Canada must develop a new Crown-First Nation Relations Department based on the Treaties.

LAND RIGHTS AND CLAIMS

Article 27 of the UNDRIP states: States shall establish and implement, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.

HISTORY AND CONTEXT

Land rights are central to First Nations claims to cultural integrity, sovereignty and resource rights. Canada's policies with respect to addressing First Nation land rights and claims have long been grounded in their extinguishment. According to the Supreme Court of Canada, the foundation of modern aboriginal rights law is the reconciliation of the *de facto* sovereignty and rights of the Crown with the *de jure* sovereignty and rights of indigenous peoples. In the modern era, First Nations seek recognition and reconciliation of their land rights.

Canadian law recognizes no proprietary rights of indigenous peoples, which does not require the consent of the Canadian state. Treaty, order-in-council (reserve lands) or comprehensive claims each require the express consent of the government in order to receive recognition as legal rights.

Canadian law once held First Nations land rights were 'personal' rights, 'moral' rights, 'political' rights or other forms of rights, which could not be actioned in a court of law. Even in the modern era, with First Nations victories in cases, such as *Delgamuukw* and *Calder*, not one square inch of aboriginal title has been recognized within 'Canadian' territory. In November, 2013, Chief Roger William will petition the Supreme Court of Canada for a declaration of aboriginal title over his traditional territory (*William v. British Columbia)*. At stake will be whether Canada applies or rejects the legal fiction of terra nullius, a concept globally discredited in the wake of the *Western Sahara* advisory opinion of the ICJ in 1975. Canada's repudiation of the Doctrine of Discovery on the 250th anniversary of the Royal Proclamation of 1763 further demonstrates Canada's need to transform words into action.

Canada currently uses two vehicles to respond to land claims: its Comprehensive Claims policy and its Specific Claims policy. In terms of comprehensive claims, Canada has consistently sought to reconcile the pre-existing rights of Aboriginal peoples with the asserted rights of the Crown through a limited form of recognition that has resulted in the extinguishment of all pre-existing Aboriginal rights. Since the early 1970s, some two-dozen First Nations have entered into comprehensive agreements with Canada on this basis, but the majority have done so due only to a lack of viable alternatives or in anticipation of negotiating a more equitable outcome.

Specific claims offer only monetary redress for historic violations of indigenous rights, including land rights. Such claims only recognize indigenous rights when they are breached; they cannot provide indigenous peoples the access or the security required to fully enjoy their right to property, nor their right to culture.

To date, Canada has failed to define a viable approach to the reconciliation of Aboriginal rights and title – despite its adoption of the UNDRIP – and, most recently, in late 2012, frustration on the part of First Nations has given rise to mass protests and other forms of indigenous civil disobedience.

CURRENT STATUS/MAIN CHALLENGES

Recognition, rather than extinguishment, is the basis upon which First Nations must be able to exercise their inherent Aboriginal title and rights over the lands and resources that they have historically occupied. Recognition is the basis upon which decades of costly and time-consuming legal wrangling can finally be displaced. Recognition encompasses the inherent right of First Nations to exist alongside all Canadians, and to do so on a basis that fully respects their right to be self-determining in the pursuit of social, economic, political and cultural objectives. The starting point for engagement between a First Nation and the Crown cannot be subject to conditions or limitations with respect to the scope and extent of recognition.

A policy that addresses Aboriginal title and rights that is grounded in the recognition of First Nation peoples and societies begins to level a playing field that has long been skewed against Indigenous peoples, and is the subject of both domestic and international criticism. The unequivocal recognition of First Nations as a starting point for the resolution of outstanding Aboriginal title and rights issues, including treaty rights, would confer a form of equivalence with respect to the status of the parties to a negotiation. Recognition does not in and of itself predetermine the outcome of reconciliation or any negotiation in respect thereof. However, reconciliation does arise

from a respectful relationship among parties, where the path forward is mutually determined rather than unilaterally prescribed. A policy framework that has this as a starting point has a far greater likelihood of achieving outcomes that will be successful on the ground.

Since 1982, more than forty Supreme Court of Canada decisions have provided guidance on the nature and content of Aboriginal rights, including Aboriginal title to land, and on the Crown's obligations with respect to such rights. The Supreme Court has made it clear that pre-existing Aboriginal sovereignty must be reconciled with assumed Crown sovereignty. The Supreme Court also interprets comprehensive claims negotiations as a "reconciliation" process in which the rights of First Nations are implicitly recognized since the subject of the negotiations is directly related to the rights. The state of the law is, accordingly, inconsistent with the federal government's position that comprehensive claims negotiations are essentially based on policy and conducted "without prejudice", and that the Crown does not recognize rights until after a final agreement is ratified, and then only in accordance with the agreement.

Nonetheless, the courts strongly support negotiations as the preferred means of reconciling governments' and First Nations' interests, including reconciling Crown title with Aboriginal title. It is, therefore, critical for new policies to be developed and adopted to clearly set out what Canada understands to be the legal principles that guide recognition and reconciliation; both for the comfort of First Nations whom are seeking to engage, and to ensure federal officials and negotiators are held accountable in respecting and acting in accordance with these legal principles. The principles guiding recognition and reconciliation would include principles articulated by the courts in implementing section 35 of the *Constitution Act, 1982* in respect of (1) Reconciliation, (2) Negotiations, (3) Honour of the Crown / Fiduciary, (4) Recognizing / Balancing, (5) Consultation and Accommodation, and (6) Interpretation. Select principles from the UNDRIP should also be considered for inclusion in a reformed claims policy. In so doing, Canada could also demonstrate how it intends to implement the UNDRIP.

Finally, Canada’s failure to live up to the commitments set out in its revised Specific Claims Policy – *Justice at Last* (2007) – and recent judicial review of a key decision of the Specific Claims Tribunal of Canada in *Kitselas* (2013) speaks to the challenges that First Nations face in not only seeking reconciliation, but also in its implementation. In 2012, Canada introduced what it referred to as a “results-based” approach to claims negotiations. This results-based approach appears to focus on working only with *willing* parties – First Nations that accept Canada’s position with respect to the potential outcomes of its existing policies and mandates. Such an approach undermines the

interests of First Nations that do not accept the limited mandates that Canada brings to comprehensive claim negotiations, while at the same time implying that it is the positions / interests of First Nations that has created a barrier to "results". Given that Canada's current policies remain out of step with contemporary jurisprudence and international convention.

First Nations not engaged in comprehensive claims negotiations are able to pursue civil litigation. However, civil litigation is costly and time consuming, and can present an insurmountable barrier to many First Nations despite the legitimate interests that they have to be advanced with Canada. In addition, even if a First Nation is able to advance a claim through the courts, their success in this forum is often, again, the subject of further negotiations (and perhaps even litigation) following the handing down of a decision.

The *William v. British Columbia* case will be argued at the Supreme Court of Canada later this year. The British Columbia Court of Appeal, applying the Canadian law of aboriginal title, denied a 'territorial' finding of title, instead awarding title only to historically occupied sites, such as villages. The reasoning for this alleged that the semi-nomadic character of the claimant First Nation was insufficient to establish an aboriginal title right over the territory; this is precisely the reasoning rejected by the International Court of Justice in the *Western Sahara* Advisory Opinion. The reasoning of the British Columbia Court of Appeal would implement the long discredited legal fiction of terra nullius, representing a tremendous step backwards for the rights of indigenous peoples in Canada and, quite possibly, internationally.

Canada often states that it views the UNDRIP as an aspirational document. Canada's arguments in the *William* case would not only fail to implement the UNDRIP, but run contrary to several Articles, as well as several other of Canada's international obligations (such as those contained in the ICERD and the ICCPR). Even in the face of a positive finding in the *William* case, there is a high probability that Canada would not implement a favourable finding. A degree of impunity on the Crown's part with respect to the implementation of indigenous land rights is not uncommon, and there are concerns that this will likely also be the outcome with respect to the Hul'qumi'num Treaty Group's petition to the OAS Inter-American Commission on Human Rights (2011). For example, this is the case with *Ominayak v. Canada* regarding the land rights of the Lubicon Lake Cree Nation, which Canada has yet to implement.

Such difficulties arising from Crown policies relating to claims or civil litigation contribute to the tremendous frustration that currently exists in Canada with respect to outstanding claims. This failure to recognize and reconcile the legitimate rights of Indigenous peoples in Canada is contributing to a general climate of agitation and has the potential to lead to greater civil unrest or even direct action. Indigenous peoples are always the losers in such confrontations – when Canada's failure to reconcile the legitimate interests of Indigenous peoples collides with the general sense of law and order that prevails in the minds of most Canadians. These situations are further exacerbated when Indigenous land rights threatened the perceived interests of third parties who are unaware of, or disregard the legitimate legal rights of a respective Indigenous group. Rarely, if ever, does Canada take the position of siding with the First Nation in such cases.

A recent initiative arising from the mass protests and other forms of indigenous civil disobedience that emerged late in 2012 has led Canada to begin a joint process of review with respect to its comprehensive claims and related policies. The importance of this review process should not be understated but, given the litany of earlier failed efforts to achieve similar results, Canada's responsibility with respect to the issues raised in this submission cannot rest merely on the potential that such a process embodies. For example, with respect to the requirement of extinguishment in settlements relating to Aboriginal title and rights, Canada does not appear to have moved from this as a requirement, however expressed. These fundamental challenges are at the core of the relationship between Indigenous peoples and the Crown in Canada and it is high time that Canada accept the reality that First Nations are nations with rights, interests and aspirations that can be accommodated without the need for extinguishment.

RECOMMENDATIONS

1. Measures of reconciliation and redress should include, inter alia, initiatives to address outstanding land rights and claims where indigenous peoples retain social, cultural or economic attachment to such lands, and to restore or secure indigenous peoples' capacities to maintain connections with places and sites of social, cultural or economic significance.

2. Reform of Canada's policies relating to land rights and claims (e.g., Comprehensive Land Claims Policy, Specific Claims Policy, etc.) must be reformed and implemented in a manner that meets the minimum requirements set out by the courts and in a manner consistent with international conventions / instruments (e.g., UNDRIP).

3. To ensure an effective process, all aspects relating to the reconciliation of Aboriginal rights and title must be subject to a mechanism of independent review and oversight whereby First Nations are afforded funded access to ensure the compliance of Crown obligations and commitments.

ENVIRONMENTAL STEWARDSHIP

Article 29 (1) of the UNDRIP states: 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.

History and Context

The fundamental problem faced by First Nations on environmental issues is similar to the issues First Nations face in any number of areas - Canada does not recognize First Nations rights, does not implement those rights once recognized, and provides First Nations with diminished and discriminatory access to justice.

First Nation peoples of Canada have a special relationship with the environment and all things within it. The land is considered sacred to First Nation peoples and the environment not only plays a key role in the health of First Nation communities, but impacts our access to key resources. First Nations have recognized since time immemorial that human beings are a critical part of the environment. First Nations continue to rely on traditional foods for nutrition and on the environment generally for a number of cultural purposes.

In Canada, environmental legislation often serves as a trigger for discharging the government's duty to consult and accommodate, as extractive projects generally have profound impacts on the unsettled or unimplemented rights of First Nations and result in significant environmental degradation. As the demand for natural resources increases, the challenges of maintaining a clean environment become greater. Contaminated waters, failure to recognize our traditional knowledge and the impacts of global climate change affect our traditional lifestyles and threaten the survival and the revitalization efforts of First Nations.

From the Royal Commission on Aboriginal Peoples (1991-1996) to the Kelowna Accord (2005), many governments have pledged action to recognize First Nation jurisdiction and to protect First Nation environments. First Nations do not require more promises, but concrete action. Despite these efforts to build more respectful relationships, set targets and develop plans of action, First Nation environments continue to fall into a regulatory gap. As the Auditor General observed in 2009, the paucity of few federal

regulations that apply to environmental protection on reserves results in significantly less protection from environmental threats than other communities. Previous Auditor General Sheila Fraser's final speech highlighted the need for concerted federal action on both First Nations issues and climate change.

Contaminated source waters impact the safety of First Nation drinking water supplies. This often results in public health crises and requires costly infrastructure to manage. At this time, major investments are required at the community-level to address basic water infrastructure needs, both in terms of capital improvements and in terms of human resources. Everyone recognizes greater involvement of First Nations and protection for the safety of source waters will reduce the need for ever increasing expenditures on safe drinking water infrastructure, yet source water protection remains a low priority for governments.

First Nations traditional knowledge requires greater recognition, because it is the foundation for First Nation law making. Recognition of the valuable contributions of traditional knowledge, particularly as it relates to environmental protection and resource management, occurs only in isolated and limited circumstances. Increased recognition and respect for traditional knowledge will result in increased language retention, increased respect for First Nations culture and increased capabilities for First Nations to assume jurisdiction and responsibility for protection of First Nation environments.

Due to their close relationship with the environment, First Nations are the first to be impacted by climate change. Many First Nations are already adapting to these impacts and require substantial support in order to protect their environments and cultures.

Today, resource extraction is taking place at an increasing rate in our traditional territories. The full and effective participation of First Nations is required to ensure these developments are responsible and sustainable. Project approvals are often issued to proponents without respect for the free, prior and informed consent of First Nations and without consideration for the particular relationship that First Nations have with the environment.

First Nations have come to a crossroads owing to the drastic changes in the environment over the last 40 years. The loss of biological diversity has eroded their material base for survival and the degradation of their traditional culture has undermined their values and social structures. This is despite initiatives to conserve and promote biodiversity and protect the global environment, which are embodied in international

accords such as the Convention on Biological Diversity and UN Framework Convention on Climate Change.

CURRENT STATUS/MAIN CHALLENGES

First Nations inherent rights are grounded in First Nations responsibilities: to the past generations, the current generation, and future generations. The Assembly of First Nations notes there are three bases to protect and preserve First Nations environments:

- Statutory provisions to protect reserve lands;
- Application of general Canadian legislation to protect traditional territories; and
- Application of First Nations treaty and inherent rights to manage their own environments.

Management of Reserve Lands

The *Indian Act* contains provisions for First Nations to exert control over reserve lands and resources. This law-making power is constrained by the Minister's ability to disallow any First Nations exercise of law-making authority. The colonial holdover prevents First Nations from exercising the powers of a municipality, let alone those of a sovereign nation, over their territories.

Canada has provided some First Nations the opportunity to 'opt out' of several provisions of the *Indian Act* through the *First Nations Lands Management Act (FNLMA)*. The government has limited the number of First Nations who can opt-in to this regime due to the costs associated with supporting First Nations operating the *FNLMA*. In other words, Canada views sustainability as a luxury for First Nations, one contingent upon the availability of capacity funding.

There are remarkably limited opportunities for First Nations to develop or enforce environmental laws through Canada's legislative framework. The government recently eliminated little-known and never applied provisions of the *Canadian Environmental Assessment Act* which would have allowed First Nations to develop their own environmental assessment regulations through the CEAA. No First Nation was able to take advantage of this provision, which would have required the consent of the government of Canada.

Application of General Canadian Environmental Legislation

Canada, like many countries, possesses a suite of environmental legislation to reconcile economic development and environmental sustainability. First Nations are encouraged to enforce their responsibilities to the environment using Canadian legislation such as the *Fisheries Act*, the *Canadian Environmental Assessment Act* (*CEAA*), the *Canadian Environmental Protection Act*, and the *Species at Risk Act* (*SARA*).

The successful implementation of the *SARA* in the next 10 years will rely heavily the government of Canada's willingness to directly work with First Nations communities regarding species at risk. It is important that the government consult with First Nations in the development and implementation of recovery strategies and action planning under the *SARA*. With the majority of species at risk located in First Nation territories across Canada it is critical that First Nations be involved in species at risk legislation and any *SARA* legislative changes, both federally and provincially.

Canada has been pursuing a suite of policies known as the Responsible Resource Development Plan since March 2011. The purpose of the Plan is to encourage extractive resource development by streamlining environmental laws, regulations and policies and weakening democratic participation. Legislative amendments were rushed through an irregular Parliamentary process (a budget appropriation) which precluded meaningful Parliamentary debate, as well as meaningful participation by First Nations (Bills C-38 and C45).

The changes to the *Fisheries Act*, the *CEAA*, the *National Energy Board Act* and particularly the *Navigable Waters Protection Act*, led to protests by First Nations Chiefs and the Idle No More movement. Changes to the Fisheries Act mean that critical habitat for fisheries upon which First Nations rely, particularly for treaty-based fisheries, will no longer receive any protection under the Act. The *CEAA* was repealed in total and replaced with the *CEAA 2012*. The *CEAA 2012* is designed to provide fewer reviews for projects, typically only in cases involving major projects. Opportunities for First Nation participation are the same as those for public participation, and have been severely limited under the Act.

In addition, those enactments which involve approvals for major projects, such as the *CEAA 2012* or the *National Energy Board Act*, either permit or require intervention by the federal Cabinet in the event a project is disallowed by a non-partisan decision maker. This makes approvals of projects a political matter. It also insulates decisions from judicial review because the principle of Cabinet confidentiality makes it difficult for

First Nations to acquire information on whether Cabinet has considered First Nations rights.

The government insists, correctly, that because First Nations rights are constitutional rights, changes to legislation and regulations will not ultimately undermine First Nations rights. However, restrictive rules surrounding standing in such processes (particularly before the National Energy Board) are marginalizing First Nations participation, and changes to such enactments are dramatically reducing opportunities for judicial review of Crown decisions. The only recourse for First Nations is to pursue remedies in a civil court.

Application of First Nations Treaty and Inherent Rights

Some First Nations have developed their own environmental assessment processes and their own laws, using their inherent rights. These rights are generally unrecognized by Canada, because Canada requires proof of an Aboriginal right in a Court of law as a precondition of recognition. All other rights, particularly those related to environmental resources, can only be exercised with the consent of the federal or provincial governments.

Canada takes the same approach to assertions of Treaty and inherent rights that it does to First Nations who engage the state's environmental framework – they can establish those rights through a civil action. First Nations unwilling to invest the considerable resources needed to bring a civil action to completion, nor wait for disposition of such a claim simply assert their rights. In some cases, First Nations have realized considerable success asserting rights, usually in partnership with NGOs or even governments. One example is the Gwaii Hanaas protected area, negotiated over a number of years between the Haida, Canada and British Columbia. In this case, the protected area was created without the Haida surrendering aboriginal rights and without Canada or British Columbia expressly recognizing those rights.

First Nations, provincial and federal governments, ENGOs and industry have developed a range of agreements and arrangements which allow First Nations and Canadians to fulfil their respective obligations to future generations, while 'parking' resolution of First Nations claims until a later date. In all of these cases; however, the assertion of the inherent or Treaty rights of First Nations depends on some kind of agreement with other stakeholders. Should First Nations seek to protect key environmental resources in absence of an agreement of stakeholders operating in their territories, their only option appears to be the civil justice system.

Access to Justice and Environment

While statistics on the average length of time of trials in Canada are difficult to acquire, Ontario produced a report suggesting that the average age of claims at the time of disposition in Toronto was about 600 days from 2001 to 2004, and had declined by almost half by 2006.[1] While the Assembly of First Nations does not have accurate information on the average age of First Nations claims at the time of disposition, complex cases such as those to establish a right of self-determination over environmental resources, would likely eclipse such times by orders of magnitude.[2]

The Inter-American Commission has already determined that the amount of time to dispose of certain types of Indigenous rights claims constitutes a sufficient delay to excuse the requirement to exhaust domestic remedies prior to filing a petition. What are First Nations to do when regulatory approvals processes do not provide sufficient accessibility for First Nations to raise issues, and when approaching the civil justice system is remarkably costly and arguably denies justice by delaying it? First Nations often have no choice but to resort to direct action.

Resource Conflicts

Road and rail blockades, attempts to prevent or limit access to work sites and other forms of direct action are how First Nations and First Nations citizens react when they cannot access justice through the regulatory framework or through the civil justice system. For example, in 2008, six members of the Kitchenuhmaykoosib Inninuwug were incarcerated for protesting resource development in their territories. Such incidents are surprisingly common in Canada – a nation which prides itself on respect for rule of law. For example, at the time of this writing, members of the Tahltan Nation are engaged in a blockade of a mining project sponsored by Fortune minerals within their traditional territory.

Moreover, because Canada's constitution provides plenary jurisdiction over natural resources to provinces and plenary jurisdiction over First Nations affairs to the federal government, most resource conflicts involve actions taken pursuant to provincial laws.

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[1] The Honourable Chief Justice Warren K. Winkler, Chief Justice of Ontario, Evaluation of Civil Case Management in the Toronto Region A report on the Implementation of Toronto Practice Direction and Rule 78 (2008), online: http://www.ontariocourts.ca/coa/en/ps/reports/rule78.pdf (last accessed September 19, 2013) at page 27. This report concluded that "Access to justice is, and continues to be, the challenge for the civil justice system.", at page 33.

[2] The *William v Canada* case, a 'simple' land rights claim required over 300 days of trial. This case was filed in 1989 and was initiated as a challenge to a forestry permit issued by the province of British Columbia.

In such cases, the federal government rarely supports First Nations inherent or Treaty rights, and often supports the actions of provinces.

MOVING FORWARD

Areas in need of improvement in the SARA include a consistent implementation of all sections under the *Species at Risk Act* from the Minister of Environment and increased species at risk funding for the First Nation communities that are working on species-at-risk initiatives. The current existing programs, such as the Aboriginal Funds for Species at Risk and the Habitat Stewardship Program, are inadequate in providing communities the ability to continue to build capacity on species at risk initiatives in a timely fashion. The Invasive Alien Species Partnership Program (IASP) was a prime example in providing First Nations with capacity in species at risk conservation within their territories, unfortunately in the ISAP was terminated in March of 2012. Incomplete implementation of environmental laws has also been impugned, through the citizen complaint procedure of the North American Agreement on Environmental Cooperation in the case of Aquaculture regulation under the Fisheries Act.[3]

First Nations are only beginning to experience the effects of Bills C-38 and C45 at the project level. As a consequence, many of the changes to environmental laws are only recently becoming apparent to First Nations. In most of these cases, First Nations are being excluded from participating in environmental reviews due to stricter standing rules.[4]

Currently, some First Nations are unable to access environmental regulatory processes. For example, Tsleil-Waututh First Nation was unable to intervene in a National Energy Board (NEB) proceeding regarding a pipeline which could impact the ecological integrity of their territory because the NEB did not consider them an 'interested party' under the new Act.

Canadian courts recognize that the current processes for assessing resource projects may not adequately discharge the duty to consult and accommodate. Yet First Nations

[3] *BC Salmon Farms*, Submission ID SEM-12-001, (10/02/12) online: http://www.cec.org/Page.asp?PageID=2001&ContentID=25165&SiteNodeID=544. This claim is pending a response from Canada in accordance with Article 14(2) of the NAAEC.
[4] *BC Salmon Farms*, Submission ID SEM-12-001, (10/02/12) online: http://www.cec.org/Page.asp?PageID=2001&ContentID=25165&SiteNodeID=544. This claim is pending a response from Canada in accordance with Article 14(2) of the NAAEC. Also see, Articles 24 and 29(1) of the UNDRIP.

must expend substantial financial resources to pursue litigation in Canada, in order to establish whether the government's conduct in any given situation sufficiently discharges the duty to consult and accommodate.

The Aboriginal rights framework in Canada encourages claims to extract resources, allowing claims to extract resources for commercial gain. This places First Nations in the curious position of framing rights claims, particularly rights claims related to self-determination, in terms of extraction and harvesting, rather than in terms of control of their resources.

Self-determination is about more than resource extraction. First Nations culture is about more than resource extraction. First Nations are seeking relationships with Canada, provinces, industry and ENGOs which enable First Nations to fulfil their responsibilities to future generations. First Nations responsibilities, particularly with respect to environmental sustainability, are mobilized by recognizing and implementing First Nations rights.[5]

First Nations have been calling for environmental reforms and greater protections since contact with Europeans. Today, First Nations use both political and legal means to enforce their right to the land and First Nations permanent sovereignty over natural resources, including environmental protection and environmental health.

[5] See generally, Article 32 of the UNDRIP.

RECOMMENDATIONS

1. Canada should recognize the inherent right of First Nations to manage environmental resources throughout their traditional territories.
2. Canada's Attorney General should devote resources to protecting the rights and interests of First Nations with respect to environmental resources, from the actions of provincial governments and industry.
3. Canada should implement the duty to consult to apply to 'high level' policy or strategic decisions which create processes dealing with resource extraction and First Nations rights.
4. Canada must ensure access to justice for First Nations to challenge resource projects.

FISHERIES

CONTEXT

Fisheries are central to First Nation economies, cultures, and traditions. First Nation interests in fisheries extend beyond dietary and income needs and include Aboriginal and Treaty rights, traditional governance and jurisdiction, environmental stewardship, and spiritual connectivity. Building upon a history of traditional fishing economies and practices, First Nations are invested in the long-term sustainability of fisheries resources and seek to engage in nation-to-nation dialogues with the Government of Canada to ensure the continuance of robust, productive aquatic habitats that can provide resources for all users.

Collaboration between First Nations and the Government of Canada is integral to the continued success of Canada's fishing sector. First Nation fishers are active in a wide array of marine and freshwater fisheries throughout Canada. Since the reaffirmation of fisheries access rights by the Supreme Court of Canada, the quantity and value of Aboriginal landings, especially in coastal regions, have increased significantly. High quality First Nation fish products have contributed to Canada's success in the seafood sector, which is currently the 8th largest exporter of fish and seafood products in the world and is the economic foundation of over 1,500 communities across Canada.

Despite the many successes First Nations have achieved in the fishing sector, significant barriers must be overcome. Capacity is lacking in many First Nation communities; fisheries infrastructure is aging, new processing plants must be built, and inconsistencies in program funding and policy development have undermined strategic planning exercises. The rapid unilateral development of new fisheries legislation has created uncertainty for many communities that rely on aquatic resources. First Nations governance structures must be developed to facilitate adaptation to emerging global economic patterns, resource pressures, and technologies and fishing practices. In order to promote mutually beneficial advancements, the Government of Canada must engage with First Nations on a nation-to-nation basis to address multi-jurisdictional issues, accommodate Treaty and Aboriginal rights, determine joint priorities and set the best course to promote prosperous fisheries based on healthy ecosystems.

The Assembly of First Nations (AFN) supports First Nations in promoting their inherent, Aboriginal and Treaty rights to aquatic and oceans resources. In accordance with the direction of the Chiefs-in-Assembly, the AFN assists First Nations in fostering resource management, conservation and protection, as well as securing the recognition and protection of rights to aquatic and oceans resources.

In accordance with s. 35 of the *Canadian Constitution Act, 1982*, the Constitution recognizes and affirms First Nation's aboriginal and treaty rights. Since 1982, Canada and First Nations have struggled to reach an agreement on how those Aboriginal and Treaty rights are to be defined and how they are to be implemented. What has transpired over the past few decades can be characterized as a persistent denial of rights, attempts to circumvent the highest laws in Canada, and placing First Nations in regulatory regimes without recognizing the fundamental principles of the Constitution of Canada or case law. Unilateral legislative, policy and regulatory changes and socio-economic barriers have forced many First Nations to turn to the courts to find legal remedies to resolve these disputes, to seek recognition of their rights, and challenge the jurisdictional division of powers and authorities.

From many First Nations perspectives, the Department of Fisheries and Oceans (DFO) has been defining Aboriginal rights and conducting related fiduciary obligations as narrowly as possible through policy and program development. When the courts broaden the definition to include some economic rights for First Nations, political turmoil erupts and in some cases, has created hostile environments that breed conflicts. Often Government will fold to public pressures for public safety reasons. An example of this is the incident at Restigouche, where Quebec Provincial Police (QPP) raided the Restigouche Reserve on June 11 and 20, 1981. The Quebec government had decided to restrict fishing, resulting in anger and confrontations among the Mi'kmaq, as salmon was traditionally an important source of food and income consistent with exercising their Mi'kmaq Treaty rights. This is commonly referred to as the Restigouche Salmon War.

Another instance that illustrates this pattern occurred in New Brunswick, following the release of the September 1999 Marshall Decision from the Supreme Court of Canada. On October 3, 1999, the Burnt Church crisis erupted, when approximately 150 fishing boats headed out into Miramichi Bay to protest against the Mi'kmaq trappers who were fishing lobster. Angry non-Indigenous fishermen damaged and destroyed thousands of Mi'kmaq lobster traps. The Minister of Fisheries closed the lobster fishery for public safety reasons while the two sides tried to mediate and negotiate. Meanwhile, DFO officers and RCMP used excessive force and more conflicts ensued. In April 2002, a federal report on the crisis suggested a number of police charges to be dropped and

that fishermen should be compensated for damaged traps and boats. It also recommended, however, that First Nations fishermen should be allowed to fish only in season and that they should attain fishing licenses, which systematically undermined the *Marshall* Decision. In order to bring attention to these injustices, First Nations have reached out to the international community and welcomed instruments, such as the United Nations on the Rights of Indigenous Peoples (UNDRIP), which states that Indigenous peoples have the right to self-determination. This includes the right to govern their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and uphold their responsibilities to future generations in this regard.

MAIN CHALLENGES

First Nations have always relied on the fisheries to sustain their economic life, provide their food supply, and sustain their cultural and spiritual life long before Canada was a country. In order to continue practicing traditional occupations and activities, First Nations seek increased shares and access in fisheries and greater involvement in management and decision-making, pursuant to their Treaties and rights. Despite the *Constitution Act, 1982*, and favourable Supreme Court rulings, not one First Nation in Canada is permitted to exercise their own Aboriginal or Treaty fishery in their traditional territories under their own management regime, governance or customary practices independent of government regulations. If they attempt to do so, they are often charged as criminals. Reconciling these rights requires a willingness on part of the Government of Canada to work with First Nations to bring the implementation of these rights in line with the principles of recognition and affirmation in Section 35 of the *Constitution Act, 1982*.

In 1990, the Supreme Court of Canada issued a landmark ruling in the *Sparrow* decision. This decision affirmed Aboriginal peoples' right to fish for food, social and ceremonial purposes (FSC). In response to this decision, and to ensure stable fishery management, the DFO launched the Aboriginal Fisheries Strategy (AFS) in 1992. Under the AFS program, the Department entered into agreements with many First Nations to establish a regulatory framework for the management of fisheries. The licence allows the group to fish for food, social and ceremonial purposes. The AFS applies only where Canada manages the fishery and where Canada seeks to provide for the "effective management and regulation of the aboriginal fishery".

Generally, the AFS impacts the policy objectives and needs of First Nations, because it sets limitations on First Nation management capacities. AFS program has been funded

annually at $35 million; has about 125 AFS agreements signed each year since the implementation of the program. Approximately two thirds of these agreements are reached with Aboriginal groups in DFO's Pacific Region, with the balance in Atlantic Canada and Quebec. The AFS is not available to the First Nations in Yukon, Northwest Territories, Alberta, Saskatchewan, Manitoba, Ontario and parts of Quebec referred to "inland fisheries". AFS was introduced as interim policy, until Government of Canada could decide how to implement Sparrow. More than 20 years later, First Nations are still dealing with the AFS shortfalls, a partially implemented Sparrow decision, along with several other government programs that were developed without meaningful consultation.

There have been a few federal reviews to modify various aboriginal programs over the years with some degree of success such as the Aboriginal Aquatic Ocean Resource Management program for coastal communities (AAROM), but Aboriginal and Treaty rights are not on the table for discussion. First Nations are told that Treaty rights are outside the DFO mandate, and these discussions should be with Aboriginal Affairs and Northern Development Canada (AANDC). These discussions end up in limbo bouncing between the federal departments without any results. AFS is up for review 2013-14. Many other programs have provided a degree of short-term success, however, the long term aspirations of Aboriginal rights-based fisheries continue to drive First Nation agendas across the country.

There are a number of other Supreme Court decisions that affirm Indigenous rights to fish and to sell fish. The Gladstone Decision was handed down in the Supreme Court of Canada in 1996. The decision recognized, affirmed and defined a commercial aboriginal right of the Heiltsuk First Nations peoples. The court also found the right had been infringed. The Heiltsuk First Nation has been at the negotiation table for nearly 17 years with the Federal Government of Canada, primarily the Department of Fisheries and Oceans negotiators. In 1999, the Supreme Court of Canada issued another landmark ruling in the Marshall Jr., decision. This decision affirmed the Aboriginal peoples' right in the Atlantic to trade for necessaries by way of commercial fishery. In response to this decision, and to once again ensure stable fishery management, DFO entered into Interim Fishing Agreements with a majority of Atlantic First Nations on the East Coast. In the 2009 Ahousaht et al v. Canada court case, the court recognized First Nations rights to fish in their territories and to sell fish. There was major disappointment that the Government of Canada appealed the decision and was unwilling to recognize, negotiate in good faith and implement the right for priority access to fisheries took over three years to come to the table from the first ruling. Canada missed an important

opportunity to demonstrate real reconciliation and partnership with First Nations in the implementation of all these decisions.

Within Canada's sport/recreational fishing community, there are concerns from First Nations that these resource users receive larger quota allocations than constitutionally protected Aboriginal rights of First Nations. First Nations in B.C. are extremely concerned that Canada's policy with respect to sport fishers is being developed and implemented without consultation with First Nation fish harvesters. Another alarming trend is the recent announcement of special sport/recreational fisheries programs and awards have been created, while Aboriginal programs are being cut or terminated. In some cases, this situation has created animosity when Canada appears to be upholding and supporting recreational "privileges" over First Nations constitutionally protected rights, or priority rights outlined in the Sparrow Decision. In some commercial and food fisheries, access to allocation is limited, fishing zones are diminishing, and fishing times are reduced to couple days or even minutes. Yet sport/recreational fisheries are not regulated nor have these same restrictions.

Inland Fisheries primarily consist of the Great Lakes, Prairie Provinces and the North. The fundamental underlying issue with respect to inland fisheries is the fact that the federal government has delegated its authority under section 91(12) to the provincial governments through the Fisheries Act and its regulations, without consultation or regard to the rights or interests of First Nations. There are many frustrating factors associated with the mainstream fishing industry in the Inland province areas. First, the federal delegation of its jurisdiction to the provinces over inland fisheries is seen as an infringement of Canada's fiduciary duty to First Nation peoples and their Aboriginal and Treaty rights to fish, such as the Natural Resource Transfer Act (NRTA). Secondly, the Freshwater Fish Marketing Act was passed in 1969 (without consultation with First Nations) and it gave the Minister of Fisheries and Oceans the authority to regulate the inter-provincial and export trade of freshwater fish and established the Freshwater Fish Marketing Corporation ("FFMC") as its agent in this regard. The Act applies to freshwater fisheries in northern Ontario, Manitoba, Saskatchewan, Alberta and the NWT. The FFMC, a federal crown corporation, has sweeping authority to export and market all legally caught fish species offered for sale by licensed fishers, subject to price and terms and conditions of purchase. Each affected province has passed complimentary legislation that effectively regulates freshwater fisheries in the respective provinces by the FFMC.

First Nations are concerned about the lack of consultation on policy objectives, the exclusion of First Nations from the management of the fisheries resources in their traditional and reserve territories and the government imposed monopoly over the marketing and sale of their catch. Specifically, First Nations are angry at the lack of economic opportunities afforded to First Nations from the operations of the FFMC, despite the fact that 85% of the client base for the commercial operations of the FFMC is comprised of northern Aboriginal fishers.

The issue here is not one simply based on economics or availability of the resource alone, but one deep-rooted in jurisdiction, governance, and the recognition and implementation of Aboriginal and Treaty rights. First Nations simply want to fish for commercial, food, social and ceremonial practices and continue their traditional harvesting occupations under their own governance and laws. First Nations seek to fully implement Supreme Court of Canada decisions that mandate the Government of Canada to respect traditional fisheries and work with First Nations to increase fishing capacity. The federal government should work directly with communities to ensure the long term sustainable growth of economically stable fisheries.

MOVING FORWARD

Recent court cases have provided us with a framework for the positive definition of the nature and scope of the relationship between the Crown and First Nations. Compelling decisions of the Supreme Court of Canada, such as Sparrow; Vanderpeet; Gladstone, Delgamuukw, Marshall, Mikisew, Haida/Taku, and Ahousaht have provided us with well-reasoned principles and a strong framework for the further clarification and enhancement of our shared interests in joint policy, management and regulatory regimes for the protection and promotion of the fisheries resource. In particular, there is an opportunity to set new standards and guidelines for the Crown and First Nations in dealing with issues respecting the shared stewardship, interest and management of fisheries resources.

Any new approach in developing a new relationship with First Nations must be grounded in discussions on 1) Rights, recognition and respect for the inherent Aboriginal and Treaty rights; 2) access and principles of the First Nation priority to accommodate First Nation allocations up front to ensure a fair share of fisheries resources to meet domestic and economic needs to secure our place as First Nations in Canada and the world; 3) Capacity and to be involved in meaningful participation in all aspects of fisheries management and decision making; and 4) accountability: to provide

strategic guidance on legislative, policy, program review that ensures government accountability and tracks First Nation progress across the country.

The time to discuss the future of rights-based fisheries is now, it will also allow for varying cultural interpretations into a way of life – of the past, present and future – and point to new directions and potential solutions to the problems shared by First Nations and other stakeholders, including engagement and consultation on federal, provincial and territorial government's policies that inhibit those rights.

RECOMMENDATIONS

1. The Government of Canada must implement Supreme Court of Canada decisions that mandate the Government of Canada to respect fisheries and work with First Nations to increase fishing capacity.
2. In order to promote mutually beneficial advancements, the Government of Canada must engage with First Nations on a nation-to-nation basis to address the multi-jurisdictional issues through Aboriginal and Treaty discussions, determine joint priorities and the best course to promote prosperous fisheries based on healthy ecosystems through tri-lateral discussions as required.
3. In order to continue practicing traditional activities, First Nations seek increased shares in fisheries and greater involvement in management and decision-making, pursuant to their Treaties and inherent rights to fisheries and aquatic resources.

RESOURCE DEVELOPMENT AND FREE, PRIOR AND INFORMED CONSENT (FPIC)

CONTEXT

Natural resources are the foundation of Canada's economy, growth and prosperity. Since the arrival of the settlers to the present day, energy, forestry, fisheries, agriculture, precious metals, and other natural resources have been the dominant force driving Canada's economy. The Treaties signed between First Nations and the Crown form a relationship based on sharing the land and the natural resources within. Continued prosperity from natural resource use is dependent upon strong and respectful working relationships between the Crown, First Nations and the private sector. Shared access and benefit from natural resources is the foundation for future economic growth.

As sovereign nations and caretakers of Mother Earth for centuries, First Nations have a unique relationship with the land. This unique relationship between First Nation peoples and the land is a core part of First Nation identity, spirituality, knowledge, culture and history and is essential in understanding the broader extent and importance of natural resource issues to First Nations. Cultural and spiritual aspects of this relationship are deeply embedded within First Nation languages, which continue to illustrate the clear historical connection between First Nation peoples, places and the harvesting and stewardship practices within their traditional territories. The relationship between First Nations and land forms the basis of Aboriginal traditional knowledge, which is often drawn upon to inform the sustainable and responsible management of natural resources. Traditionally, First Nations take a holistic view of the world, one that recognizes and celebrates the interconnectedness of all things. Balance and harmony are critical elements to be fostered and respected in the relationship with the collective elements of the land and natural resources.

In Canada, the federal and provincial governments are negotiating agreements with First Nations in various natural resource sectors that include multiple jurisdictions and fall under various provincial and federal legislations, policies and regulations. In negotiating natural resource development, First Nations are placed in difficult positions where projects must be balanced with considerations about the environment, Treaty and Aboriginal rights, and multi-generational impacts on culture, society, and health.

Outdated pieces of legislation, unenforced Treaty and unimplemented Supreme Court decisions further complicate negotiation processes that have led to protracted disagreements between First Nations project proponents and the Government. The end result is often acrimonious and divisive instead of unifying and mutually beneficial.

Historically, Treaty making between First Nations and the Crown involved the exchange of promises, including promises that First Nations would be able to exercise their rights, jurisdiction and governance over the lands and waters. First Nations have never given up any rights to their traditional resources. However, First Nations continue to be under-represented in all resource sectors. First Nations have limited participation in the forest products industry, mining, fisheries, large scale energy and land use planning. Part of the struggle that has plagued progress can be attributed to the delays in settling of First Nation land claim agreements, and implementation of Supreme Court decisions. In the meantime, large tracks of land have been granted to mining companies, forestry firms, and energy companies. However, the fact that forestry, mining, fishing, and energy are also economically and culturally significant to First Nations is often overlooked.

CURRENT ISSUES

Mining provides a larger gross domestic product in the amount of $23 billion to Canada's GDP. Forestry and logging, including pulp and paper manufacturing provides $23.2 billion, and oil and gas is approximately $65 billion. The most valuable mining resources are coal, petroleum, and natural gas. First Nations also depend on the mining of these resources for jobs and economic development in their communities. Often, there is a requirement to consult First Nations in the extraction of these resources. Fast track processes like the Major Project Management office must make concerted efforts to inform First Nations of potential projects that may impact their rights, and conduct adequate, transparent and timely consultation processes.

The *Indian Act* grants the majority of governmental power over lands and resources to the Minister of Aboriginal Affairs and Northern Development, the Governor in Council and other government officers and permits, and only a supervised residual role to First Nations. First Nations have only very limited authority to make decisions regarding the use of some natural resource activities on reserve. Under the current *Indian Act*, First Nations may make regulations in relation to animals or fish on reserve. In all other situations, authority rests with the Minister or other department officials.

The *Constitution Act 1867*, s. 91(24) places "Indians and Lands reserved for Indians" in the exclusive power of the Federal Government, while it places off-reserve natural resources under the exclusive power of provincial governments. This jurisdictional split has never adequately accounted for First Nation rights, jurisdiction and interests or the obligations owed pursuant to Aboriginal and Treaty rights.

The challenges and the solutions are certainly complex and will require many levels of engagement. In addressing the issues related to natural resources, the Government of Canada must remember its international commitments under the United Nations Declaration on the Rights of Indigenous Peoples and the Convention on Biological Diversity. First Nations must play a central role in ultimately addressing the larger issues of the relationship between First Nations and Canada.

According to domestic and international law, specifically the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), Canada must uphold the right of Indigenous peoples to the free, prior and informed consent. The denial of this fundamental principle of how states should interact with Indigenous peoples has exacerbated disputes concerning land, territory and resources arising from extractive industries, including large-scale water, energy and infrastructure projects, and agricultural investments.

The natural resource sector continues to be a prime driver for the Canadian economy; mining alone contributed approximately $50 billion to GDP in 2011. The Government of Canada has embarked on a policy for "responsible resource development" to aggressively promote and support extractive corporations. Legislative and regulatory changes initiated under the Harper government will make it easier for industry to extract resources, without the necessary democratic processes and legal protections for Indigenous rights. Existing First Nation rights and responsibilities demand that they are full partners in discussion about exploration, ownership, participation and production and long-term sustainability of their environments, communities and future.

The ongoing manifestations of doctrines, such as the doctrine of discovery and terra nullius that have been adopted by colonial governments throughout the world, continue to directly harm the socio-economic conditions of Indigenous Peoples as well as threaten cultural practices and traditional environmental and medicinal knowledge. The path forward requires that states honour and implement Treaties and Aboriginal title and rights. Today, as Canada has been embarking on an aggressive strategy to formalize economic relationships with other nations, the $650 billion in foreign investment is hinged on access by industry to the resources held within Indigenous Peoples' lands.

First Nations must be consulted when Canada enters into international economic agreements that may impact their existing rights.

In June 2011, the Assembly of First Nations organized the International Indigenous Summit on Energy and Mining. The event brought together over 800 delegates from Indigenous communities as far as Norway and Brazil, as well as government and industry. The summit featured success stories as well as those challenges faced by Indigenous peoples who are asserting their rights to share in resource development in their traditional territories. Outcomes included the identification of tools to support a virtual knowledge exchange centre for First Nations in Canada, industry and government. One which would cover a wide range of critical steps from duty to consult, to accessing experts, and information on environmental assessments, training, employment, and project financing and development tools. These tools would recognize and promote First Nations values, traditions and traditional ecological knowledge as important aspects of business and sustainable development goals for Canada, and the world.

AFN believes the centre would also serve to complement the newly established Canadian International Institute for Extractive Industries and Development. In October 2011, Prime Minister Harper announced that the Institute would help developing countries manage their natural resources. While the Institute has great potential, Canada's history – at home and abroad – of the treatment of Indigenous Peoples remains below the international standard of free, prior, and informed consent, and this potentially raises the question of whether or not Canada has the political will necessary to provide supports on an international level.

The Canadian government and the extractive companies operating within, or from, Canada must enhance their practices to legally adhere to the duty to consult and accommodate, domestically, and to the internationally accepted standard of free, prior and informed consent of Indigenous Peoples.

Our economic visions are not dissimilar to the rest of Canada; First Nations envision sustainable communities with healthy families as central to our overall success. At the same time, Indigenous values, our traditional knowledge and our connection to our lands and waters has been and will always be an unshakeable bond.

RECOMMENDATIONS

1. That the international community encourage public and private interests to expand beyond primary motivators for development to also consider the expense development has on the land, water and Indigenous Peoples.
2. That Canada ensure that the UNDRIP is accepted as the minimum standard and governments engage First Nations on a nation-to-nation and government-to-government basis.
3. That Canada develop and implement, in conjunction with representative Indigenous Peoples organizations, a set of consultation and accommodation processes that respect the duty to consult and accommodate; and that Canada in good faith provide these tools and instruments to other nations and encourage them to properly include Indigenous Peoples in all stages of extractive processes as a means to recognize free, prior and informed consent of Indigenous Peoples.
4. That Canada initiate necessary reforms to existing legislation, regulations and policies governing natural resource management arrangements in light of Aboriginal and Treaty rights.
5. That Canada implement policy frameworks to guide resource managers in understanding Aboriginal and Treaty rights and the resulting obligations and in ensuring that private resource operations and tenure arrangements do not infringe, without appropriate justification, upon Aboriginal and Treaty rights.
6. That Canada implement Treaties and settle outstanding land claims, which will increase First Nation access to natural resources to pursue both traditional and economic development activities.
7. That Canada support First Nations in developing First Nation business capacity, through developing and utilizing new and existing programs for business training, mentorship, technology transfer and documentation of instructive cases, and improving access to capital.

FISCAL RELATIONSHIP

BACKGROUND

When First Nations signed the Treaties with the Crown, they agreed to share the land with the newcomers; a sharing defined from the perspective of respect between peoples who would live on the land and respect for the land itself. Obligations were entered into on both sides. First Nations expected and believed that both parties were agreeing to share the wealth of the land; that everyone would benefit from the fruits of collective labours.

This is not the situation today. Study after study has demonstrated that the harvest has not been shared equally or equitably. First Nation governments have long advocated for a transformed fiscal relationship with the Federal Government to respect First Nation rights and appropriately align responsibilities. This has been demonstrated through several years of national advocacy, resolutions and AFN pre-budget submissions (i.e. *2012 Pre-Budget Submission as well as AFN Resolutions #61/2012, #24/2011, #23/2011, #77/2008).*

A sustainable funding base is essential to create the conditions necessary for First Nations to develop economically, thereby ending the cycle of poverty and unacceptable conditions that currently face First Nations across Canada. The sustainability and equitability of funding levels have a significant impact on the ability of First Nation governments to provide adequate services to their citizens. First Nation citizens face some of the most difficult social and economic problems in Canada and as a result First Nation governments often have a more difficult task than other governments delivering adequate services.

Current funding arrangements for basic services for First Nations citizens are subject to annual allocations, changing program parameters and reporting obligations as well as unilateral realignment, reductions and adjustments.

In December 2006, the *Report of the Independent Blue Ribbon Panel on Grants and Contribution Programs* tabled specific observations and recommendations related to First Nations: *Payments to First Nations governments are (or ought to be) more like intergovernmental transfers than typical grants and contributions. ... mechanisms*

other than grants or contributions for the funding of essential services such as health, education and social assistance in reserve communities are needed... .[6]

In response, the Federal Government developed a new Policy on Transfer Payments, and an associated Directive on Transfer Payments to Aboriginal Recipients came into effect on October 1, 2008. This new Policy appears to have created greater flexibility and as such may be a modest improvement. Still, however, this new Policy does not respond to the overall recommendations of the Panel to advance more stable, intergovernmental-type arrangements.

Furthermore, recent reports indicate persistent challenges still remain. The *Auditor General's 2011 Status Report* examined the progress of previous recommendations issued between 2002 and 2008, focused on Programs for First Nations on Reserves, specifically in the areas of education, water quality, housing, child and family services, land claim agreements, and reporting requirements. The report concludes that while some efforts have been made to address recommendations of previous reports, conditions have generally not improved for First Nations in each of the areas examined—and in some cases have gotten worse. The report goes on to identify structural impediments to this progress: *In our view, many of the problems facing First Nations go deeper than the existing programs' lack of efficiency and effectiveness. We believe that structural impediments severely limit the delivery of public services to First Nations communities and hinder improvements in living conditions on reserves.*

The report further explains four examples of such structural impediments:

- Lack of clarity about service levels:
    - The federal government provides services on reserves that are otherwise provided by provincial or municipal governments. While in some cases there is policy commitment to provide these services at a comparable rate to those in other jurisdictions, comparability is poorly defined and rarely outlines the range and level of services to be provided.
- Lack of a legislative base:
    - The federal government provides core services and programs to First Nations on a policy and discretionary basis, as opposed to other jurisdictions that have legislation outlining the provision of services and associated responsibilities. This results in vulnerability for First Nations through poorly defined and funded programs.

[6]The Report of the Independent Blue Ribbon Panel on Grants and Contribution Programs Report. "*From Red Tape to Clear Results*". 2006. Treasury Board Secretariat http://dsp-psd.pwgsc.gc.ca/Collection/BT22-109-2007E.pdf p. 8.

- Lack of an appropriate funding mechanism:
    - The use of contribution agreements to fund core government services and on-going program obligations (such as health care or education) leads to poor stability from year-to-year for planning and program delivery; creates problems in timing of release of funds and its continuity; inhibits accountability to First Nation citizens; and leads to onerous reporting.
- Lack of organizations to support local service delivery:
    - First Nations generally do not have access to secondary or tertiary supportive institutions that support service delivery, such as school boards or health management boards or other regional bodies.

The report provides the following final observation: *Addressing these structural impediments will be a challenge. The federal government and First Nations will have to work together and decide how they will deal with numerous obstacles that surely lie ahead. Unless they rise to this challenge, however, living conditions may continue to be poorer on First Nations reserves than elsewhere in Canada for generations to come.*

First Nations have been stymied in their capacity to pursue self-determination and self-government as a result of the unjust distribution of the wealth of this nation; it is time for redress based on fundamental and commonly held principles. Such principles that will ground a new fiscal relationship may include:

- Equity. Funding commitments to First Nation governments that are at least equal to that provided to provincial and territorial governments.
- Fairness and Security. Ensuring that basic services enjoyed by all Canadians are not jeopardized and a standard of care guaranteed
- Stability. Long-term, legislated funding transfers that have automatic escalators.
- Predictability. The ability to engage in financial planning with confidence regarding future revenues and expenditure obligations.
- Accountability. Delivering transparency, effective and appropriate reporting to First Nation citizens, from First Nation governments and to the Government of Canada
- Authority/Autonomy. Greater authority to set priorities and determine how the fiscal priorities of First Nation communities are determined.
- Flexibility. Fiscal transfers that are flexible enough to enable effective decision making power for First Nation governments.
- Access to capital: Increasing First Nations' economic growth will require improved access to capital so that First Nations can build the necessary physical infrastructure and attract business investment.

CURRENT CONTEXT

Today, most Canadians rely upon fundamental programs and services for their health, education and social assistance needs. The Federal Government, recognizing the need for fiscal stability within provincial and federal governments, has consistently supported annual rates of growth that reflect both demographic and inflationary pressures guaranteeing a consistent level of basic service.

The Federal Government provides funding to provincial and territorial governments for such core services through the following transfers:

1. Canada Health Transfer (CHT)

The CHT is the largest major transfer and provides long-term and predictable funding for health care. CHT transfer payments are set in legislation to grow by 6% annually through an automatic escalator.

2. Canada Social Transfer (CST)

The CST is a federal block transfer in support of post-secondary education, social assistance and social services, early learning and childcare. CST payments are set in legislation to grow by 3% annually through an automatic escalator.

3. Territorial Formula Financing (TFF)

The TFF is the largest federal transfer to the three territorial governments and supports the funding of essential public services in the North, such as hospitals, schools, infrastructure and social services. The transfer is designed to recognize the high costs of providing public services to a large number of small and isolated communities. For example, in 2010-11 the per-capital transfers for the three territories were: NWT ($21,285); Nunavut ($33,281) and Yukon ($19,232).

4. Equalization

Equalization is the transfer program that addresses the fiscal disparities among provinces, enabling less prosperous ('have-not') provinces to provide their residences with public services comparable to those in other provinces. Equalization payments have been increasing at a stable rate of at least 3.5% annually.

In comparison, First Nation governments must manage many of these same core services on the basis of discretionary program funding that has no legal protections.

Since 1996, Finance Canada has maintained an arbitrary 2% cap on spending increases for core services, which is one-third of the legislated 6% increase that most Canadians will enjoy through the CHT.

In fact, when adjusted for inflation and the rapid population growth of First Nations communities since 1996, the total budget for the Department of Indian and Northern Affairs Canada (INAC) has actually decreased by 3.5% and funding for core services such as education, economic and social development, capital facilities and maintenance has decreased by almost 13% since 1999-2000.[7]

SETTING A NEW COURSE

If there is to be reconciliation between the rights and interests of First Nations and the sovereignty of the Crown, then Canada must renew its relationship with First Nations. It must create a relationship built on the principle of respect for other people and for the land, the principle of sharing, and the principle of community responsibility, to ensure we all succeed together for now and seven generations hence. A sustainable funding base is essential to create the conditions necessary for First Nations to develop economically, thereby ending the cycle of poverty and shameful conditions that currently face First Nations across Canada.

The vision of a new Fiscal Relationship put forward by the Royal Commission on Aboriginal Peoples (RCAP) remains relevant and begins by defining First Nations governments as nation-based rather than community-based. Looking forward, it is clear that there is an opportunity to create a broad framework for change through the following Recommendations. There is an opportunity to build upon and assess existing initiatives in a collaborative and principled process that supports the overall goal of increased First Nation self-determination. This new relationship will ensure First Nations governments receive the financial support they need to serve their citizens and affirm First Nations governments as national leaders in accountability and successful administration.

[7] Financial data are from INAC 2009 Departmental Performance Reports and TBS Main Estimates. Population data are from INAC Registered Indian data, both on and off-reserve.

RECOMMENDATIONS

1. Shared Principles – The very first step may be for First Nations and the Crown to establish mutual principles to achieve the path forward. A new fiscal relationship needs to be based on core principles that may include: Equity; fairness and security;
   - stability;
   - predictability;
   - accountability;
   - authority/Autonomy:
   - flexibility: and
   - access to capital

2. New Fiscal Mechanisms – Fulfilling recommendations from many past reports and evaluations identifying that payments to First Nation Governments should reflect intergovernmental transfers similar to that provided to Canada's Provinces and Territories. However, given that First Nations are often very remote and impoverished, the element of 'need' in the transfer formula, similar to what is done with the Territorial Formula Financing should be incorporated.

3. Standards and Capacity Development – First Nations and the Federal Government should work collaboratively to develop standards and links to available mechanisms, as agreed upon. This would enable First Nation governments to attain recognition of their performance and capacity as set out in standards to facilitate stream-lined transfers and reporting.

4. Re-Alignment and improved coordination – An alignment of existing programming and services across the Government of Canada is needed to better ensure coordination and efficiencies. A renewed First Nation-Crown relationship requires appropriate and efficient machinery of Government. Looking to the future, it may be that current functions of the Department of Aboriginal Affairs and Northern Development would be transformed to entities upholding this relationship as well as ensuring efficient service delivery.

IMPLICATIONS OF STATE ACTIONS ON COLLECTIVE AND HUMAN RIGHTS & QUALITY OF LIFE

FIRST NATIONS EDUCATION

Article 13 of the UNDRIP states: 1. 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. 2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14 of the UNDRIP states: 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. 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.

BACKGROUND

First Nations have long advocated for the development and implementation of comprehensive education systems under full First Nation jurisdiction that support quality lifelong learning grounded in First Nations' languages, cultures, traditions, values and worldviews.

AFN Resolution 12-2010 notes that "First Nations leaders and educators recognize that the right to and policy of Indian Control of Indian Education still applies in 2010 as it did in 1972." The resolution adopts First Nations Control of First Nations Education 2010 as the national First Nations education policy. Also in 2010, the government of Canada endorsed the United Nations Declaration on the Rights of Indigenous Peoples. The education provisions of the Declaration provide a framework for addressing issues in First Nations education. AFN Resolution 18-2011 reaffirms "the obligation of the Federal

government to work with our Nations to implement the Inherent and Treaty Right to education." The resolution also calls upon the National Chief and the Chiefs Committee on Education to work on a strategy for engagement with the federal government.

The UNDRIP contains specific provisions concerning the right of Indigenous peoples to education in Articles 14 and 15. In his statement on the International Day of the World's Indigenous Peoples in 2008, UN Secretary-General Ban Ki-moon noted that the Declaration "…sets out a framework on which States can build or rebuild their relationships with indigenous peoples. … [I]t provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated."

In June, 2008, the government of Canada issued an apology for the era of residential schools, over a century of devastating and prolonged assault on Indigenous languages, cultures, spirituality and traditional governing systems throughout the country. The Prime Minister stated that "[t] here is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again." In announcing a Truth and Reconciliation Commission, the Prime Minister noted that "[i]t will be a positive step in forging a new relationship between Aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward together with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us."

First Nations education on reserve continues to be governed by Section 114-122 of the *Indian Act* which essentially empowers the Minister to make all key decisions concerning the education of First Nations peoples, including entering into agreements with provincial governments for the education of First Nations learners. These education provisions have remained unchanged since 1951, the era of residential schools. Responsibility for First Nations students residing off-reserve is left to provincial and territorial governments. There are no provisions in the *Indian Act* to ensure First Nations peoples, wherever they reside, have access to a high quality, linguistically and culturally safe and appropriate education.

The ongoing implications of this approach are seen in outcomes for First Nations children. According to federal data, only one in three First Nations students residing on reserve can expect to graduate from secondary school whether they attend a school on reserve or in the mainstream system. In 1995-96, the year before the funding cap was introduced, the First Nations graduation rate was 34%. In 2010-11 the graduation rate

was 35%. The rate has remained constant for 15 years despite state sponsored commissions, working groups, roundtables, and policy and program agendas.

CURRENT CONTEXT

Funding Formula for First Nations Schools

There are over 500 First Nations schools across the country. First Nations schools are funded by an out-dated policy framework which does not include costs needed to support the educational components of a 21st century school system that are currently missing from INAC's funding. This includes such basic services as school libraries; technology (computers, connectivity, data systems); sports and recreation; vocational training; First Nations languages; and school board-like services.

Since 1996-97, the national education funding formula has been capped at a maximum 2% increase per year. This is despite a steady growth in both inflation and the First Nations population over the same period – requiring an annual increase of at least 6.3% since 1996 for First Nations education. Chronic underfunding of First Nations schools has meant that First Nations schools are unable to cover the costs of essential school needs, such as the increasing costs of teacher salaries, books and curriculum, and classroom equipment. The outdated funding formula and the permanent cap on education funding create structural discrimination for First Nations students in First Nations schools. This has led to an accumulated shortfall exceeding $3B in the total First Nations education budget.

From time to time, the federal government has introduced time-limited targeted education programs. These are proposal-based initiatives which do not address the core capacity needs of First Nations schools, yet now comprise a significant proportion of education funding. Short-term proposal-based funding inhibits long-term planning, adds to an administrative burden on First Nations schools, and fails to benefit all schools equitably. The annual shortfalls in special education/special needs funding have lead the Mississaugas of New Credit First Nation to launch a Human Rights case to seek equity with funding provided for children off-reserve. The cumulative effects of the underfunding have denied a generation of First Nations learners the opportunity to enjoy their rights to a high quality, linguistically and culturally relevant education.

Federal contribution agreements require First Nations governments to ensure that First Nations students attending First Nations schools on reserve have access to "education programs and services, including student support services, comparable to the programs and services required to be provided in public schools". However, the funding provided

to First Nations schools is not comparable to the funding provided to provincial schools, but more importantly, it is not enough to cover the needs of First Nations schools. This approach unilaterally offloads the burden of achieving comparability to First Nations without providing the necessary resources to attain the standard. The imposed standard of comparability falls far short of standards recognized in article 14 of the United Nations Declaration on the Rights of Indigenous Peoples which obligates State governments to work with Indigenous peoples "to 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."

The program and policy to fund First Nations students on-reserve to attend provincial schools does not require provincial schools to meet standards under sections 14 and 15 of the UN Declaration on the Rights of Indigenous Peoples.

According to the Report of the Expert Mechanism on the Rights of Indigenous Peoples: *The indigenous child's right to education is, however, not only a matter of access to and availability of education, but also of the content of education. The form and substance of education, including curricula and teaching methods, have to be culturally appropriate and acceptable to indigenous peoples, that is, relevant, of high quality, culturally safe and appropriate.*[8]

Furthermore, the Expert Mechanism notes that: *States are obliged to ensure that education is flexible and adaptable to the specific needs, cultures, languages and situation of indigenous peoples concerned and responds to their diverse social and cultural settings. For instance, the best interest of an indigenous child might not in all circumstances be identical with the best interest of non-indigenous children owing to their distinct culture, lifestyle and the collective nature of their societies*[9]*.*

Current legal and policy instruments do not ensure that the specific linguistic and cultural needs of First Nations students will be addressed in mainstream schools. Canada is also a signatory to the *Convention on the Rights of the Child* and has obligations under Article 8 to respect the right of the child to preserve their identity, and, under Article 30, to ensure that a child can "enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language." The lack of

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8 Report of the Expert Mechanism on the Rights of Indigenous Peoples: Study on Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education, August 31, 2009, A/HRC/12/33, Para. 24

9 Ibid., para 26

protection or guarantees for First Nations cultures and languages in mainstream schools contravenes Article 8 of the UUNDRIP.

New Federal Legislation on First Nations Education

In March, 2012, the government of Canada announced that it will work with "willing partners" to introduce a First Nations Education Act to be implemented by September 2014. A Discussion Guide issued in December, 2012 noted that "*The proposed Act would require that services to students and to schools typical in provincial systems be available in First Nation education systems. Standards for teachers, curriculum, graduation, assessments, safety and daily operations would need to be consistent with those of the provinces."* There is nothing in the Discussion Guide which ensures standards of education which reflect First Nations identities, languages, and cultures, nor has any assurance been provided in the "Blueprint" document released in July, 2013. The government of Canada has invited the general public to submit comments about the Discussion Guide and the Blueprint on government website. This has the potential to dilute any First Nations input.

The duty to conduct deep consultation on matters affecting Aboriginal and Treaty rights has not been adequately discharged to this point. The federal government unilaterally announced legislation and has unilaterally designed an insufficient consultation process rather than pursue a process that enables First Nations to design, develop and implement their solutions for the benefit of their children. There is a legal obligation on the part of the federal government to work with First Nations to ensure that measures are being taken to accommodate First Nations issues and concerns, fully consistent with Aboriginal and Treaty rights.

Chiefs-in-Assembly have affirmed through Resolution 14-2013 that the federal government's role in First Nations education is to recognize the right of First Nations to fully implement the inherent and Treaty right to education through the provision of predictable, sustainable, and needs-based funding, which includes annual escalators or financial adjustments to account for the rise in annual education costs, inflation, population, capital needs, and geographic considerations. These funding considerations are generally accepted factors for the development of education funding formulae mandated in provincial and other jurisdictions around the world, and are included as fundamental requirements for the resourcing and funding of First Nations education. First Nations have repeatedly sought justice on this issue through resolutions, correspondence, and meetings with federal officials. Stable, fair funding, inclusive of costs associated with language, culture and technology, are essential to maintain and drive the implementation of high-performing, accountable education

systems and standards – designed by, administered and monitored by First Nations to achieve the best outcomes for their children.

In 2009, the Expert Mechanism on the Rights of Indigenous Peoples noted that *"Indigenous peoples, in exercising their right to self-determination, have the right to educational autonomy. States, in consultation and cooperation with the peoples concerned, must ensure the realization of educational autonomy, including the financing of such autonomous arrangements. Indigenous peoples should be regarded as having prepaid present and future financial allocations from the State, including allocations to education, by sharing their lands, territories and resources with others".*[10]

Furthermore, the right to educational autonomy includes the right of Indigenous peoples to decide "their own educational priorities and to participate effectively in the formulation, implementation and evaluation of education plans, programmes and services that may affect them, as well as the right to establish and control their own education systems and institutions, if they so choose."[11] To honour the historic apology for the policy of residential schools and give effect to reconciliation, Canada must recognize *First Nations rights to First Nations Control of First Nations Education*.

Potential Privacy Violations

In 2008 the federal government announced a five-year, $27 million initiative to build their capacity to enable electronic record keeping and facilitate online reporting from First Nations communities. The Education Information System (EIS) will collect data about First Nations students, staff in First Nations schools, salary information and other data of a personal nature. EIS will be owned, operated and controlled by the federal government. There are no indications that this will reduce the administrative burden. Concerns have been expressed by First Nations that the amount of data being requested is actually increasing. There are no assurances of privacy protection, particularly protection from the access and use of the data by third parties. First Nations are concerned that the EIS does not respect the right of First Nations to Ownership, Control, Access, and Possession (OCAP) of data. The EIS ensures that the federal government will continue to control First Nations education in violation of Article 14 of the United Nations Declaration on the Rights of Indigenous Peoples which calls upon States to support the development of Indigenous institutions and systems. The EIS has also been established in violation of Article 19, the right to free, prior and informed consent.

[10] Ibid. para 14
[11] Ibid. para 15

RECOMMENDATIONS

1. That the Report of the U.N. Special Rapporteur affirm Canada's obligation to ensure that educational programs and services for Indigenous peoples must be developed and implemented in consultation and cooperation with the Indigenous peoples concerned in order to address and incorporate their specific needs, histories, identities, integrity, values, beliefs, cultures, languages and knowledge, as well as their social, economic and cultural priorities and aspirations. Educational programmes and services for Indigenous peoples should be of high quality, culturally safe and appropriate, and must not aim at or result in unwanted assimilation of Indigenous peoples.

FIRST NATIONS LANGUAGES

The preamble of the UNDRIP states: Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.

Article 14 (3) of the UNDRIP states that: 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.

CONTEXT

The Assembly of First Nations Language Implementation Plan, adopted by Chiefs in Assembly in 2007, outlines a collective and collaborative process for the revitalization and preservation of First Nations languages in Canada. The working group for the Language Implementation Plan established the following vision: *"Languages are a gift from the Creator which carry with them unique and irreplaceable values and spiritual beliefs that allow speakers to relate with their ancestors and to take part in sacred ceremonies. It is our vision that the present generation recover and strengthen the ability to speak these sacred, living languages and pass them on so that the seventh and future generations will be fluent in them. As they belong to the original peoples of this country, First Nations languages must be revitalized, protected and promoted as a fundamental element of Canadian heritage."*

To realize the vision the working group developed five goals, which are based on the legal rights for Indigenous languages outlined in various United Nations documents and consistent with First Nations policy documents on Education and Language. These policy documents include, "Wahbung, our Tomorrows" and "First Nations Control of First Nations Education", among others. The five underpinning goals of the Implementation Plan include:

- Increase the number of First Nations people who speak their language by increasing the opportunities to learn their language.
- Increase the opportunities to use First Nations languages by increasing the number of circumstances and situations where First Nations languages can be used.
- Improve the proficiency levels of First Nations citizens in speaking, listening to, reading and writing First Nations languages.

- Increase the rate of which First Nations languages can be enhanced, revitalized and developed so that they can be used in the full range of modern activities.
- Foster among First Nations and Non-First Nations a positive attitude towards, and accurate beliefs and positive values about First Nations languages so that the acquisition of a First Nations language becomes a valued endeavour that serves to enrich Canadian society.

Work in the area of First Nations language recognition and revitalization includes focus on establishing the necessary implementation mechanisms to ensure that First Nations languages are recognized as official languages which are irreplaceable and integral to the national character, and that First Nations jurisdiction over language and culture programming is assured; ensuring that First Nations priorities, principles, and strategic plans are resourced in preparation for full implementation of language and cultural programming; and supporting improved proficiency levels of First Nations citizens in speaking, listening, reading, and writing in First Nations languages, including increased amount of literature, artistic works, videos, academic works, pedagogical material, public communications, public services, and all manner of communications to be available in First Nations languages.

A clear Vision Statement for Lifelong Learning was articulated in the *First Nations Control of First Nations Education, 2010*[12], First Nations lifelong learning is a process of nurturing First Nations learners in linguistically and culturally-appropriate holistic learning environments that meet the individual and collective needs of First Nations and ensures that all First Nations learners have the opportunity to achieve their personal aspirations within comprehensive lifelong learning systems.

This vision for linguistic and culturally appropriate learning environments is endangered by the unilateral decision of the Canadian government to legislate First Nations education, by centralizing all education decision and policy making within the Department of Indian Affairs' hands, by its silence on specific details for equitable and sustainable funding, by determining and imposing provincial standards that often limit language and culture programs, the absence of technology required for students in the 21st century, tying reporting to a faulty data system that has not ensured they have consent of students/parents and withholding vital education funding, not because First Nations haven't reported but due to their data system that doesn't work.

[12] Assembly of First Nations. (2010). First Nations Control of First Nations Education: It's Our Vision, It's Our Time, p. 10.

Since 1996, Canada has been aware that Indigenous languages in Canada "*are among the most endangered in the world."*[13] The struggle for equity of opportunity to 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"[14] is monumental, when the Prime Minister of Canada states to the world that Canada has "no history of colonialism..."[15].

In response to Canada's claim of "no history of colonialism[16]," the Assembly of First Nations National Chief Shawn A-in-chut Atleo responded on October 1, 2009: "The effects of colonialism remain today. It is an attitude that fuelled the residential schools; the colonial Indian Act that displaces traditional forms of First Nations governance; the theft of Indian lands and forced relocations of First Nations communities; the criminalization and suppression of First Nations languages and cultural practices; the chronic underfunding of First Nations communities and programs; and the denial of Treaty and Aboriginal rights, even though they are recognized in Canada's Constitution."

Despite the Statement of Apology to former students of Indian Residential School on 11 June 2008, that "this [Residential Schools] policy of assimilation was wrong, has caused great harm, and has no place in our country," the *Roadmap for Canada's Linguistic Duality 2008-2013: Acting for the Future*, states that an unprecedented $1.1 billion investment "presents new, targeted measures that will have a ripple effect, promoting an approach that contributes to a better understanding among English-and French-speaking Canadians, and to their mutual enrichment." The Roadmap for Linguistic Duality by the French and English colonizers as the "cornerstone of our national identity" is discriminatory, assimilative in its stated intent, and contributes to the destruction of all Indigenous languages, cultures and histories in Canada.[17]

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[13] UNESCO. (1996). *Atlas of the World's Languages in Danger of Disappearing*. Ed. Stephen A. Wurm, Paris, p. 23.
[14] UN Declaration on the Rights of Indigenous Peoples, Article 13.
[15] Reuters. 25 September 2009. *Every G20 nation wants to be Canada, Insists PM.*
[16] Edward W. Said noted "Neither imperialism nor colonialism is a simple act of accumulation and acquisition. Both are supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people require and beseech domination, as well as forms of knowledge affiliated with domination…" *Culture and Imperialism, 1994; 9.*
[17] Aboriginal Affairs stated Strategic Outcome for Indian and Inuit Education, K-12 and Canadian Heritage's Aboriginal Peoples' Program both align with Canada's Outcome of "Diverse society that promotes **linguistic duality** and social inclusion.

CURRENT ISSUES

According to the latest Statistics Canada (2011)[18] census data on Indigenous languages in Canada, there are:

- over 60 [endangered] Indigenous languages that are identified into 12 distinct language families;
- Between 2006 and 2011, the number of Aboriginal people who reported that they were able to conduct a conversation in an Aboriginal language declined by 2.0%, while the Aboriginal identity population increased by 20.1%;
- Only 22.4% of First Nations were able to conduct a conversation in an Indigenous language, while only 18.7% reported an Indigenous language as their Mother Tongue.
- The AFN conducted a telephone survey with Directors of Education, and/or Principals of First Nation schools on reserve between December 2011 and February 2012:
- Of 388 First Nations schools sampled, 17% or 58 schools had Indigenous Language Immersion Programs;
- Of 366 First Nation schools sampled, 57% or 209 schools provided cultural activities (camps, on-the-land activities);
- Of 317 First Nation schools sampled, 26% or 81 schools fully integrated cultural teachings into the curriculum.

Funding Barriers to achieving Indigenous Language and Culture Revitalization

Aboriginal Affairs provides an estimated $15 million for all on reserve schools (2008) based on 1996 funding formula of $215 per student (national) for a salary of one language teacher for 200 students; Quebec regional reduced this amount to $185 per student. This means that small schools cannot provide the services of a full time Indigenous language teacher.

Canadian Heritage provides $3,750,000 annually for all First Nations in Canada[19] for Indigenous languages revitalization; these funds cannot be used to teach languages in schools. However, they provide education in the language of the minority (French & English, $280.0M); support for second language education ($190.0M); summer language bursaries ($40.0M); cultural development fund ($14.0M); these amounts are in addition to what each province funds to education.

[18] Statistics Canada. (2011). National Household Survey: Aboriginal peoples and language. Catalogue no. 99-011-X2011003.

[19] 2006 Census reported North American Indian population of 785,000 in Canada.

On May 21, 2003, a delegate representing Canada to the United Nations Permanent Forum on Indigenous Issues, Agenda Item, Culture, announced to the UN that in the Speech from the Throne, (2002) Canada was demonstrating its commitment to preserve, revitalize and promote [Indigenous] languages and cultures by dedicating $172.5 million, and to launch an Aboriginal Language and Culture Centre in 2004-05. Canada reneged on this promise, cut funding to $5 million for all First Nations, Métis and Inuit language programs and never built the Centre, to the outrage and disappointment of Indigenous peoples. Instead, Indigenous peoples were made to conduct another study (Task Force Report, 2005), made 25 recommendations, of which only one recommendation was acted upon using existing monies.

RECOMMENDATIONS

Immediate Actions to Revitalize Indigenous Languages and Cultures in Canada require:

1. Pro-active legal frameworks to recognize and support Indigenous Languages – as recognized in the European Charter on Regional and Minority Languages; Esther Martinez Native American Languages Preservation Act, U.S.; and Government of the Northwest Territories, Canada that officially recognizes 11 unique Indigenous languages.
2. Indigenous Language Revitalization Programs – to be funded at equitable and sustainable rates to that funding provided to English and French minority language education programs and related costs, such as the Elders and traditional knowledge keepers' role in language and cultural revitalization.
   Recommended revitalization programs include:
   - Immersion Programming – most successful method of creating more speakers, increasing the fluency of semi-fluent speakers
   - Pre-School Language Nests – for very young children and parents
   - Master-Apprentice Programs – one-on-one immersion for learners committed to becoming fluent by intensively working with a fluent speaker to become language teachers
   - Language & Cultural Immersion Camps – opportunities for fluent speakers to pass on their languages and Indigenous knowledge through traditional cultural activities
   - Training and Certification – collaboration between Indigenous Institutes of Higher Learning and mainstream institutions to develop and deliver training and certification for Indigenous Language teachers
   - Documentation of Language – recording, documenting and preserving Indigenous languages and knowledge
   - Development of Resource Materials – to aid in increasing use and proficiency through culturally appropriate materials and assessment tools

- Archiving Development – Language archiving using technology, App Development for use with computers, smartphones, etc.

INDIAN RESIDENTIAL SCHOOLS

HISTORY AND CONTEXT

The Residential School System, funded by the Government of Canada and administered by Christian churches, operated across Canada starting in the late 1800s. While the policy was abandoned in 1970s, the last residential school did not close until 1996. Generations of First Nation children were forced to attend these institutions, usually far away from their families and nations, and often separated from their siblings. The Aboriginal Healing Foundation defines the Residential School System as including industrial schools, boarding schools, homes for students, hostels, residential schools, residential schools with a majority of day students, or a combination of any of the above.[20] It is estimated that 150,000 Indigenous children attended residential schools. Residential schools registered children from every Indigenous group – First Nations, Inuit, and Métis children. The Indian Act was the primary mechanism used to enforce residential schooling and the majority of the students attending were registered under the *Indian Act*.

The genocidal philosophy of "killing the Indian in the child" is evident in how residential schools were created with the purpose of assimilating children into the dominant culture by disconnecting them from their sense of identity and removing them from their families, communities, and nations. The residential school system was the result of a partnership between the federal government and the Roman Catholic, United, Anglican and Presbyterian Churches.[21] Financial and ideological considerations led to this alliance between the state and the churches, working together towards a shared goal of assimilating and Chrisitianizing Indigenous children.[22]

The Indian Residential School System is characterized by widespread abuse and chronic conditions of neglect. Former students began disclosing widespread physical and sexual abuse in the 1980s and 1990s. State officials were well aware of extensive occurrences of disease, hunger, and overcrowding. In 1907, Indian Affairs' chief

[20] Aboriginal Healing Foundation. 2005. *Reclaiming Connections: Understanding Residential School Trauma Among Aboriginal People*. Ottawa: Aboriginal Healing Foundation.
[21] Royal Commission on Aboriginal Peoples. 1996. Volume 1: Looking Forward, Looking Back. Chapter 10: Residential Schools. Available online: www.ainc-inac.gc.ca/ch/rcap/.
[22] Miller, J.R. 1996. *Shingwauk's Vision. A History of Native Residential Schools*. Toronto: University of Toronto Press.

medical officer, Dr. P.H. Bryce, reported alarming death rates. Many children died from disease; many also died as a result of malnutrition, neglect, abuse, from injuries sustained while working or from exposure while trying to escape. Due to the chronic underfunding of residential schools, children were forced to participate in the operation of the schools, often under unsafe working conditions, which allowed little time for low quality academic instruction. The work done by children was not simply a matter of training, but it was absolutely essential to the day-to-day operation of residential schools. Residential school were also sites of biomedical experimentation.[23]

While residential schools are no longer in operation, the impacts are still being felt by former students, their families and communities. As illustrated by the testimony gathered by the Truth and Reconciliation Commission, individual and collective healing is required to overcome the legacy of Residential School which has been linked to joblessness, poverty, family violence, drug and alcohol abuse, family breakdown, sexual abuse, prostitution, homelessness, high rates of imprisonment and early death.[24]

CURRENT ISSUES

Former students of Indian Residential Schools (IRS) continue to seek justice. In the 1990s, a series of class action lawsuits were launched which led to the historic 2006 Indian Residential School Settlement Agreement (IRSSA), the largest class action settlement in Canadian history. The IRSSA included compensation payments for former Residential School Students; established an independent process for serious physical abuse, sexual abuse and other wrongful acts; provided funding to the Aboriginal Healing Foundation to support healing initiatives; established a commemoration initiative and the creation of the Truth and Reconciliation Commission to create an accurate public record of Residential Schools. Many of these elements have been fraught with problems and, despite a formal apology by the Prime Minister in 2008, many students feel that the core principles of healing and reconciliation are not being met.

Key issues include students whose schools were not included in the IRSSA, as well as students who were not compensated for all of their time at school due to missing, lost or

[23] Mosby, Ian. 2013. Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942–1952. *Histoire sociale/Social history* 46 (91): 145-172.
[24] Dion Stout, M. & Kipling, G. 2003. *Aboriginal people, resilience and the residential school legacy*. Ottawa: Aboriginal Healing Foundation.

destroyed records. Also of concern are day scholars (who attended residential schools, but went home at night) and day students (who went to non-residential schools) who faced similar abuses and loss of culture as IRS students, but are ineligible for compensation or healing supports.

Currently, a court-ordered investigation is underway for alleged violations of the IRSSA and violations of the Financial Administration Act by a number of law firms, impacting thousands of former IRS students.

The impending closure of the Aboriginal Healing Foundation (AHF) has created gaps in healing services for former IRS students. Health Canada is providing health supports as part of the TRC process, but unlike AHF programming, these are not community-based and on-going.

RECOMMENDATIONS

1. Canada must honour the 2011 apology and commit to reconciliation and restitution as the only viable path forward.
2. Canada must commit to ongoing community-level healing programs and supports and services for IRS students, their families and communities, to address the ongoing inter-generational impacts of Indian Residential Schools.
3. Canada must recognize Day Scholars and Day Students and provide compensation equal to that of the Indian Residential Schools Settlement Agreement.

SOCIAL DEVELOPMENT AND CHILD WELFARE

Article 7 of the UNDRIP states: 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8 of the UNDRIP states: 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

Article 21 of the UNDRIP states: 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22 of the UNDRIP states: 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

Article 23 of the UNDRIP states: Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24 of the UNDRIP states: 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

BACKGROUND

The Assembly of First Nations (AFN) has been mandated by Chiefs-in-Assembly to advocate for inclusive, holistic and culturally-based social development systems under First Nations control aimed at building healthy, safe and sustainable communities. This mandate aligns with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and is further supported by United Nations Convention on the Rights of the Child, as well as Canadian legislation.

Child Welfare

The inadequacies of Canada's approach to First Nations child welfare has recently garnered media attention, in part due to an ongoing complaint before the Canadian Human Rights Tribunal, filed by the AFN and the First Nations Child and Family Caring Society (FNCFCS). The complaint, initiated in 2007, alleges that Canada's failure to provide equitable and culturally based child welfare services to First Nations children on-reserve amounts to discrimination on the basis of race and ethnic origin contrary to section 5 of the Canadian Human Rights Act, RCS 1985, c H-6. After spending a reported $3 million fighting to keep the case from the reaching the Canadian Human Rights Tribunal, the Commissioners recently found that Canada failed to disclose roughly 50,000 of relevant documents, calling these actions "far from irreproachable."[25] The case is ongoing and is expected to wrap up in early 2014.

Child welfare policies and programs continue to fail First Nations children and communities to staggering and long-lasting consequences. Constitutionally, the federal government is responsible for "Indians and lands reserved for the Indians" (Constitution Act, 1867, Section 91.24), including on-reserve social and health services, while the provinces provide off-reserve services for all Canadians. Currently, there is no mechanism to ensure funding parity between provincial and federal child welfare services. Some First Nations child and family services receive up to 22% less per child than their provincial counterparts.

For decades, First Nations children have been over-represented in the child welfare system and are now more than three times likely to be in care. There are three times as many First Nations children in the care of child welfare agencies than there were in

[25] 2013 CHRT 16, page 18.

attendance at the height of the Residential School era.[26] As the horrors of Residential School experiences come to light, as well as growing recognition of the harms of the Sixties Scoop[27], the need for child welfare solutions that keep First Nations children within First Nations households is becoming apparent. The spiritual and cultural wellbeing of First Nations children are best served within a First Nations environment. However, First Nations children continue to be removed from their families and communities at an alarming rate. For example, the federal government's own data found that out-of-home placements for First Nations children on reserve increased an astounding 71.5% between 1995 and 2001.[28] In order to avoid replicating the mistakes of our colonial history, First Nations must have the authority and capability to administer child welfare systems based on our unique worldviews in the best interest of our own children.

Very clearly, there is a need to ensure First Nations children are provided safe and healthy homes. The Canadian Incidence Study of Reported Child Abuse and Neglect (CIS): Final Report (2005) reports that the primary reason why First Nations children come into care is "neglect". The social determinants of health model highlights the unassailable link between poverty, poor housing conditions, low educational attainment and high instances of alcohol and substance abuse. Without considerable family supports and community program investments, parents do not have the supports they need to address family challenges and to prevent their children from being placed in care. Policy responses, therefore, must be capable of addressing and supporting the full scale of social determinants of both individual and community wellbeing; this must include sufficient infrastructure investments in First Nations communities, robust health services (including mental health), employment programs, meaningful access to culture and the land, traditional economies, justice and culturally appropriate policing.

[26] First Nations Child and Family Caring Society of Canada, Wen'de: We are Coming to the Light of Day (2005), pg.8.
[27] This term refers to the practice, common from the 1960s to the late 1980s, where high numbers of First Nations children were fostered or adopted into non-First Nations households.
[28] McKenzie, B. (2002) Block Funding Child Maintenance in First Nations Child and Family Services: A Policy Review. Winnipeg: Kahnawwake Shakotiia'takenhas Community Services.

Jordan's Principle

As mentioned previously, the federal government is responsible for "Indians and lands reserved for the Indians" (Constitution Act, 1867, Section 91.24), including on-reserve social and health services, while the provinces provide off-reserve services for all Canadians. Unfortunately, in practice, this jurisdictional divide does not provide clear answers when it comes to the provision of health services for First Nations people, particularly those residing on-reserve. The result is that First Nations people are often left without vital services, services that would be available to non-First Nations Canadians, while jurisdictions argue over who is responsible to cover the costs.

One high profile example of the true costs of these jurisdictional disputes is the case of Jordan River Anderson from the Norway House Cree Nation in Manitoba. Jordan spent the first part of his life in a Winnipeg hospital suffering from a rare neuromuscular disorder. At two years of age, doctors attempted to send him to a medical foster home closer to his home community; however, federal and provincial officials argued over who should pay for his care, including items as minor as specialized bathing equipment. Tragically, Jordan died at age five having never lived a day outside of the hospital.

This failure on the part of both federal and provincial governments led to the development of "Jordan's Principle". Jordan's Principle is a mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of First Nations status. It states that the government department first contacted for a service readily available off-reserve must pay for it while pursuing repayment of expenses, and that jurisdictional disputes, whether they are between departments or between levels of government, must not impede the provision of health care services to First Nations. The House of Commons unanimously adopted this principle in Private Members Motion 296 on December 12, 2007.

Since that time, the Canadian government has shown very little effort in meeting its obligations under Jordan's Principle. In fact, in April of 2013, a Federal Court ruled that the federal government, bound by Jordan's Principle, must reimburse the cost of care for Pictou Landing First Nation member, Jeremy Meewasige, who lives with numerous complex disabilities requiring 24 hour care. In the decision, federal court Justice Leonard Mandamin ruled that "Jordan's Principle is not to be narrowly interpreted." Unfortunately, in May of this year, Canada announced its intention to appeal the decision.

RECOMMENDATIONS:

1. That the federal government fund First Nations child welfare to, at minimum, the same level as their provincial counterparts;
2. That federal supports for First Nations child welfare be sufficiently flexible to allow for First Nations directed and managed solutions and policies;
3. That the federal government increase investment in all areas of the social determinants of health in order to mitigate the need for child welfare services in the first instance.
4. That Canada and the jurisdictions, with full involvement of First Nations, fully implement Jordan's Principle in the broadest possible terms.

ECONOMIC PARTICIPATION, EMPLOYMENT & TRAINING

Article 20 (1) of the UNDRIP states: 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 activity.

CONTEXT

First Nations are pursuing a vision of sustainable economic and trade self-sufficiency achieved by ensuring investments in stable community infrastructure, opportunities for resource revenue options, human resources, First Nation-led economic programs, services and incentives, and effective economic partnerships. By being active participants in economic development, we can better ensure First Nation economies thrive, creating wealth and jobs and supporting our people to have an active role in shaping the national economy. First Nations are taking a leadership role as Indigenous peoples to balance development, opportunities for the green economy, conservation and environmental protection.

The path to prosperity and productivity continues to run through First Nations territories, the original stewards of the land. With increased legal recognition, and an unrelenting resilience, First Nations' re-emerging economic confidence helps shape the Canadian economy. There is a new opportunity to foster the self-reliance of local economies for the long-term. First Nations insist on respect for the land, sustainability, economic policy that includes the future of First Nations, and a fair share of the benefits of development. First Nations must be full participants and drivers of new sustainable and responsible economic opportunity. First Nations are pursuing a path forward supporting the prosperity for First Nations – and for Canada.

To support First Nations in pursuing economic growth and trade development opportunities, the AFN has begun to examine potential for, and impacts related to, some trade relationships more closely. In addition to identifying the need to advocate consideration of First Nation interests in federal trade initiatives with other global economies. In order to support this work, and in line with direction provided from resolution 02/2010, AFN has begun a review of trade initiatives that were undertaken by the federal government. AFN has also reviewed and taken an inventory of the different types of support that exist federally for the business community at-large; participated in

a trade mission; examined opportunities for trade education; and outlined possible discussion topics for a national forum focused on First Nations, trade and commerce. AFN is also seeking First Nations communities and First Nations businesses assessments of trade arrangements with businesses from other parts of the world.

First Nations are not anti-development but any development must be at their direction, responsible, sustainable and for mutual benefit. Every single major company and industry in this country does business with First Nations. From mining and energy, to tourism and transportation, First Nations can be participants, partners, and owners. From catering to security to environmental protections services, there are literally dozens of spin-off service businesses that are First Nation owned and operated.

We need investment in the young people and First Nations education and skills training. The young people are the future entrepreneurs and business owners who will generate prosperity for them, their communities, and all of Canada. As the youngest and fastest growing population in the country, there is great potential among our peoples and communities. The First Nation population growth rate is over 25% (6% for general population), and over half of our population is under 25 years of age.

Investments in First Nation people through education, skills training and employment opportunities will ensure First Nation participation in the economy and close the skills and education gap between First Nations and the rest of the population. Research shows that closing this gap will generate $400 billion within a generation and save Canada $115 billion in social costs.

RECOMMENDATIONS

1. Full commitment to negotiation frameworks inclusive of First Nation governments, provinces and territories to ensure First Nations benefit from any and all development and resource extraction in their territories and that such development is done with their full engagement and approval of their citizens.
2. Respect for First Nation priorities regarding the use of and access to their territories and binding arrangements that protect the rights of First Nations to balance economic and environmental interests.
3. Canada needs to work with First Nation governments to implement a comprehensive set of measures to eliminate the economic gap between First Nation citizens on and off reserve and non-Indigenous Canadians, including support First Nation employment, training, labour force and human resources development needs.
4. Creation of a First Nations Economic Strategy, that builds on existing First Nation-developed frameworks, to support community's efforts towards nation building, economic infrastructure, training and skills development, connectivity, resource development and sharing responsive to local and regional development priorities.
5. Implementation of a framework that respects Indigenous and Treaty rights and enables First Nation governments to effectively support their economies.
6. Clear respect and fulfillment of First Nations rights to tax exemption.

FIRST NATIONS HEALTH

Article 23 of the UNDRIP states: Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

BACKGROUND

Health care for First Nations continues to be a complex and diverse issue. It is clear that the constitutional responsibility and Treaty obligation for First Nations health rests with the federal government. However, provinces and territories (PT) play an integral role in the health outcomes of First Nations people both on and off reserve.

Federal health services are often not well coordinated and funding gaps exist within the different funding components. Siloed approaches to the funding and the Federal Governments assimilation policies make flexibility and adapting to emerging issues almost impossible. Socio-economic determinants such as poverty (lack of employment and lower income) and inadequate housing contribute to First Nations inability to improve health status.

CURRENT CONTEXT

Overall, health outcomes of First Nations lag far behind the non-Aboriginal population. It has long been the goal of the AFN to close the gap in health outcomes between the general Canadian population and First Nations. This objective is to be shared by Health Canada, as demonstrated by the express mandate to “address health barriers, disease threats, and attain health levels comparable to other Canadians.” While we clearly share similar objectives, the fact remains that First Nations people continue to suffer disproportionately with poor health, both mentally and physically. For example, it is well known that people suffering with addictions or mental health issues are more likely to find themselves within PT justice systems and although suicide rates vary considerably between First Nations communities, the First Nations youth suicide rate is approximately 5-7 times higher than that of the general Canadian youth population.

As it stands today, when compared with the Canadian public, First Nations populations face much higher rates of chronic and communicable diseases such as diabetes, cancer, heart disease, tuberculosis and HIV/AIDS and they are exposed to greater health risks associated with, but not limited to, jurisdictional barriers to accessing health services, poor housing, poverty, contaminated water, higher rates of smoking and exposure to second-hand smoke, higher rates of alcohol and drug abuse, obesity, violence, limited access to appropriate health services (eg., remote location and isolation of many communities), discrimination and limited access to healthy foods and employment opportunities.

Even with these alarming statistics, First Nations programs face a challenging fiscal reality. Since 1996, federal funding for First Nations core programming have not kept up with the rate of growth, creating substantial pressures on First Nations health delivery systems and the essential services provided under the Non-Insured Health Benefits (NIHB) program. The AFN has reiterated the urgent need for immediate new and sufficient investments for the NIHB program to address the mounting health crisis in First Nations communities.

As with most programs that support First Nations communities, NIHB health services exist without a legislative base or governing framework. Instead, the government maintains the position that health care is provided to First Nations as a matter of policy and not a legal obligation. With no regulatory base in place supporting programs in important areas of healthcare standards or facility standards, etc… and on the basis of recurrent policy changes, health services provided under NIHB are not always well defined and there exists persistent confusion about federal responsibility for funding them adequately.

Furthermore, it is estimated that an additional $572 million in 2013-2014, and $805 million over the next five years would be required to meet the existing shortfall, as well as anticipated demands for new registrants. The AFN has also reiterated the need the Government to review current approaches and programs to address all the aforementioned gaps and to address the high associated federal administration costs.

Nearly a generation has passed since the release of the ground-breaking Royal Commission on Aboriginal Peoples (RCAP) report in 1996. One of RCAP's key recommendations is that, "governments and organizations collaborate in carrying out a comprehensive action plan on Aboriginal health and social conditions." This recommendation remains largely unfulfilled. We must all work together to ensure that another generation does not pass without a meaningful and fundamental improvement

to First Nations health. The First Nations vision is to have a First Nations controlled and sustainable health system that adopts a holistic, comprehensive and culturally appropriate approach. This vision includes access, services and benefits to all First Nations people, regardless of where they live. It is the goal of all persons working to address First Nations health that communities will regain or improve their wellness and individuals will live healthy, empowered lives. Efforts to achieve this health system will span a spectrum of activities from realigning the system, to wellness and disease prevention, ensuring that First Nations have an equitable provision of health services, and establishing a recognized First Nations jurisdiction in health services supported by sustainable funding.

To attain this, First Nations leadership must work towards developing PT and federal partnership agreements that require parties to be committed to addressing the issue of reducing the First Nations health inequity in Canada and responding to the First Nations health disparities and consequences of prior implementation mechanisms onto First Nations and their communities.

Achieving the vision of a First Nations controlled health system is premised on two fundamental concepts:

- **Sustainability** requires funding matched to population growth, health needs, and real cost drivers, as well as effective measurements to monitor and track spending. This will ensure that funding results in real improvement in First Nations health outcomes. Ultimately, sustainability will only be achieved as progress is made to establish First Nations control, management, and delivery of health systems.
- **Integration** is essential to overcome the myriad of health programming at federal, provincial and municipal levels that creates devastating gaps in First Nations health. Empowered First Nations will integrate health services and programs across jurisdictions to create a new holistic framework of First Nations health system renewal.

Improving the health of First Nations is based on improving access, quality and sustainability of health services; adhering to a vision of health as part of a seamless continuum of care which links all health programs and services across all jurisdictions; and, improving First Nations control over health care and reciprocal accountability between the federal government and First Nations.

RECOMMENDATIONS:

1. Consistent with inherent, Treaty and Aboriginal Rights defined in section 35 of the *Canadian Constitution,* programs aimed at improving the health outcomes of First Nations must include First Nations. They must be community-based and community designed, with a strong understanding that no two communities are alike.
2. The Government of Canada, as well as other relevant bodies must recognize First Nations governance and address the critical gaps in First Nations health, through *advancing* First Nations systems that are culturally appropriate and effective; *delivering s*ustainable, fair and equitable funding for First Nations health services; and *improving* coordination and effective intergovernmental cooperation and partnership.
3. Improving health care for First Nations must place culture as a core component throughout all programs and policies.
4. There is also the need for sustainability of resources that are matched to population growth, health needs, real cost drivers, on improving access, quality and sustainability of health services regardless of residence; adhering to a vision of health that adopts a holistic and culturally appropriate approach as part of a seamless continuum of care which links all health programs and services across all jurisdictions; addressing all social determinants of health, improving First Nations control over health care; reciprocal accountability between the federal government and First Nations; as well as effective measurements to monitor and track spending.

JUSTICE & COMMUNITY SAFETY

Article 22(2) States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

CONTEXT

First Nations people are the most marginalized and dispossessed people in Canada, and are subject to persistent individual, institutional and legislative discrimination. Statistics Canada found that 35 percent of Indigenous peoples had been the victim of at least one crime in a one year period as compared to 26 percent of non-Indigenous people. Indigenous peoples were also likely to be victimized more often and experienced violent crime at a rate three times greater than national averages.

In addition to the fact that First Nation peoples face a lack of justice as a collective, First Nation individuals also face personal injustices and oppression at the hands of the criminal justice system. First Nation individuals have a far greater probability of being charged and a greater likelihood of appearing in court, facing jail time and being detained for longer than non-Indigenous offenders.

The circumstances of First Nation offenders remain different from those of most Canadians, as a consequence of ongoing, intergenerational impacts of the residential school system, the Sixties Scoop and damage to identity, culture and language, and current socio-economic conditions. In R. v. Gladue, the Supreme Court of Canada instructed sentencing judges to consider other systemic issues faced by Indigenous offenders, including social and economic conditions and the legacy of dispossession and colonization faced by Indigenous peoples. The Supreme Court also established that Indigenous offenders should, in certain cases, be treated differently from other offenders. Section 718.2(e) directs sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. In recent developments, federal amendments to the Criminal Code (Bill C-10) and the requirement of mandatory

minimums removed the ability of conditional sentencing and negate the application of Section 718.2(e) and further discriminate against First Nation peoples.

First Nations require greater control and authority in resolving conflict matters within their communities. Some positive and promising arrangements exist under self-government and other agreements. These arrangements provide First Nations with greater control to decide upon appropriate processes and remedies for conflict resolution. First Nation self-determination includes the right to a separate First Nation justice system – laws, institutions and supportive processes – based wholly upon First Nation values, philosophies, customs, and traditions.

First Nations people are in some ways are under-policed in terms of situations where the police choose not to act even where there is evidence that crimes have been committed against First Nation people.

First Nation communities do not have comparable levels of policing to other communities. First Nation Policing services continue to lack status as essential services, with funding allocated on a discretionary basis and, as such, at risk of reduction in the face of other federal priorities. This puts our communities and citizens at continued risk.

The Assembly of First Nations (AFN) is mandated through resolutions to pursue changes within the justice system to respond to the needs of First Nation peoples, and advocate for the return of control to First Nation communities, so that they may determine their own destinies. First Nations have Inherent and Treaty rights to govern themselves according to their own laws, enforcement and dispute resolution processes. However, these rights have been interfered with through the imposition of non-Indigenous governance and legal systems. As a result, First Nation citizens face many challenges related to the Canadian justice institutions.

Ending Violence against Indigenous Women and Girls

It is estimated that over 582 Indigenous women are currently missing across Canada. Canadian police and public officials have long been aware of a pattern of racist violence against Indigenous women and have done little to prevent it. While attitudes towards missing Indigenous women are changing, the number of missing women continues to increase. First Nations have called for concerned legislation or regulations to compel law enforcement officials to properly investigate crimes against First Nation peoples.

In 2008, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) gave a 2008 directive to Canada to “examine the reasons for the

failure to investigate cases of missing or murdered Aboriginal women and to take the necessary steps to remedy the deficiencies in the system [and] carry out an analysis of those cases in order to determine whether there is a racialized pattern to the disappearances and take measures to address the problem if that is the case."

There has not been action on this recommendation and Canada continues to ignore the broader factors that place Indigenous women and girls at greater risk of violence. There has been a chronic lack of adequate and sustainable resources to provide long term solutions for community based initiatives to create safer and healthier First Nation communities. The escalation of violence against Indigenous women and girls continues and this is clear evidence of the failure of the criminal justice system to adequately respond to this national tragedy.

There is an immediate and pressing need to seek justice for Indigenous women and girls in Canada and ensure that they have the same opportunities to fully enjoy their rights, regardless of where they reside. The Canadian Human Rights Commission has reported that young Indigenous women are five times more likely than other Canadian women to die as a result of violence. The numbers of missing and murdered Indigenous women are staggering and increasing every year. The Native Women's Association of Canada (NWAC) estimates that roughly 600 Indigenous women and girls in Canada have gone missing or have been murdered over the last two decades. The majority of these cases remain unsolved. Community based workers estimate that these numbers are up to four times higher. In addressing violence against Indigenous women, AFN seeks to broaden awareness from a focus on domestic and family related violence to examine broader, societal forces and state violence which have placed Indigenous women at greater risk.

Given the unacceptable levels of violence against Indigenous women and girls, AFN is committed to action and pressing for an effective strategy which must include full commitment and participation from all levels of government including First Nations, civil society and both Indigenous and non-indigenous people. Our actions must be able to ensure justice for women and girls who are or have been victims of violence, make changes to laws and policies that allow these problems to persist, ensure the availability of adequate support services and generate a fundamental societal shift that will no longer allow epidemic levels of violence against Indigenous women and girls to continue.

National Public Commission of Inquiry on Violence against Indigenous Women and Girls

The AFN, NWAC, First Nations, Indigenous women's organizations and families of murdered and missing Indigenous women have been long advocating for a Royal Commission or National Public Inquiry on Violence Against Indigenous Women and Girls, including the circumstances around those that have been murdered or are missing. Support for a National Public Commission of Inquiry has been growing and social justice organizations, church groups and international human rights bodies have lent their voices to this call. In April 2013, Ministers of Aboriginal Affairs also agreed to call upon the federal government to initiate a National Public Inquiry.

A National Public Commission of Inquiry is critical for accountability and to create change. However, without a strong and actionable national strategy and plan for implementation, change will continue to be delayed. In order to compel concerted actions and efforts, a National Action Plan is urgently required. Such a Commission could ensure an open and transparent examination of socio-economic, political and historical factors and their current manifestation within the child welfare, justice and corrections systems that lead to increased vulnerability; examine police practices and protocols with regards to investigations in incidences where Indigenous women are reported missing, communications with families and among and between jurisdictions; examine and build on the substantial – and often unimplemented – recommendations made in previous commissions, inquiries, reports and task forces (such as the Royal Commission on Aboriginal Peoples, Manitoba Justice Inquiry , National Aboriginal Women's Summits, etc.) with a focus on identifying critical barriers to their implementation and strategies to overcome these; examine experiences, supports and strategies in urban centres; provide special focus on the North and the unique perspectives and experiences of Northern First Nations and Inuit communities; review innovative practices and community-based supports in preventing violence and achieving reconciliation; and, increase public awareness and understanding of the impacts and underlying causes of violence.

On February 14, 2013, Parliament voted to create a Special Committee on Violence Against Indigenous Women (IWFA) that will conduct an investigation into the high incidences of violence, identify root causes and provide recommendations for solutions. Initially, the committee had one year to complete its study and table a report. However, with the prorogation of Parliament which means the dissolution of the IWFA this mandate has been cut drastically short.

Canada has tabled its response to the second cycle Universal Period Review of the United Nations Human Rights Council, where all recommendations to develop a National Action Plan to End Violence, to call a National Public Commission of Inquiry, and to ensure accurate data collection on incidences of missing and murdered Indigenous women and girls were rejected. This raises serious questions about this government's intentions to implement recommendations of the Special Committee, and to broader work on ending violence.

Criminal Justice and Corrections

Violence is not only seen in the context of victimization of Indigenous persons, but it is also part of a cycle that is perpetuated by their current unacceptable overrepresentation in the correctional system. Between 2001-2002 and 2011-2012, the incarcerated Aboriginal population has increased 37.3%, with an increase in the incarcerated female Aboriginal population of 109%, according to the Correctional Investigator of Canada. At the provincial or territorial levels, we see even higher levels of Aboriginal over-incarceration. In 2010-11, 27% of adults in provincial and territorial custody were Aboriginal, a rate which is six to seven times higher than their proportion of the total adult Canadian population. This alarming trend is particularly pronounced for First Nation women. In 2012, Public Safety Canada released the report "Marginalized: The Aboriginal Women's experience in Federal Corrections", which stated that while Aboriginal people account for just four per cent of the Canadian population, one in three females in the federal correctional system is Aboriginal. In addition, over the last 10 years, the representation of Aboriginal women in the prison system has increased by nearly 90 per cent, making them the fastest-growing offender group.

In Canada, the policies, programs and practices of the correctional system have produced differential outcomes for First Nation offenders. Over-incarceration and greater levels of involvement with the criminal justice system as both victims and offenders continue harm against First Nation individuals, families and communities. A number of inquiries, such as the Aboriginal Justice Inquiry of Manitoba, acknowledge that police profiling and institutional racism contribute to First Nation over-representation in prisons.

The circumstances of First Nation offenders are different than most Canadians – not only are they overrepresented in the criminal justice and corrections system, First Nation crime is almost always tied to substance abuse, intergenerational abuse arising from residential schools, the "Sixties Scoop", low levels of education, lack of employment opportunities, poverty and family issues. The First Nation and Aboriginal

offender population is younger, more susceptible to persuasion, related to substance abuse, increasingly gang affiliated and more frequently suffering fetal alcohol syndrome. Bill C-10: Safe Streets and Communities Act which came into effect in 2012 is omnibus legislation that combines nine bills from the previous parliament and includes changes to the Youth Criminal Justice Act and the requirement of mandatory minimum sentences for drug offences. First Nations have expressed numerous concerns with an approach that uses expensive and punitive jail measures as this disproportionally impacts First Nation citizens as they are already overrepresented in the corrections system, and will not address underlying issues that lead to involvement with the justice system. AFN has opposed this Bill and noted that it limits the discretion of judges. In R. v. Gladue, the Supreme Court of Canada instructed sentencing judges to consider other systemic issues faced by Aboriginal offenders, including social and economic conditions and the legacy of dispossession and colonization faced by Aboriginal peoples. In Gladue the Supreme Court also established that Aboriginal offenders should, in certain cases, be treated differently from other offenders.

In fact, the Federal Government's "Tough on Crime Agenda" does nothing to ameliorate the disproportionate rates at which Aboriginal peoples are incarcerated – quite the opposite, in terms of Aboriginal peoples' over-representation within the justice system, the federal government's agenda will only serve to further increase the numbers and worsen the already staggering injustice experienced by Aboriginal peoples as a whole.
Many First Nations have urged the federal and provincial governments to provide financial support to First Nation communities to develop crime prevention programs. First Nation communities support the use of sentencing circles and other alternative dispute resolution processes that are more holistic, promote healing and restore cohesiveness in the community when dealing with offenders. Many First Nations continue to encourage the use of alternatives sentencing process and deplore the use of imprisonment. First Nation communities support the use of sentencing circles and other alternative dispute resolution processes that are more holistic, promote healing and restore cohesiveness in the community when dealing with offenders.

First Nations Policing

First Nation police services play an important public safety role in our communities. Unfortunately First Nation police services are not afforded the same respect or recognition as mainstream police services as they are under-funded on a year to year basis and are designated as enhancement to either provincial police services or the RCMP as opposed to essential police services. Despite the evolution of First Nation police services over the years, the First Nations Policing Policy (FNPP) has not been updated to address chronic under-funding or the legal designation of our police

services. A more sustained effort is required by federal and provincial governments including the RCMP to continue building working relationships nationally and regionally to address the current gaps in First Nation policing i.e. chronic under funding and legal designation, which in turn would lead to safer and security communities and families. The current federal FNPP has systematically put First Nation police services into a crisis state. RCMP evaluations with key stakeholders clearly indicate that First Nations need an equitable level of funding as well as culturally appropriate responses.

The Assembly of First Nations has a number of resolutions calling for a renewed federal framework for First Nations Policing as well as a new funding model that supports capital, infrastructure, officer recruitment and retention, officer support systems, training and development, and the purchase and replacement cost of equipment and technology. On March 4, 2013, federal Minister of Public Safety Vic Toews announced a five-year renewal of the federal First Nation Policing Program, providing for the first time predictable and stable funding for First Nations policing. However, the current policy approach to First Nations policing fails to meet the needs of First Nation Police Services across Canada and its out-dated assumptions place the safety of First Nations communities at risk. AFN will continue to support new innovative approaches driven by First Nation leadership and based on the specific priorities of each First Nation Police Service. We will strongly advocate for a new framework to fund and standardize First Nation police services to ensure the public safety needs of each community is met.

RECOMMENDATIONS

1. That Canada provide support for the development of First Nations community action plans for improved safety and security for First Nations citizens – particularly women and girls – and provide on-going support to the families of the murdered and missing women.
2. That Canada create a National Public Commission of Inquiry on Violence Against Indigenous Women and Girls to conduct specific inquiry on the cases of murdered and missing and make concrete and specific recommendations to end and address violence against Indigenous girls and women.
3. That Canada provide sustainable support and enhancement to community justice programming.
4. That Canada review the impact of Bill C-10 on First Nation peoples and focus on established sentencing principles from the Supreme Court of Canada.
5. That Canada stabilize and enhance funding of First Nation Police services and immediately classify First Nation Police Services as essential services.
6. That the RCMP improve communication and protocols with communities and families.
7. That Correctional Service Canada immediately address and improve the treatment of Indigenous prisoners.
8. That all governments undertake a joint comprehensive review of the criminal and family justice systems, with an aim to identify key areas for change and develop action plans to address these.
9. That Canada support capacity-building and research for First Nations to develop and reinstitute their own “systems”, inclusive of their traditions, philosophies, and culture, with the aim of implementing First Nation justice institutions, courts, sentencing and dispute resolution mechanisms.
10. That all governments create mechanisms to ensure that Indigenous women and girls have a role in decision-making and policy/strategy development.

WATER, HOUSING, AND INFRASTRUCTURE

BACKGROUND

Safe and reliable community infrastructure and housing are central priorities for First Nations as they are critical to supporting human capital and the overall health, educational achievement and economic participation of First Nation citizens. However, many First Nation communities lack essential capital, clean water and adequate housing.

Strong and sustainable community infrastructure supports all aspects of individual and collective health. However, due to factors such as chronic underfunding caused by the 2% cap on First Nations programs instituted in 1996, extreme climate challenges, and catastrophic natural events such as flooding and fires, many First Nations cannot provide stable infrastructure in their communities. Building Futures, a study commissioned by the federal government and released in 2006, identified a $15.2B to $25.6 billion need for First Nations major assets in the 15 years following the release of the report.

Water and Wastewater

Canada's First Nations basic community infrastructure needs lag far behind that of comparable communities' off-reserve. A clear example of this is in the area of drinking water and wastewater treatment. Currently there are 122 First Nation communities with Drinking Water Advisories including four Do Not Consume Advisories. Many of these DWAs have been in effect for more than one year, some for over ten years.

The root cause as identified in a 2006 report "Report of the Expert Panel on Safe Drinking Water for First Nations" is the Government of Canada's Federal policy for the general standard of living on reserves was laid down in 1977, in a memorandum to Cabinet that proposed an expanded infrastructure program for reserves. At the core of its strategy was the intent "to provide Indian homes and communities with the physical infrastructure that meets commonly accepted health and safety standards, is similar to that available in neighbouring, non-Indian communities or comparable locations, and is operated and maintained according to sound management practices. Subsequent Cabinet decisions, and the actions of ministers and public servants, have been shaped by acceptance of this strategy. The federal government has never provided enough

funding to First Nations to ensure that the quantity and quality of their water systems was comparable to that of off-reserve communities.

The National Engineering Assessment released by the Federal Government in July 2011 concluded that 73 percent of First Nation water systems have major deficiencies and pose a high and medium risk to the quality of water. These deficiencies may lead to potential health and safety or environmental concerns. The assessment identified a need of $4.7 billion for water and wastewater over the next ten years. Annually this works out to $470 million but recent federal budgets have provided only $165 million annually, less than half of what the Government's own report recommended.

The federal government's response to these unacceptable conditions was to introduce legislation – which has now passed into law (Bill S-8: Safe Drinking Water for First Nations) -- that would give authority to the government to develop water and wastewater regulations to apply on First Nations. This law does not recognize the inherent jurisdiction of First Nations over their lands and resources and creates new regulations and standards without providing First Nations with the resources to meet those new standards. In addition, there is no commitment to provide certainty of adequate engagement and involvement of First Nations in the development of regulations.

In the development of this enabling legislation the government did not adequately consult nor accommodate First Nation governments. Engagement sessions on a regulatory regime were carried out based on the parameters identified in the aforementioned Expert Panel report on Safe Drinking Water for First Nations.

The *Safe Drinking Water for First Nations Act* does not provide any resources to implement or support regulations and standards that the Act would enable. The enforcement of these regulations puts First Nations at risk, as they will not have the capacity, training, and infrastructure to provide safe drinking water to their citizens. Within the Act the government has made provision to absolve itself from any liability from any acts or omissions involving the legislation. This is a clear neglect of its fiduciary responsibilities owing by the Crown in right of Canada to First Nations.

Finally, the government has included a non-derogation clause with conditions that effectively renders it a derogation clause. This practice of limiting the effect of a non-derogation clause has become a concern as it appears to be a conscious effort to include this language in other legislation.

First Nations are not opposed to regulations and the protection that they afford to the public but without the necessary resources support them puts First Nations in jeopardy.

Bill S-8 continues a pattern of unilaterally imposed legislation and does not meet the standards of joint development and clear recognition of First Nation jurisdiction. The engagement of some First Nations and the modest changes made to the Bill do not respond to the commitment to mutual respect and partnership affirmed in the UNDRIP.

In 2011, Winnipeg Free Press, a newspaper produced a series of investigative articles centering on several First Nation communities in Northern Manitoba. These news articles presented to the world the deplorable living conditions many First Nations have to live with. Homes without running water and sanitation provide by slop pails. In an advanced country like Canada there is no excuse for this except that being First Nations gets you less attention. In a way, the UN Millennium Development goal Target 7.C: "to halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation" applies to our communities. Despite progress, 2.5 billion in developing countries still lack access to improved sanitation facilities. In 2011, 768 million people remained without access to an improved source of drinking water. Many First Nations members can be counted in these numbers.

Chiefs have consistently called for the protection of the Aboriginal and Treaty right to water. The management of water resources, wastewater treatment and the protection of source water is a right that First Nations have not relinquished. In addition, access to clean drinking water is a universal human right, recently affirmed by the United Nations. Canada has a responsibility to ensure clean drinking water in First Nations communities.

Housing

The availability of safe, secure and affordable housing in First Nations communities across Canada is a decreasing at an alarming rate. The need for housing is increasing at levels that existing federal programs are not able to meet. In 2005, the Assembly of First Nations stated the need for 80,000 new units to capture the existing back-log in communities; in a more recent report, AANDC estimates that between "2010 – 2034 there is a need for 130,197 new units to accommodate household and family growth, 11,855 replacement units to accommodate the deteriorated stock, and the major renovation of between 8,261 and 10,861units."

Overcrowding is a serious problem in many communities with instances where multi generations are living within the same roof in a building that was designed for on family. Overcrowding exacerbates the prevalence of communicable disease such as tuberculosis. Lack of privacy and abuse are other real impacts of overcrowding. The average per unit occupancy is 4.8 for First Nations compared to 2.7 for the mainstream. But in fact in many communities this number can rise to over 8 or substantially higher. Inadequate housing affects learning outcomes and family health and inability to participate fully in economic opportunities.

Current federal programs such as Canada Mortgage and Housing Corporation's On-Reserve Social Housing Program (Section 95) has been significantly decreasing over the years; from a minimal 945 new units in 2008 to a disappointing planned construction of 465 units in 2013. Social Housing operating agreements are expiring, which means those living in social subsidized units will not be able to afford rent, as the occupants will be required to pay market rent and not rent geared to income. Further, between the years of 2013 and 2018, due to expired operating agreements, First Nation communities will lose subsidies on 9,580 Social Housing units (Section 95), while only 2,075 new subsidized units will be created. This could potentially displace 7,505 families, forcing them to seek affordable housing elsewhere or become homeless.

In 2007, the federal government announced the creation of the First Nations Market Housing Fund (FNMHF) in the amount of $300 million; in essence, a "fund" that would provide backstopping to First Nations so their members could access housing loans to create homeownership units. Since its inception the estimation of its reach to create 25,000 new units has failed, as only 52 loans have been accessed of which 46 are new constructed units or renovated. . The FNMHF also has a Capacity Development Program which provides funding for First Nation communities that meet or are close to meeting the Fund's criteria for the Credit Enhancement Facility.

With Canada being the only G8 country to not have a National Housing Strategy; First Nation leaders have come together to demand the creation of a National First Nations Housing Strategy, which will help focus efforts on improving housing conditions and filling the continuum of need for those First Nations members residing on-reserve. This action is in response to the federal government's disregard of the deplorable conditions and numerous requests for inclusion in policy development and program creations to address First Nations Housing throughout the continuum of need.

Throughout the years the federal government has devised attempts to address either social housing or homeownership. The attempts have been to manipulate a program created for off reserve to adapt for on-reserve. First Nations need grassroots housing solutions, ones created by First Nations for First Nations, by individuals who have lived and realized the challenges and unique identities which create such a diverse community. Thriving communities are not comprised of sole tenure such as homeownership or social housing. Healthy communities stem from a healthy home, a healthy family grows to contribute to economy, and that healthy family must reside in a safe secure and affordable housing tenure.

As supported by Articles 21 and 23 of UNDRIP, First Nations must be supported in developing housing solutions that meet their particular needs. It is not acceptable that the Indigenous peoples in Canada should be living in overcrowded and inadequate homes and in several communities in third world conditions.

In the report of the Special Rapporteur on the mission to Canada in 2007 on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari submitted 111 recommendations. In particular Recommendation 96 states “Canada should adopt a national strategy on affordable housing that engages all levels of government including Aboriginal governments, Aboriginal people, civil society and the private sector. The strategy will require permanent and adequate funding and legislation set within a rights-based framework.” Canada has yet to develop a National Strategy on Housing.

Community Infrastructure

Another factor that has limited First Nations ability to keep up with managing their assets and respond to the growing demands for basic community infrastructure, is in 1995, the Federal government imposed a 2% cap on increase for First Nation program funding. This has placed support for community growth at a virtual standstill as the consumer price index has remained about 2% since then (2.2 in 1995 and 1.5 in 2012), in effect no growth from federal funding to First Nations. In an area where federal funding is crucial to maintenance and operation for community infrastructure, this has reduced the lifespan of these assets. In a comparable situation, Canada’s municipal infrastructure backlog in four asset categories the replacement cost of these assets alone totals $171.8 billion, nationally. First Nation’s backlog situation is much more acute and is exacerbated by the funding cap imposed in 1995. There is no current estimate what the total funding backlog is for First Nation critical community infrastructure.

First Nations in Canada have the highest population growth rate and the youth represent 50 % of the population under 25 year of age. This presents both an opportunity and a challenge. An opportunity in terms of being able to access the potential employment opportunities offered by such a large and potential base for labour supply. A challenge in that a large segment of the population that is not able to access proper schools for learning, inadequate housing with overcrowding, prevalent mold in many homes, and lack of proper sanitation facilities which are not conducive to learning.

RECOMMENDATIONS

1. That Canada support and assert First Nations rights to manage, protect, develop laws and regulations on water as guaranteed under Section 35, Canada Constitution 1982
2. That Canada work jointly with First Nation governments to clearly assess and catalogue actual needs in capital, water and wastewater systems and housing.
3. That Canada support First Nations in developing a rights-based National First Nation Housing Strategy, to support First Nation management and delivery of housing, with a focus on community-planning and supportive partnerships.
4. That Canada support First Nations in developing a National First Nation Water Strategy, with focus on water rights, watershed management and protection, and the management of water resources and proper treatment and disposal of wastewater as part of the health and protection of First Nation citizens and their access to safe and adequate supplies of potable water.
5. That Canada make immediate investments in sustainable housing, community infrastructure, including water, wastewater and source protection.
6. That Canada provide support for First Nations to meet and implement new wastewater effluent standards and related regulations and source water protection plans to ensure protection of water supplies in the future.
7. That Canada support the establishment of a First Nation Water Commission to support First Nation management of water systems.
8. That Canada support the development of public and private partnerships with First Nations to develop sustainable community capital and infrastructure and develop innovative alternative servicing options.
9. That Canada reform the Regulatory Environment to support First Nation provision of housing policies, codes, standards, by-laws and enforcement measures that frame how the operational control of housing takes place within any given First Nation.
10. That Canada ensure adequate and sustainable community infrastructure funding that reflects actual operation and maintenance costs and will enhance and protect long term investments.
11. That Canada support the establishment of national and/or regional First Nation ‘Centres of Excellence’ to support delivery and management of housing in First Nation communities.
12. That Canada implement funding and a procedure in order for First Nations to develop capacity and training, and enhance their resiliency in emergency management.

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