REVIEW OF ACCOUNTABILITY AND MUTUAL ACCOUNTABILITY FRAMEWORKS

FINAL REPORT

Submitted to:

Assembly of First Nations and
the Department of Indigenous and Northern Affairs Canada

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Institute on Governance
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EXECUTIVE SUMMARY

> *"First Nations traditional social systems were founded on the concept of reciprocal accountability – that each member of the community was accountable for their decisions and actions, and for their contributions to the community's wellness as a whole." (*BC First Nations Health Authority).[1]

This report has been compiled to inform the deliberations of the Assembly of First Nations (AFN) and Indigenous and Northern Affairs Canada (INAC) as they move towards transforming the fiscal relationship between First Nations and the Crown. It is submitted under the aegis of Technical Working Group #3, Mutual Accountability, which was tasked with proposing options for a mutual accountability framework that will demonstrate results to citizens, First Nations communities, governments, and Parliament.

The Institute on Governance (IOG), in consultation with the co-chairs of the Working Group, developed a framework to guide the research into funding agreements used by different levels of government, both in Canada and around the world. For this research, various accountability arrangements and agreements were examined, most notably:

- Land Claims/Modern Treaties
- Territorial Formula Financing
- International agreements and Treaties
- Block Funding
- Transfer Payments
- Municipal Transfer Payments
- Institutional Authorities.

While no arrangement assessed was truly reciprocal in terms of accountability, the agreements examined did provide examples of different approaches that build towards reciprocal accountability, and as such provided some value to inform this study.

The statements in this report reflect the findings and conclusions of the IOG and are intended to inform discussions of the Technical Working Groups moving forward.

The Evolution of Accountability in Canada

In this report, the evolving notions of accountability that exist in Canada and around the world are discussed and defined, and the shared principles that serve as the foundation for mutual or reciprocal accountability are laid out in brief. An overview of the historical evolution of Canada's system of fiscal federalism is also provided, detailing how governments have refined and streamlined fiscal arrangements in accordance with principles of accountability. The Canada Health and Social Transfers, Equalization, and Territorial Financing are all described, as well as the beginnings of the relationship between First Nations governments and the Canadian

federation. The general tenor of the shift from tightly centralized federalism to a more devolved, decentralized, multilevel model is traced in detail, as are the emergence of new partners and concerns in the various fiscal relationships governing the federation.

Current State of Fiscal Relationships

The report also details the current state of the fiscal relationship between First Nations and Canada, as well as a number of the most significant issues surrounding it today. These include: the shortcomings of the various funding vehicles used by INAC to support First Nations governments; the onerous reporting burden they place on First Nations; the narrow focus on outputs, rather than outcomes; and the lack of transparency around funding decisions. There is a movement underway towards reframing this accountability relationship away from a paternalistic, compliance-based model that most closely resembles an agent-principal relationship towards a more mutual, reciprocal model, based on a nation-to-nation, government-to-government relationship. The Institute on Governance found that while these moves are well intentioned, relationships between donors and recipients, or funders and beneficiaries, are intrinsically unequal, and the assumptions underlying the current relationship are inherently paternalistic.

Today, accountability of First Nations remains first to the federal government for funding and results, and not to their own citizens. Fundamental to any renewed fiscal relationship is the recognition that First Nations governments should be accountable first to their citizens, as are all levels of governments. Reciprocity or mutual accountability between the two levels of government requires this foundational change. Superficial adjustments to accountability systems will have little long-term impact without fundamental change to the foundations of the relationship between First Nations and the Crown. Stable, predictable government-to-government fiscal transfers along the same lines and principles as provincial, territorial, or municipal funding are needed to achieve true mutuality and reciprocal accountability.

It will be important to ensure First Nations have the capacity to support new funding and accountability arrangements. The aggregation of individual First Nations governments into new, larger entities through community-driven nation rebuilding could increase capacity to introduce new funding models and arrangements in order to support true nation-to-nation relations. Such aggregation and rebuilding could take place along treaty lines, along lines of culture or language, or along some other metric, depending on First Nations preference. Individual communities should be empowered to reconstitute and rebuild themselves into larger nations, with the reconstruction taking the form most desired by communities. Other methods for capacity building include direct investment in First Nations governments, particularly their financial management systems, structures and personnel, as well as enabling and improving institutional support mechanisms.

Institutional Supports

Institutional support is required to build the capacity of First Nations to support this transition, and the Indigenous institutions created under the *First Nations Fiscal Management Act* will be crucial in this regard. Potential new institutions may also be required, including a First Nations

Auditor General, data and statistical support, and a new Joint Body governing the reengineered relationship. While the role of this latter body is yet to be fully determined in detail, it would establish the management of the relationship independent of political leadership.

The report concludes with an overview of key questions to consider when examining accountability models in the current context of Indigenous people in Canada and their vision for self-reliance, self-actualization and self-determination. These questions are designed to assist the parties in: sharpening definitions of mutual/reciprocal accountability; operationalizing Indigenous and treaty rights and their associated fiduciary obligations; identifying key principles that are foundational to future reciprocal accountability arrangements; the conditions and criteria that need to be in place to introduce desired changes to the fiscal relationship; as well as what legislative change and new institutions will be required to oversee the required transformation and transition.

INTRODUCTION

In July 2016, the Minister of Indigenous and Northern Affairs Canada (INAC) signed a Memorandum of Understanding (MOU) with the Assembly of First Nations (AFN) National Chief. The MOU creates a Joint Committee on fiscal relationships and mandates it to "fully examine the current fiscal arrangement(s) and joint produce options, proposals and recommendations on:

- Options for replacing the 2% cap
- Options for closing socio-economic gaps
- Funding approaches and financial transfer mechanisms
- Engagement strategies for seeking First Nations' input and participation in developing new options for new fiscal relations and arrangements
- Other recommendations deemed important by both parties."

The MOU outlines the principles the two signatory organizations will follow in undertaking the technical reviews and in making recommendations to the Joint Committee by the end of December 2017. These are discussed further under the section "Shared Principles".

We understand that there are three working groups supporting the First Nations Fiscal Relations initiative under the INAC-AFN MOU:

- **Technical Working Group #1 - Sufficiency**: to propose approaches to address the 2% cap, re-base funding where needed and escalator options in order to ensure First Nations have access to comparable services and programs as other Canadians.

- T**echnical Working Group #2 - Predictability:** to propose new vehicles to ensure effective, timely and predictable access to funding in a manner comparable to similar programs and

services other Canadians enjoy. This includes advancement of policies and innovations on how funding and related terms and conditions will flow in a new fiscal relationship.

- **Technical Working Group #3 - Mutual Accountability:** Propose options for a mutual accountability framework that will demonstrate results to citizens / First Nations communities, governments and Parliament in closing socio-economic disparities and inequities. This includes appropriate possible metrics and indicators, as well as data sources to support them.

The Institute on Governance (IOG) was engaged by members of the AFN and INAC Working Group #3 to examine the evolution of accountability in Canada and options for the parties to examine ways of introducing new mutual accountability frameworks in order to support a renewed nation-to-nation relationship between Canada and Indigenous peoples based on the recognition of rights, co-operation and partnerships.

METHODOLOGY

The IOG worked with the project leads of the AFN and INAC to develop the methodology and the framework to support this research. The methodology followed in undertaking this research is outlined below.

Research Framework

The IOG developed a framework to guide research into what other levels of government (provinces/territories/municipalities) are doing in Canada to support shared and mutual accountability for the provision of essential programs and services similar to those delivered on reserves by the federal government.

Examination and Selection of Agreements for Review

Based on an initial meeting with the AFN and INAC Working Group Co-Chairs, the IOG developed a consolidated agenda, which included the identification of key areas to use in assessing each agreement. These areas included:

- Type of agreement used to transfer funds
- Funding formula
- Underlying principles that support the agreement
- Identification of any conditions attached to the transfers
- Type of accountability mechanisms used
- Performance measures and, if applicable, institutions used to monitor accountability and/or performance

- Dispute resolution mechanisms used. (**Note:** while these mechanisms were identified more research may be needed to understand how often these mechanisms have been used)
- Degree of transparencies

To determine which accountability agreements would be worth a thorough examination and analysis, the IOG first undertook an environmental scan of inter-jurisdictional transfer agreements and, in consultation with AFN and INAC Working Group Co-Chairs, the team decided to assess approximately 20 arrangements that had potential to offer insight into mutual/reciprocal accountability, or at least to suggest potential for its adaption to a Canadian nation-to-nation context.

Based on preliminary research on each of these agreements the IOG compiled the review of agreement findings into an individual template table based on the areas identified above. The tables were compared and analyzed in order to narrow the list down from twenty 'promising' agreements to the seven most substantive ones, in terms of providing scope, variance, comparative value, and insight into the state and best practices of current transfer agreement models. These selected agreements are:

- Land Claims/Modern Treaties
- Territorial Formula Financing
- International Agreements and Treaties
- Block Funding
- Transfer Payments
- Municipal Transfer Payments
- Institutional Authorities

These cases feature different types of agreements and different approaches to holding parties to account. While none of the agreements assessed are truly reciprocal in terms of accountability, they do offer different approaches toward the direction of mutual accountability, and as such provide some value for this study. The primary types of agreements reviewed are outlined below. A more detailed overview of the findings of the review of specific accountability agreements can be found in Annex A.

Overview of Types of Accountability Agreements Examined

Land Claims/Modern Treaties

Modern treaties represent nation-to-nation and government-to-government legal relationships between Indigenous signatories, the Government of Canada, and in some cases, a province or territory. They are intended to formalize, further define, and recognize the land and resource rights of the Indigenous signatory on their traditional territory, and to result in meaningful improvements to the social, cultural, political, and economic well-being of the Indigenous

people concerned. At the same time, these treaties provide all signatories with a mutually agreed-upon foundation for the beneficial and sustainable development and use of Indigenous peoples' traditional lands and resources.

Modern treaties address such matters as:

- Ownership and use of lands, waters and natural resources, including the subsurface;
- Management of land, waters, and natural resources, including fish and wildlife;
- Harvesting of fish and wildlife;
- Environmental protection and assessment;
- Economic development;
- Employment;
- Government contracting;
- Capital transfers;
- Royalties from resource development;
- Impact benefit agreements;
- Parks and conservation areas;
- Social and cultural enhancement;
- The continuing application of ordinary Aboriginal and other general programming and funds; and
- Self-government and public government arrangements.

When modern treaties are ratified, the treaty rights they contain are constitutionally recognized and protected, and the terms of these agreements take precedence over other laws and policies in Canada.[2]

INAC defines treaties as "solemn agreements" between the Crown and Indigenous peoples and offers some context into historical and modern treaties:

"The Government of Canada and the courts understand treaties between the Crown and Aboriginal people to be solemn agreements that set out promises, obligations and benefits for both parties."

"Starting in 1701, in what was to eventually become Canada, the British Crown entered into solemn treaties to encourage peaceful relations between First Nations and non-Aboriginal people. Over the next several centuries, treaties were signed to define, among other things, the respective rights of Aboriginal people and governments to use and enjoy lands that Aboriginal people traditionally occupied."

"Treaties include historic treaties made between 1701 and 1923 and modern-day treaties known as comprehensive land claim settlements. Treaty rights already in existence in 1982 (the year the Constitution Act was passed), and those that came afterwards, are recognized and affirmed by Canada's Constitution."[3]

For this research, IOG highlighted the James Bay Cree Agreement of 1975; the Nisga'a treaty of 1998, and the Nunavut Land Claim Agreement of 1993.

Territorial Formula Financing

According to the Department of Finance Canada, Territorial Formula Financing (TFF) is a form of equalization payment that funds public services in the Northwest Territories, Nunavut, and the Yukon, so that residents of these territories can enjoy similar services to those of the provinces. TFF is an annual unconditional transfer from the Government of Canada to the three territorial governments enabling them to provide their residents a range of public services reasonably comparable to those offered by provincial governments, at reasonably comparable levels of taxation.

TFF helps territorial governments fund essential public services in the North, such as hospitals, schools, infrastructure and social services, and recognizes the high cost of providing public services in the North as well as the challenges the territorial governments face in providing these services to a large number of small, isolated communities.[4]

International Agreements and Treaties

A number of international agreements and treaties between states contain elements of mutuality in their accountability structures. We examined two cases: mutual accountability frameworks for development cooperation, and the International Joint Commission established by treaty between Canada and the United States.

Global Affairs Canada uses mutual accountability framework agreements to outline the agreement of governments to establish and agree to mutual commitments to development and governance goals at the administrative level.

Selected for consideration for this study is the mutual accountability framework agreement between the government of Canada and the Philippines with questions examined including the nature of the agreement, the framing of responsibilities, and whether or not reciprocity translates into an equal partnership.

The International Joint Commission is a collaborative inter-jurisdictional organization formed as a partnership between Canada and the United States. It “prevents and resolves disputes between the United States of America and Canada under the 1909 Boundary Waters Treaty and pursues the common good of both countries as an independent and objective advisor to the two governments.”[5]

Block Grant Funding

A Block Grant is funding that is provided as a single, generally multi-year transfer from one body to another in order to fund a suite of programs or initiatives. The recipient has some flexibility on the specific areas the grant is used to fund, albeit with some general provisions.

According to the U.S. Department of Housing and Urban Development, who administers the Indian Housing Block Grant Program (IHBG), the program is a formula grant that provides a range of affordable housing activities on Indian reservations and Indian areas. The block grant approach to housing for Native Americans was enabled by the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA).

Block contribution funding is an option for providing transfer payments to Aboriginal recipients where the recipient has met certain assessment criteria and where a number of transfer payment programs that require a five or more year relationship with the recipient to achieve objectives can be funded under a single multi-year funding agreement.

Transfer Payment Agreements

Transfers come in different forms, and provinces both receive transfer payments (from the Federal government) and provide transfers (to municipal governments). Some of the different types of transfers are:

Transfer Payments: "A monetary payment, or a transfer of goods, services or assets to a third party that does not result in the acquisition by the Government of any goods, services or assets."[6]

Grants: "A grant is an unconditional transfer payment where the eligibility criteria that are applied before payment assure that the payment objectives will be met. An individual or organization that meets the eligibility criteria for a grant can usually receive the payment without having to meet any further conditions. Grants are not subject to being accounted for or audited."[7]

Contributions: "A contribution is a conditional transfer payment in which there are specific terms and conditions that must be met by a recipient before payment is given. Contributions, unlike grants, are subject to performance conditions that are specified in a contribution agreement. Before receiving a contribution, the recipient must provide a performance measurement strategy, including an explanation of the program objectives and expected results; performance indicators and targets; and internal audit and evaluation strategies. The government can audit the recipient's use of a contribution."[8]

Other Transfer Payments: "A monetary payment, or a transfer of goods, services or assets made, on the basis of an appropriation, to a third party, including a Crown Corporation, that does not result in the acquisition by the Government of Canada of any goods, services or assets. Transfer payments are categorized as grants, contributions and other transfer payments. Transfer payments do not include investments, loans or loan guarantees."[9]

Municipal Transfer Payments

In Canada, municipalities rely on fiscal transfers to support approximately 20% of their budget requirements, while the remaining funds are derived locally, primarily from property taxes. Internationally, particularly in developing countries that are transitioning to more decentralized delivery, fiscal transfers can make up the bulk of municipal revenues, comprising up to 70 or 80% of municipal budgets. As noted by the Federation of Canadian Municipalities, without access to stable and predictable funding through government transfers, these municipalities would be unable to provide the local services and infrastructure required to meet even the most basic needs of their communities.[10]

The Ontario government uses the Ontario Municipal Partnership Fund (OMPF) as a mechanism for transferring payment to municipalities, transferring $505 million in unconditional funding to 338 municipalities of varying size and wealth across the province.[11] Combined with uploads of various municipal service responsibilities to the province, it totals more than $2.3 billion in payments to fund local government activities.[12] It uses the following mechanisms to allocate funds to governments based on relative need:

1. Assessment Equalization Grant
2. Northern Communities Grant
3. Rural Communities Grant
4. Northern and Rural Fiscal Circumstances Grant
5. Transitional Assistance[13]

For more details on each funding mechanism under the OMPF, please see Annex B.

Institutional Authorities

Various institutions across the country, including the British Columbia First Nations Health Authority, the Auditor General, and the institutions established under the *First Nations Fiscal Management Act* have accountability structures that can usefully inform a redevelopment of the fiscal relationship between Canada and First Nations. These organizations are accountable to the various governments under whose authority they are established, and to citizens through various mechanisms. When they are of relevance, they are cited in the following report.

EVOLVING NOTIONS OF ACCOUNTABILITY

The traditional definition of accountability assumes *"a relationship in which one party, the holder of accountability, has the right to seek information about, to investigate and to scrutinise the actions of another party, the giver of accountability"* (Mulan, 2002, p. 3). Within the Indigenous context this has led to a one-sided accountability regime.

The Auditor General of Canada (AGC) defines accountability as:

> *"a relationship based on obligations to demonstrate, review, and take responsibility for performance, both the results achieved in light of agreed expectations and the means used. Effective accountability requires disclosure: setting out beforehand what is expected and then reporting against those expectations. It also requires learning: looking in light of the expectations at what was accomplished or not, and what has been learned that will improve future performance*."[14]

In 2002, the AGC reasserted (as they have in numerous previous reports) that "[w]orkable solutions are needed to improve accountability… ".[15] More recently, the AGC noted in its June 2011 report that "the use of contribution agreements between the federal government and First Nations may also inhibit appropriate accountability to First Nations members."[16] It is often unclear who is accountable to First Nations members for achieving improved outcomes or specific levels of services. First Nations often cite a lack of federal funding as the main reason for inadequate services. For its part, INAC maintains that the federal government funds services to First Nations but is not responsible for the delivery or provision of these services.

If positive change is to occur, it is recognized that First Nations themselves will have to play an important role in bringing about the changes. First Nations will need to lead in:

- Identifying outcomes,
- Providing input into legislative changes,
- Developing effective, accountable governance and service standards within their communities, and
- Determining how those standards will be monitored and enforced.[17]

In addition, accountabilities in the Indigenous context require a reflection on fiduciary responsibilities and obligations that arise from the constitutional protection of Aboriginal peoples and their treaty rights. Kornelsen (2015) argues that:

> *"Operationalizing Aboriginal and treaty rights and the associated fiduciary obligation within theories of reciprocal accountability may both encourage its uptake and clarify its content" (p. 6).*[18]

There is overwhelming support (including jurisprudence) for the claim that Canadian governments owe a fiduciary obligation to ensure that the interests of Aboriginal peoples are taken into account and are not undermined through federal/provincial legislation or policy. Kornelsen argues that Canada's fiduciary obligations arise within a historical relationship of responsibility, trust and mutual vulnerability. The mutual roles and responsibilities implied by fiduciary relationships can enable a shift from adversarial, rights based models to models based on mutual/reciprocal accountability. [19]

Reciprocal Accountability

The OECD has found that mutual accountability relies on trust and partnership around shared agendas rather than on hard sanctions for non-compliance. This is required to encourage the behaviour change needed to meet commitments. It is supported by evidence that is collected and shared among all partners.[20]

In a 21st century context the notion of reciprocal accountability in an Indigenous context is garnering greater attention and experimentation. Reciprocal accountability has been defined as "*the activity of rendering an account within a group and between groups so that the actors negotiate their identity, obligations and commitments in relation to each other, producing an environment of reciprocal accountabilities*"[21]. Kornelsen further argues that the consideration of Indigenous perspectives on reciprocity and accountability is an essential, yet mainly overlooked component of the development of effective and appropriate accountability models between Indigenous peoples and government funders. Critical to these agreements are principles that all parties are expected to uphold in order to achieve the outcomes of the agreement.

SHARED PRINCIPLES

The foundations of mutual accountability are shared principles that both parties agree will guide the parties in carrying out the agreement – fundamentally the principles the parties agree to uphold and live up to. Taken together they constitute the foundations of a common commitment. It should be recognized that Principles must stand together – ignoring one undermines all agreement principles.

As previously noted the AFN and INAC have signed an MOU which contain a number of guiding principles. Specifically, the statement that the new fiscal relationship should be based on the principle of 'sufficient, predictable, and sustained' funding, and the stipulation that nothing in the MOU shall 'diminish, derogate, abrogate, or infringe any existing aboriginal, treaty, legal, inherent, or any other First Nations rights.' The other main principles of the MOU include:

- *Nation to Nation Relationships*: Both Canada and the AFN commit to supporting the renewal of a nation-to-nation relationship between First Nations and the Crown based on the recognition of rights, respect, cooperation, and mutual partnership.
- *Improving Socio-Economic Outcomes*: Both parties recognize the need for action to improve the overall well-being of First Nations as nations, communities, and individual citizens, and that steps towards this goal must include the joint establishment of proper and fair intergovernmental fiscal relations.
- *Cooperation*: Both parties agree to work together to eliminate disparities and inequities between First Nations and other Canadians.
- *Respect for Established Structures*: Both parties recognize that First Nations have established governance structures and their governments must be full participants in the design and delivery of essential services.

Below are a range of categories and options that can stimulate a useful dialogue that will need to take place in order to reduce this exhaustive list to a more select articulation of mutually agreed principles. The principles agreed to within the AFN/INAC MOU should be considered as a starting point as the federal government and First Nation governments seek to articulate and reaffirm the principles that will guide the rebuilding of their nation-to-nation relationship.

This review found that most agreements identify what principles will govern the relationship; those that are needed to create and maintain positive relationships and to achieve expected outcomes.

Accountability Principles

The World Bank suggests five principles of accountability:

- *Certainty*: promote funding certainty over time to facilitate medium and long term planning
- *Autonomy*: independence & flexibility in setting local priorities
- *Revenue adequacy*: sufficient revenues to discharge designated responsibilities
- *Efficiency*: easily applied for, recorded, reported upon, generally facilitate good organization
- *Equity*: fairness, fiscal need balanced against fund raising capacity[22]

In terms of the indigenous fiscal relationship, these principles are of most direct relevance to the accountability role of the federal government in any new accountability framework that places an emphasis on mutuality. The federal government should strictly adhere to these principles as it redesigns its fiscal relationship with First Nations.

Reciprocal Principles

The following are principles that would be included in an outcome-focused, open, reciprocal accountability relationship, as they require a degree of mutuality between partners. Note: In the context of First Nations, it is recognized that accountability has to be to their citizens in contrast to the traditional principal-agent accountability relationship.

- *Shared responsibility*: and accountability for outcomes achieved. For agreements between First Nations and other levels of government, this means all parties share an interest in, and responsibility for supporting, Indigenous governments and citizens.
- *Objectivity*: which ensures that factors that drive decisions are structured to prevent favouritism and redress power imbalances.[23]
- *Fairness and consistency:* Fiscal arrangements should treat First Nation governments in reasonably comparable fiscal circumstances in a reasonably consistent manner e.g., fairness among regions, and fairness within a region among bands or tribal councils.[24]

- *Common processes*: Ministries follow common processes, tools and templates to support consistent oversight of transfer payments.[25]
- *Responsiveness:* to changes in recipient's financial situation and flexibility to accommodate changes in arrangements to allow for evolution in the recipient's scope of responsibility and capacity to manage.[26]

Incentive Based

A significant issue for AFN/INAC to consider is whether the new fiscal transfer system should contain incentives or be policy neutral.

- *Incentives*: encourage sound fiscal management.[27]
- *Policy neutrality*: fiscal arrangements should not distort policy choices for governments.
- *Affordability* – The costs of managing the implementation of fiscal arrangements must be affordable.
- *Clear incentives*: for the recipient to promote economic development, expand revenue sources, address social issues, and foster self-sufficiency.[28]
- *Performance related incentives*: think through what behaviours you want from individuals and the partners and develop incentives or indicators to encourage that behaviour.
- *Efficiency related concentration and specialization*: Seek to encourage aggregation, creation of shared services arrangements between First Nations, centralize processes where average cost falls as scale is increased; concentrate where efficiencies are gained through specialization; collocate where benefits can be obtained from working in proximity to those performing related activities.[29]

Transparency Principles

There are several facets that could be reflected in a principle of transparency, which holds that fiscal arrangements should be managed openly and clearly, with funding policies and methods set out. Four main facets reflecting the principle of transparency are:

- *Transparency* – Fiscal arrangements should be managed openly and transparently, with funding policies and methods set out clearly.
- *Information sharing*: relevant and appropriate information and data are collected, managed and shared across the government.[30]
- *Program operation and outcomes*: that are clear (transparent) to the recipient authorities, their community members and the general public.
- *Focus on outcomes*: objectives of transfer payment activities are clearly defined and contribute to the achievement of public policy outcomes.[31]

Service Delivery Principles

This list includes process-oriented principles pertaining to mutual accountability:

- *Comparability:* reasonably comparative standards of services should be "available to all citizens;" and access to programs and services should be "comparable to other Canadians." In the context of First Nations, citizens should have access to reasonably comparable programs and services as other Canadians in comparable circumstances. Recognizing there are some tension between the principle of comparability and targeting on greater need.
- *Communication*: there is respectful ongoing and meaningful communication between parties.[32]
- *Full integration*: of all programs and services.[33]
- *Involvement*: Involve First Nations in decision-making about programs and services.[34]
- *Planning for implementation*: Because rigorous application of these principles would alter the nature of the accountability relationship and the structure of the attendant processes (performance frameworks, performance "conversations", targeting of funding to create incentives and increase equity, etc.) changes need to be carefully planned and phased, with appropriate grandfathering and other adjustment provisions.[35]

The next section contextualizes this study by explaining the historical development of fiscal arrangements in Canada, leading to an analysis of contemporary initiatives and reflections on improving accountability.

A Brief Historical Overview of Fiscal Federalism

Canada's federal system has evolved over the past century and continues to develop – adapting to changing social, economic, and political realities with relative flexibility. The following summary overview of Canadian fiscal federalism is provided to underscore the path Canada has taken to arrive at its present-day government relations. A more detailed version can be found in Annex C.

The Canadian federation was born in 1867, and the first constitution, the British North America Act, divided powers between the federal and provincial governments, significantly assigning power over matters pertaining to 'Indians and land reserved for the Indians' to the federal government. The federal government was given most powers of taxation, but the provinces were handed responsibilities for health care, education, and social services; these became increasingly expensive after the institution of public health care and cradle-to-grave social programs were established in the middle of the twentieth century. This created a fiscal imbalance between the provinces' responsibilities and their capacity to raise revenues, as well as the imbalance between the richer and poorer provinces and territories, which possessed very unequal fiscal capacities. In response, two systems of transfer payments were developed.

These would eventually become the Canada Health Transfer (CHT) and the Canada Social Transfer (CST), and the systems of Equalization and Territorial Formula Financing.

From Cost-Sharing to Block Funding

The CHT and CST have their origins in federal cost-sharing agreements with the provinces in the 1950s and 60s. They have undergone numerous iterations, but eventually emerged as a system of block grants, distributed to the provinces from the federal government provided certain basic principles and conditions are met. For the health system, these principles are enshrined in the Canada Health Act: Universality, Portability, Accessibility, Comprehensiveness, and Public Administration. For the Canada Social Transfer, the provinces must ensure that there are no residency requirements barring Canadians from accessing the programs, no matter their province of origin.

The transfers are unconditional as long as these principles are respected, and provinces are free to spend the money how they wish. There is no system of reporting or auditing to document how precisely the money is spent, unlike the old cost-sharing arrangements of the 1950s and 60s, which gave provinces less flexibility in designing and delivering their own programs. The current system recognizes that government-to-citizen accountability is preferable to government-to-government accountability, and assumes that provincial legislatures will provide the lion's share of accountability to ensure money is spent appropriately, though some accountability is exercised at the negotiations for new funding accords.

Equalization

Equalization emerged in the 60s and 70s to address the imbalance between provinces and is now enshrined in principle in Canada's constitution. It addresses the broad belief that all Canadians should have equal access to public services, no matter where they reside in Canada. This is expressed in the constitutional provision for 'reasonably comparable levels of public services, at reasonably comparable levels of taxation.' Equalization payments are quantified on the basis of complex and sometimes contentious funding formulas, which take into account provincial revenue generation capacity per-capita. The formula calculates the difference between the per capita revenue yield of a province using average levels of taxation, and the national average. Money is transferred from the provinces with higher fiscal capacity to the provinces able to raise less. The formula is adjusted periodically to reflect changing economic realities, and some changes in status have resulted. Ontario, for example, is now a recipient of equalization transfers rather than a donor, while Newfoundland, long a recipient, has become a donor. The transfer is unconditional, and distributed as a matter of right. The citizens of each province, through their elected legislatures, democratically exercise accountability for the money spent.

Territorial Formula Financing

Transfers are also made from the federal government to the three territorial governments. Territorial Formula Financing (TFF) is based on a formula that calculates the difference between

a territory's Gross Expenditure Base, and their capacity to raise their own revenues through taxation and services, while also taking into account the higher cost of delivering services to remote, under populated Northern communities. The federal government funds the resultant difference. Given the relatively small tax bases and revenue generation capacities of the three territories, federal funding thus constitutes the bulk of territorial government spending. Like equalization, the CHT, and the CST, TFF is unconditional, and is intended to promote reasonably comparable services and levels of taxation for all Canadians. It is taken as a given that the democratically elected legislatures of the various territorial governments will effectively exercise the necessary accountability for how funding is spent.

Municipal Transfer Payments

Transfers are also made under a variety of systems from provincial governments to municipalities. Ontario's system of municipal transfers, the Ontario Municipal Partnership Fund, is the largest provincial transfer, dispensing $505 million in unconditional funding to 338 municipalities of relative size and wealth across the province. It uses a number of mechanisms and indexes to allocate funds to governments based on relative need, in acknowledgement of the disparate circumstances of municipalities across the large and populous province. The Fund is explained in detail in Annex B.

Evolution Toward Nation-to-Nation Relations

The rise of First Nations governments as autonomous partners within the Canadian federation, and not federally administered wards of the state, has added a new layer to Canadian fiscal federalism. Under the Indian Act of 1876, the Department of the Interior (now the Department of Indigenous and Northern Affairs Canada) established a system of government by chiefs and band councils, delegating certain nominal powers to tribal governments, but leaving most power and responsibility in the hands of departmental Indian Agents. Over the second half of the twentieth century, First Nation governments began to assume more and more responsibility for their own affairs, and the department became primarily a funder of services, rather than a provider. Indigenous resistance and activism has seen the recognition of Indigenous rights in Section 35 of the Constitution Act in 1982, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples and the signature of a number of Modern Treaties and Self-Government agreements, stretching from 1975 to the present day, including the establishment of Nunavut in 1997 (as a result of the Nunavut Land Claims Agreement).

INAC and other federal government departments fund non-self-governing First Nations under four main authorities: grants, contributions, alternative funding arrangements, and flexible transfer payments (more details on these can be found in Annex D). Funding under these arrangements is delivered to First Nations governments through Comprehensive Funding Arrangements, INAC First Nation Funding Arrangements, and Canada First Nation funding arrangements. These together constitute the means of providing the money available to Indigenous communities through the four main departments responsible for distributing Indigenous funding: INAC, Health Canada, Employment and Social Development Canada (ESDC),

and Canada Mortgage and Housing Corporation (CMHC). Devolution has resulted in First Nation governments exercising responsibility with federal government funding. This relationship is of great importance but, as currently structured, places a significant and onerous reporting burden on First Nations governments, which hinders their ability to use funding provided to deliver programs and achieve desired outcomes. Currently the focus is on meeting reporting requirements to demonstrate appropriate use of funding. While Canada has made many attempts to rationalize the existing system over the years, progress has been slow and inconsistent.

Self-Government Agreements

Fiscal relations with First Nations that have signed Self Government Agreements are slightly different. These agreements, which have provided for direct Indigenous ownership of over 600,000 square kilometers of land, and transferred over $3.2 billion in capital, provide signatory First Nations governments with a range of responsibilities and authorities over their own citizens, and any other resident of their territory, including powers of taxation. They can be comprehensive, or narrower sectoral agreements providing self-government for a particular policy area, such as education. The core of First Nations financing becomes the Financial Transfer Agreement, negotiated every five years with the federal government. The standard for these agreements is similar in principle to that used for equalization payments, providing for reasonably comparable services by First Nation governments at reasonably comparable levels of taxation.

WHERE ARE WE NOW?

Much has changed since the days when Chiefs and Councils held no responsibility for program delivery and Indian Agents handled all reporting and administration functions. The return of administrative responsibilities to First Nations communities have led to significant new challenges. A number of the most significant issues surrounding the current fiscal relationship, as identified by First Nations, INAC, and the AG, are outlined below.

Appropriateness of Funding Vehicles

The majority of First Nations programs on reserves are funded through federal government contributions, which we have identified above as being the most onerous funding mechanism available in terms of the reporting requirements and the lack of trust and responsibility they imply. One of the most significant limitations with these agreements is that they do not always focus on service standards or results to be achieved. Moreover, these funding vehicles offer little in terms of stability given the fact that they are based on annual renewed and new agreements, which cannot be finalized until INAC confirmed funds from the previous period have been spent appropriately. As a result, First Nations often need to reallocate funds from elsewhere in their budgets, where available, in order to continue meeting community service requirements.[36]

Many actors in the policy space, including INAC itself, have studied the possibility of moving from a contribution-based model to a grant-based model of funding, which would have the effect of reducing the reporting burden on First Nations while enhancing the quality of service they are able to provide. This would also demonstrate greater trust on the part of government, with considerably less paternalistic assumptions about the responsibility and capability of First Nations governments. The preferred approach of many parties, including the AFN, the Penner Committee, and the Royal Commission on Aboriginal Peoples (RCAP), would be the abandonment altogether of grants and contributions, and the recognition of First Nations as a third order of government, entitled to intergovernmental transfers routinely received by provincial and municipal governments.[37]

The Reporting Burden

The number of federal programs providing fiscal support to First Nations governments has increased and without integrated reporting, the reporting burden has correspondingly amplified. This means that First Nations governments face the most burdensome reporting regimes of any government in the Canadian federation. While the Government of Canada has continued to invest efforts over the years to reduce and simplify reporting requirements, the complexity of that process has made it clear that the foundations of accountability needs to significantly shift to see a reduction in reporting.[38] The AGC has estimated, and the AFN has confirmed in 2011, that at least 168 separate reports are required annually of First Nations governments by the four federal departments and agencies that provide the most funding to First Nations: INAC, Health Canada, Human Resources and Skills Development Canada (now ESDC), and CMHC.[39] [40] That amounts, given that there are only around 250 work days in a year, to very nearly two reports every three days. The AFN has estimated that INAC alone receives over 60,000 reports from First Nations annually.[41] The AG has found significant overlap and duplication among these required reports, and with the exception of some financial documents, the recipient departments make limited use of the information submitted. In their audit, they found that:

- Reporting requirements are dictated by funding authorities, not based on consultation with communities,
- Information reported is generally not used in the setting of funding levels,
- Reports contain information that does not reflect community priorities,
- New reporting requirements are introduced with little or no review of pre-existing requirements, adding to the compliance burden,
- Little feedback is given to the First Nations, except for analysis of audited financial statements,
- Most required reports for INAC or Health Canada do not provide adequate information on performance or results, and
- Little of the information being collected from the First Nations is being used by the federal organizations receiving the information in their reports to Parliament.

The Office of the AG voiced concern that the burden of these reporting requirements meant that scarce administrative and financial resources were being used up in meeting them, rather than in providing direct support to the communities doing the reporting.[42]

A Focus on Outputs, Rather than Outcomes

The scale of the reporting burden aside, the majority of information provided to the federal government by First Nations relates narrowly to compliance with agreed-upon outputs, not demonstrable results in the communities concerned. INAC, Health Canada, HRSDC, and CMHC are oriented in the reports they require towards narrow accountability for inputs spent, activities undertaken, and outputs produced, without concern for what outcomes the spending actually achieved. Little of the information collected from First Nations reporting is used in departmental estimates or reports to Parliament. Information on performance and outcomes in a First Nations context is often difficult to acquire, or nonexistent. What data is collected and gathered, on school graduation rates, for example, or on recipients of social assistance, is often of limited use for measuring the performance of a given program or service.[43]

Lack of Transparency Around Funding Decisions

INAC began publicly releasing Canada's fiscal approach for self-government arrangements in 2015, including policy and funding methodologies, rather than treating them as confidential negotiating mandates. The policy lays out the principles of Canada's fiscal approach, the models under which funds are transferred, and the accountability relationships expected, in a clear manner.[44] But for the 95% of First Nations which have not entered into full self-government agreements and which generally remain funded by INAC and other government departments, there are still issues around clarity and consistency of federal funding, and negotiations remain adversarial and complex.

Changing the Nature of the Accountability Relationship: Towards Mutual or Reciprocal Accountability

There is a significant movement underway towards reframing the accountability relationship between First Nations and the federal government towards a model that is *less* paternalistic, focused on compliance, and burdensome in terms of reporting requirements. The current accountability relationship between First Nations and the federal government closely resembles that between a principal and an agent, with the government, as represented by INAC, acting as the principal, and First Nations assuming the role of agent. First Nations have many accountability relationships, including to individual members and to capital providers, but the general perception is that they are accountable, first and foremost, to INAC, and not to their own citizens.

The Auditor General (AG) has observed that governments in Canada and First Nations generally 'no longer understand one another's needs,' making the current accountability framework 'unworkable because little legitimacy is attached to it.'[45] The AFN has developed a First Nations accountability agenda, asserting that an important step towards recognizing inherent

Indigenous and treaty rights and implementing effective First Nations government involves 'changing the relationship between the Government of Canada, First Nations governments and organizations, and the citizens they all represent.'[46]

There is an increasing desire on the part of all parties to the federal-Indigenous relationship to move towards an accountability framework based on the principles of mutual or reciprocal accountability.[47] This is the model of accountability that has been set as a target within the international aid community in structuring the relationships between donors and recipients of government-to-government financial aid, and forms the object of one of the five principles of the 2005 *Paris Declaration on Improving Aid Effectiveness.*[48] To date, 137 countries have subscribed to this declaration, under which donors and partners are mutually accountable for development results.[49] In the context of First Nations governance, such a model should retain the following conditions:

- Genuine dialogue and debate processes based on mutual consent, common values, and trust.
- Recognition of capacity and tailoring of accountability mechanisms,
- A shared performance-based management agenda and objectives that bring together all partners as a basis for cooperative action through positive incentives and the desire to protect reputation, as opposed to sanctions, and
- Existence of performance information based on mutually agreed performance criteria.[50] [51]

In this spirit, the IOG undertook an analysis of 20 separate accountability arrangements in a variety of contexts, including municipal, provincial, federal, First Nations, and international examples, in order to determine what models may be of relevance to reimagining the fiscal accountability relationship between First Nations and the Government of Canada.

WHERE DO WE GO FROM HERE?

Towards A Government-to-Government Relationship

While moves to establish a structure of mutual accountability for First Nations fiscal arrangements are well intentioned, the difficulties presented in achieving such a system of reciprocal accountability within the current governance framework (underlined and supported by the *Indian Act*) are significant. Relationships between donors and recipients, or funders and beneficiaries, are intrinsically unequal, and are difficult to resolve, as the experience of the international aid community attests. Moreover, the present legal and fiscal relationship between First Nations and the federal government rests on fundamental assumptions that are inherently paternalistic.

Superficial adjustments to systems of accountability will have little long-term impact within this broader governance context. Recognition of the inherent Indigenous right to self-government and firm establishment of First Nations as a third, equal order of government in the Canadian federation will require a restructuring of the funding relationship, as well as the establishment of guaranteed government-to-government transfers of the type that prevail at the provincial and municipal levels. Major transfers to provinces and municipalities operate under the assumption that effective accountability for funding will be exercised by the citizens and legislatures of the relevant jurisdiction and that residents of that jurisdiction are responsible for their own affairs.

It is often assumed that such a fiscal relationship must wait until First Nations have the fiscal and administrative capacity to shoulder the concomitant responsibilities. Many of Canada's over 600 First Nations have already achieved such capacity, and for those that lack the required capacity, they will not be best served by a continued relationship of dependence. There is growing evidence that capacity is best developed in the exercise of capacity,[52] and those First Nations that remain in a state of perpetual fiscal dependency will never achieve the outcomes intended unless and until they are given the resources to do so in an empowering way.

Stable, predictable, government-to-government fiscal transfers for First Nations authorities, along the same lines, and principles, such as Territorial Formula Financing, transfer payments to municipalities, Equalization, or the Canada Health and Social Transfers, will ensure a more sustainable, prosperous, and equitable future for the Indigenous peoples of Canada. True mutual accountability can be achieved only in the atmosphere of mutual respect and formal equality that such transfers would symbolize.

The nature of accountability in intergovernmental relations has significantly evolved. Any future path for Indigenous people in Canada to move to a true nation-to-nation relationship must recognize that the transition in an Indigenous context, will take time. Given the distributed and disaggregated nature of Indigenous communities throughout Canada (over 600 First Nation communities not including Métis and Inuit), appropriate interim steps may be necessary before an entity moves to a new funding model.

If the end goal is for Indigenous peoples to assume greater control, responsibilities and self-determination then new accountability models focused on outcomes and based on governments working in full partnership with Canada's First Nations, Métis and Inuit peoples are required. Other areas that will support a new relationship with Canada's First Nations are outlined below.

The Role of Institutions

Institutional support will be crucial to helping First Nations redevelop their fiscal relationship with the federal government. Building capacity will require the sustained engagement of many outside actors, and potentially the creation of new actors. The last few decades have seen the development of a number of important new institutions designed to help First Nations make

the transition to self-government more smoothly. Some of the most important of these for the fiscal relationship were established under the *First Nations Fiscal Management Act* of 2006. Taken together, these three organizations provide valuable support to First Nations looking to move out from under the *Indian Act*, and to take control of their own destinies through increased financial independence. They will be useful resources during any transition towards a new fiscal relationship, and provide a wellspring of expertise that all participating governments would do well to avail themselves of.

Since the passage of the Act in 2006, over 211 First Nations are scheduled as participants in these institutions, and more request addition to the roster on a regular basis. Participation in the Act's framework is optional, and First Nations choose whether they will partake in the taxing and borrowing regimes it creates, as well as the subsequent regulations. In order to participate, a First Nations submits a Band Council Resolution to the Minister of INAC, requesting they be added to the FNMA's schedule. The process generally takes about three months. Once an application is approved, the First Nation can begin interacting with any one of these three institutions.[53] INAC, the AFN, and all First Nations should leverage the existing know-how of these organizations to the greatest extent possible in any restructuring of the fiscal relationship.

The Role of Indigenous Institutions in Rebuilding Capacity

INSTITUTION	DESCRIPTION OF ROLE
First Nations Tax Commission	The First Nations Tax Commission is a shared-governance corporation regulating and streamlining the approval of property tax and new local revenue laws for those First Nations that have applied to participate under the relevant act. It aims to build administrative capacity through providing sample laws and accredited training, while reconciling First Nations governments' interests with those of their taxpayers.[54] It aims to support First Nations governments in building and maintaining efficient taxation regimes while ensuring that they and their citizens receive the maximum benefit possible from those systems.[55] The expertise and knowledge leadership they provide will be important in the redevelopment of the funding relationship between INAC and First Nations as more and more nations move towards assuming tax responsibilities and out from under the *Indian Act*.
First Nations Financial Management Board	The First Nations Financial Management Board is another shared governance corporation established under the *First Nations Fiscal Management Act*, with a complementary mandate to assist First Nations in strengthening their local financial management regimes, and to provide independent certification to support borrowing from the First Nations Finance Authority and other sources for economic development purposes.[56] It has a mandate to develop and support the application of general credit

	rating criteria to First Nations, and to provide review, audit, assessment, and certification services. It also makes itself available to co-manage or third-party manage First Nations in difficult financial circumstances.[57] The trusted certification they provide allows First Nations governments to access capital markets, enhancing their ability to provide quality infrastructure and other services that other Canadians take for granted.
First Nations Finance Authority	The First Nations Finance Authority is a not-for-profit corporation permitting qualifying First Nations to work co-operatively in raising long-term private capital at preferred rates through the issuance of bonds, while providing investment services to First Nations governments.[58] The FNFA operates independently from the federal government, and is owned and managed by participating First Nations, who appoint representatives to the board to look after its affairs. It provides a full suite of investment services and access to long-term loans for those First Nations participating in its affairs, improving the standard of living in those First Nations through access to capital markets.[59]

Taken together, the institutions enabled under the *First Nations Fiscal Management Act* will provide a reservoir of raw financial data and technical and administrative capacity and expertise that will be of great importance in the establishment of new First Nation institutions, including the First Nations Auditor General and First Nations ombudsperson, as discussed in greater detail below. There will be considerable crossover between all of these bodies as the new institutions are established and begin to get off the ground.

Potential New Institutions

Recommendations have been made over the years for the creation of a number of new institutions, the existence of which would support the restructuring of the Canada-Indigenous relationship and help First Nations move towards self-sufficiency. Some of these will be critical in the development of any new fiscal paradigm, allowing for the exercise of a more mutual accountability for results by First Nations and the federal government, and enhancing the development of outcomes-based policies for First Nations.

First Nations Auditor General:

An Auditor General (AG) serves to hold governments accountable for the manner in which they spend public funds, and to make recommendations to improve the functioning of public service organizations. Since the 1990s and the report of RCAP, there have been calls for a separate AG responsible for Indigenous peoples. The AFN has called for such an institution and INAC has done studies on its potential feasibility.[60] A new institution could be created under the auspices of the current AG of Canada, in order to ensure that relevant expertise is retained and encouraged as the new Indigenous institution develops.[61]

A series of private members' bills were introduced throughout the 1990s and 2000s that attempted to install such a mechanism, but all died on the order papers before they could become law.[62] First Nations opposed these efforts as unilateral federal government efforts, citing flaws in the process of appointing the relevant officials, which was deemed not to sufficiently involve First Nations. Adequate consultation with Indigenous communities will be necessary to ensure that the new arrangement has legitimacy and the appointment process of key officials will need to be more than just a governor-in-council appointment, with appointments being made after due discussion with Indigenous groups. Such an institution would have to be First Nations-led and First-Nations specific. The capacity being developed by the institutions established under the *First Nations Fiscal Management Act* will be essential in obtaining the necessary expertise to make such an arrangement a practical, effective reality.

First Nations data and statistical support:

The First Nations Statistical Institute was created in 2006 under the *First Nations Fiscal Management Act* as a First Nations-led Crown Corporation. It was tasked with acquiring and increasing the accessibility of data relevant to First Nations in order to improve planning and decision-making in important policy areas.[63] While historically there has been much information available about the lives of Indigenous peoples in Canada, produced by a range of different organizations, it has been difficult for potential users to access. Moreover, government statistical methods and approaches have often failed to meet the needs of First Nations, and many communities routinely boycotted data gathering exercises by Statistics Canada and INAC.

The FNSI was established to address these challenges, and to become the authoritative source of information on the fiscal, economic, and social conditions of First Nations and their institutions.[64] It was eliminated by federal budget cuts in 2014 without achieving any of its identified objectives.[65] While there is little desire to recreate such a body, it is clear that a supportive structure for the data needs of First Nation governments and for the common needs of First Nations and Canada must exist if the fiscal relationship between the Crown and Indigenous peoples is to progress towards better outcomes and INAC should work with the AFN either to identify a suitable successor organization, or encourage government to support a new entity (or entities) capable of supporting the production and delivery of timely, relevant, and accessible data on First Nations in Canada. The First Nations Information Governance Centre may be well placed to take on this role, or to advise on the appropriate form any new institution should take.[66]

Joint Body Governing Relationship: First Nations Fiscal Relations Institution

An important weakness of the current relationship between Indigenous peoples and the Crown is the lack of formal structures in place to safeguard changes to the relationship beyond the leadership commitment of the government of the day, which is subject to sudden change. Short

of prime ministerial or ministerial commitment, there are no mechanisms in place to ensure that the relationship is managed independently of political considerations.

The relationship with Canada's Indigenous peoples is too important to be managed in an unstructured way. To ensure mutual accountability between the federal government and First Nations an external body may be needed, established in legislation or the Constitution to: monitor the fiscal relationship; ensure both sides meet their stated commitments and that the relevant discussions and negotiations take place to manage this relationship. Such a body must have a sound constitutional or legal footing, most likely being established in statute, be bound to meet with sufficient frequency, and be empowered with its own secretariat to manage operations and relationships.

The First Nations Fiscal Relations Institution could oversee the relationship between First Nations and the Government of Canada by coordinating the activities of supporting institutions and service providers, and engaging First Nations Governments and sectoral experts in dialogue on what success the fiscal relationship is having, as well as what system improvements are needed. It could perform assessments of First Nations fiscal and administrative capacity to determine both where funding is ready to be received, and where it will do the most good. It could recommend remedial action and recognize capacity improvements, as well as recommend funding inputs and coordinate programmatic implications of those inputs with the supporting institutions. It could assist in drafting fiscal transfer agreements for First Nations governments to sign, utilizing its dedicated expertise and capacity to achieve the best allocation of resources. It could also play a useful role in aggregating performance data and reporting to Parliament, First Nations, and the general public on progress towards closing the socio-economic gaps between First Nations citizens and other Canadians.

In conjunction with this function, it makes sense for such an institution to also serve as an independent resource to inform fiscal negotiations between First Nations and the Crown.

Models for this kind of body exist already, both around the world, and in proposals that have been made, but never implemented in Canada. In New Zealand, where the Treaty of Waitangi between the Crown and the Māori nation is one of the foundational documents of the state, a permanent commission of inquiry known as the Waitangi Tribunal has been an established part of the governance landscape since 1975, when it was established in legislation.[67] It is charged with investigating and making recommendations on claims brought by Māori against the Crown, in order to seek redress for grievances or to establish claims. It also examines and reports on proposed legislation, if referred there by the New Zealand Parliament or a Minister of the Crown, in order to determine what implications the bill may have on the country's treaty relationships and responsibilities. While the tribunal is not a court of law, and its findings are sometimes ignored, it is imbued with exclusive authority to determine the meaning and effect of the Treaty of Waitangi, and occupies an essential role in the New Zealand constitutional landscape.[68]

Here in Canada, RCAP has made a number of recommendations for reforming the relationship between the Crown and First Nations. It called for a new Royal Proclamation, made by the Queen, in her role as head of state and historical guardian of the rights of Indigenous peoples, to set out the principles of a new relationship and outline the laws and institutions necessary. Among the new laws and institutions proposed was a series of bills that would establish, in statute:

- An Indigenous Lands and Treaties Tribunal, which could potentially be modelled after New Zealand's Waitangi Tribunal, in order to decide on specific land claims and ensure that treaty negotiations are conducted fairly,
- An Indigenous Parliament, established to represent Indigenous peoples within federal governing institutions and to advise the other houses of parliament on matters affecting Indigenous people, pending constitutional amendment to establish a House of First Peoples as a coeval branch of Canada's Parliament, and
- An Indigenous Relations Department and Indigenous and Inuit Services Department, which together would replace the department of Indigenous and Northern Affairs, to manage and implement the new nation-to-nation relationship, in the former case, and in the latter case, to provide services to those groups that have not yet opted for self-government.

While the idea of an Indigenous Parliament, or House of First Peoples, is not under discussion, precedent exists for such institutions. The Scandinavian countries of Norway and Sweden have both established separate parliaments for the Sami people, who were recognized as indigenous peoples in Sweden in 1977, and in Norway in 1990.[69] The parliaments are established by special enabling legislation, and empowered to legislate on matters of relevance to the Sami people.[70] Like the devolved assemblies in Scotland, Wales, and Northern Ireland, they are established by statute, and not constitution, and can technically be overruled on certain matters by the national parliaments, but they form an important vehicle for both the preservation of Sami culture and the sovereignty of Sami people over their own affairs, and matters of cultural, economic, and political importance, such as education, health care, and language.[71]

Taken together, or separately, these proposals would establish bodies capable of supporting the development and management of accountability frameworks in a manner that is equitable, just, and rational. They would bring much needed structure and formality to the relationship between the two parties, and help to ensure that Indigenous concerns are at the forefront of Canada's national agenda and political debates. While technically such proposals are within the powers of the federal government acting alone, the kind of lasting legitimacy required for such changes would best be ensured by soliciting the engagement and cooperation of Canada, the provinces, the territories, and of course, First Nations, from the very start.

It may be worth noting that the current government is already committed to implementing the recommendations of the Truth and Reconciliation Commission, which include a call to establish a National Council on Reconciliation as an independent, national oversight body with membership jointly appointed by the Government of Canada and national Indigenous

organizations, with a mandate to monitor and report to Parliament on progress towards reconciliation. Any overlap between this body's functions and those of the other new institutions discussed in this report should be addressed at the formative stage of any new institution.

Aggregation of Nations

Under the *Indian Act*, the Indigenous nations of what is now Canada were broken up into over 600 band governments, limited to reserves, with land bases and populations often dramatically transformed from their pre-colonial condition. The chiefs and band councils that govern these communities under the Indian Act are subjected to a number of longstanding governance challenges as a result of their small size and often remote locations, including a reduced local fiscal and economic capacity, a lack of the economies of scale prevalent in more populous parts of Canada, hampering their ability to deliver essential services at cost.

The aggregation of First Nations governments into larger, more populous entities would enhance the ability of First Nations to deliver essential services, manage land and natural resources, and deal with the federal government on nation-to-nation terms. The effectiveness of tribal councils in delivering aggregated service to disparate communities proves that such consolidation can be beneficial to communities, while also simplifying INAC funding procedures. RCAP recommended in its report that 'economic development at the level of the Aboriginal nation, confederation, or provincial/territorial organization' would be preferable to similar action at the community level, allowing for more choice for decision makers, access to larger amounts of capital, better linkages among communities, and a better chance of being competitive in a global marketplace.[72]

That said, such an aggregation would be fraught with difficulties, including the strong identification of individual Indigenous Canadians with their particular reserve, the difficulties of categorizing First Nations groups by external criteria such as language or historic affiliation, and the existence of legally binding historic treaties which deal with multiple First Nations groups, and with which identification on an individual level is often strong. The resistance to such an aggregation, if not driven by Indigenous people from Indigenous perspectives and priorities, may be strong. Any move towards consolidating First Nations governments into larger, more effective entities must be driven by First Nations themselves. Extensive consultation, sustained leadership at the political level, and earnest engagement in good faith on the part of the federal government will be essential to any reorganization. Development in this direction should also not be established as a pre-condition to any new fiscal relationship or the development of a mutual accountability framework.

DISCUSSION QUESTIONS FOR AFN-INAC WORKING GROUP ON MUTUAL ACCOUNTABILITY

What follows are key questions to consider when examining accountability models in the current context of Indigenous people in Canada and their vision for self-reliance, self-actualization and self-determination:

1. How do the parties define mutual/reciprocal accountability?

2. Should reciprocal accountability be the conceptual framework to support the development of more effective, inclusive, and responsive programs and services to Indigenous communities in Canada?
   - What are the key elements of mutual/reciprocal accountability?

3. How does fiduciary accountability contribute to the development of more effective accountability frameworks?

4. How can the parties operationalize Indigenous and treaty rights and the associated fiduciary obligation within models of reciprocal accountability?
   - How can reciprocal accountability relationships be developed and maintained?

5. What should be the key principles that are foundational to future reciprocal accountability agreements?

6. What are the conditions and criteria that need to be in place to introduce transfer agreements as a funding mechanism for First Nations similar to those used with territorial and municipal governments? What interim measures are required?

7. Is legislative change required to change the governance structure and move to establish First Nations as a third level of government?

8. How can Canadian governments support First Nations in building capacity by exercising capacity?

9. What is the anticipated role of First Nation institutions in supporting the transition to a true nation-to-nation relationship?
   - Is a joint governing body or tribunal needed to monitor the evolution of the fiscal relationship and commitments made?

ANNEX A

A REVIEW OF ACCOUNTABILITY AGREEMENTS: OVERVIEW OF FINDINGS

What follows is a summary of findings from the review of accountability agreements.

Type of agreement used to transfer funds

Under the frameworks examined for this report, a number of different types of agreement are reached between the various parties to support shared objectives. They include:

- Formal treaties between states,
- Formal treaties or Land Claims Agreements between states and Indigenous governments,
- Block Grant payments between orders of government within the same state,
- Formula Grant payments between orders of government within the same state,
- Block Grant funding from a department of government to an Indigenous government within the same state, and
- Administrative agreements between governments, without statutory basis.

Most arrangements have some formal basis in legislation, which sets out the legal terms under which funds are transferred, and outlines the processes by which funds are disbursed. Some funding is disbursed in the form of block grants, where eligibility is established before funds are approved and released, and broad discretion is given to recipients to spend the money according to their own priorities. Other funding is dispersed according to formulas established in legislation which pre-determine how money will be dispensed according to data on needs and priorities. Some arrangements do not deal with funding levels at all, and merely establish principles by which transfer provisions should be governed by the various parties.

Examples from Environmental Scan

Indian Housing Block Grant Program (US)

The Indian Housing Block Grant Program (IHBG) is authorized by the *Native American Housing Assistance and Self-Determination Act* of 1996 (NAHASDA), which was reauthorized in 2008. NAHASDA recognizes the right of tribal self-governance and the unique relationship between the Federal Government and the governments of Indian tribes, established by long-standing treaties, court decisions, statutes, Executive Orders, and the United States Constitution. NAHASDA requires HUD to engage in formal negotiated rulemaking with IHBG recipients to periodically review and issue program regulations. The foundation of HUD‟s partnership with Federally recognized tribes is its

government-to-government consultation policy, which includes a commitment to engage in formal negotiated rulemaking when appropriate, as when developing Federal policies that have tribal implications. The IHBG is an annual formula grant to provide housing and housing related assistance to low-income American Indians and Alaska Natives who live on Indian reservations or in other traditional Indian areas. The actual IHBG recipients are eligible tribal governments or their designated housing entities, which deliver the housing assistance to families in need. IHBG recipients have the flexibility to design and implement appropriate, place-based housing programs, according to local needs and customs. IHBG recipients often leverage their grant funds as catalysts for further community and economic development. HUD‟s Office of Native American Programs (ONAP) administers the IHBG program.

International Joint Commission for the Great Lakes

The International Joint Commission was established under the Boundary Waters Treaty of 1909 to help the United States and Canada prevent and resolve disputes over the use of the waters the two countries share. The IJC's responsibilities include reporting on progress made under the Great Lakes Water Quality Agreement between the nations toward restoring and maintaining the chemical, physical and biological integrity of the Great Lakes and connecting waters.[73] In particular, the Commission rules upon applications for approval of projects affecting boundary or transboundary waters and may regulate the operation of these projects; it assists the two countries in the protection of the transboundary environment, including the implementation of the Great Lakes Water Quality Agreement and the improvement of transboundary air quality; and it alerts the governments to emerging issues along the boundary that may give rise to bilateral disputes.[74] The Canadian and U.S. governments share the funding of the Commission under the terms of the relevant treaty. Global Affairs Canada is responsible for finding the money to fund Canada's share of reference studies, but it has no established way of doing this. Funds have been provided ad hoc, either by the Treasury Board or from the regular budgets of the federal departments involved. Those departments have covered part of the costs by providing professional services or in-kind support—such as office space— for the studies.

Land claims/Modern Treaties

Modern treaties represent nation-to-nation and government-to-government relationships between an Aboriginal signatory, the Government of Canada and in some cases, a province or territory. They are intended to further define and recognize the Aboriginal land and resource rights of the Aboriginal signatory, and to meaningfully improve the social, cultural, political and economic well-being of the Aboriginal people concerned. At the same time, these agreements provide all signatories with a mutual foundation for the beneficial and sustainable development and use of Aboriginal peoples' traditional lands and resources.[75] First Nations, Métis or Inuit groups generally exchange aboriginal title to traditional lands in exchange for the rights and benefits set out in a specific land claims agreement, and move out from under the auspices of the *Indian Act* to take on the functions of self-government.

There are many such agreements throughout the Canadian North, including the James Bay and Northern Quebec Agreement with the Cree and Naskapi of Quebec, and the Nunavut Land Claims Agreement, which created the new territory of Nunavut. Modern treaties, or comprehensive land claim settlements, include provisions that enable Indigenous groups to own land, participate in managing land and resources, share in revenue generated from resource development and govern themselves.[76] Canada's funding support for First Nations varies depending on the Self-Government Agreement, and additional funding is available across a wide spectrum of activities, including governance, economic development, education, land management, and other areas. A range of formulas support these funding activities, but core funding is generally disbursed under the Fiscal Transfer Model formula, which stipulates that federal funding will be the difference between the General Expenditure Base and the Own-Source Revenue Contribution from the relevant First Nation.[77]

The Nisga'a Treaty, to use an example, provides for an open, democratic and accountable Nisga'a Government. It includes representation for all Nisga'a through the Nisga'a Lisims Government, four Village Governments, and three Urban Locals, which provide a voice for Nisga'a citizens who live outside the Nass Valley. The Nisga'a Treaty establishes decision-making authority for Nisga'a Government within a model that the Nisga'a have been accustomed to and have accepted for many years. The Nisga'a Government model is designed as a practical and workable arrangement that provides the Nisga'a Nation with a significant measure of self-government that is consistent with the overall public interest and within Canada's constitutional framework. Health, education, social services and other services are now provided under a Fiscal Financing Agreement.

<u>Mutual Accountability Framework for Development Cooperation between the Government of Canada and the Government of the Philippines, 2015-2020</u>

This Mutual Accountability Framework for Development Cooperation "establishes a shared desire to support broad-based and sustainable economic growth, by making available programs, projects and activities that will create employment, significantly reduce vulnerabilities to poverty, and improve the quality of life of all Filipinos (…) Canada Designates the Department of Foreign Affairs, Trade, and Development (DFATD) and the Philippines designates the National Economic and Development Authority (NEDA) to implement this Framework on their behalf."[78]

<u>BC First Nation Health Authority</u>

Authority arises from British Columbia Tripartite Framework Agreement on First Nations Health Governance. The Tripartite First Nations Health Plan signed by the First Nations Leadership Council (FNLC), the Government of Canada and the Government of British Columbia (BC) on June 11, 2007 committed the parties to put in place a new structure of governance that "leads to improved accountability and control of First Nations health services by First Nations."[79]

Ontario Municipal Transfer Payment Agreement

The Ontario Municipal Transfer Payment Agreement is a work in progress that frames different types of transfers alongside different accountability measures. In addition to Transfer Payments, the document addresses other types of transfers such as Grants, Contributions, and Other Transfer Payments; they "do not include investments, loans or loan guarantees."[80]

Territorial Formula Financing

Territorial Formula Financing (TFF) is statutorily enshrined in the *Federal-Provincial Fiscal Arrangements Act*, and governed for each territory by the respective *Territorial Government Formula Financing Agreements.*[8182] While the agreements are based in the same constitutional principles as the equalization payments to the provinces, they are a separate transfer, and territories do not pay into the equalization system.[83] The federal government dispensed over $3 billion to the territories through these transfers, accounting for between 70 and 80 percent of the territory's various budgets.[84]

Principles of the Agreements

Underlying all of the agreements examined are shared sets of principles, which outline shared responsibilities to which the parties have agreed to be bound, and set standards around service and the measurement of performance. The principles determine broad accountabilities, state general standards, and outline strategies for ensuring compliance with shared objectives.

Examples from Environmental Scan

Indian Housing Block Grant Program (US)

NAHASDA acknowledges tribal sovereignty, and the unique federal trust responsibility toward Indian tribes. The Office of Public and Indian Housing is committed to providing safe, decent, and affordable housing; create opportunities for residents' self-sufficiency and economic independence; and assure fiscal integrity by all program participants.

Providing safe, affordable homes is considered an essential element in the federal government's trust responsibility. IHBG recipients are also held accountable for their progress in completing self-defined housing activities and complying with NAHASDA's program requirements. ONAP staff also monitors recipient compliance and progress.

BC First Nations Health Authority

Key principles embedded in the agreements between parties:

- Respect for cultural knowledge and traditional health practices;
- Respect for diversity;

- A commitment to overcome jurisdictional issues through "effective working relations";
- A commitment to deal with the determinants of health;
- No duplication of programs and services, and no creation of a parallel health system;
- A commitment to reciprocal accountability and ensuring no impact on Aboriginal treaty rights or fiduciary responsibilities; and
- Open and timely information-sharing"[85]

The principle of reciprocal accountability is fundamental to the First Nations Health governance structure and the health of the partnership. Parties have agreed to "work together collaborative and be accountable to one another at all levels to achieve our shared goals, living up to our individual and collective commitments."[86]

International Joint Commission for the Great Lakes

Although the 1909 Treaty created separate national sections through both parties, the Commission "strives to operate as single entity, speaking with one voice and receiving advice from its staff and boards without regard to citizenship. While staff members are employees of a particular government and Commission office, they are accountable first to the full Commission." The Commission employs joint fact-finding in order to achieve consensus, which it strives to achieve "wherever possible, both in its own deliberations and those of its boards and similar bodies. (…) While directing its advice and assistance to governments, the Commission takes account of the need to foster public awareness of the issue in question and ensure that the public is able to contribute to the consideration and implementation of its assessments by governments." The Commission strives to provide advice that is "timely, well-founded, honest, and relevant." It's "rules of procedure must be in accordance with justice and equity," it "seeks to ensure the inclusion of appropriate expertise in the membership of its boards, while drawing that expertise from a diversity of sources on a non-discriminatory basis."[87]

Land Claims/Modern Treaties

According to the Government of Canada, self-government fiscal relations should be guided by the following principles:

- "Aboriginal, federal and provincial/territorial governments share responsibility for financing self-government.
- In sharing this responsibility, these governments should seek to ensure that members of the communities represented by Aboriginal Governments have access to public programs and services that are reasonably comparable to those available to other Canadians living in communities of similar size and circumstance, although they need not be identical in all respects.

- To undertake their responsibilities, Aboriginal Governments should receive reasonably consistent and equitable allocations of federal funding support under reasonably stable, predictable and flexible arrangements.
- Governments should practice transparency and openness in fiscal matters - in particular, through public disclosure of funding methodologies, transfers, budgets and financial statements.
- Fiscal arrangements should foster accountability, clarity of roles and responsibilities, and sound public administration.
- Fiscal arrangements should encourage efficiency and cost-effectiveness, and take into account the differing circumstances of communities including their size, location and accessibility.
- Fiscal arrangements should be affordable and consistent with the policies of the Government of Canada."[88]

Moreover, Canada should ensure that it provides a fair and equitable allocation of available federal resources among Aboriginal Governments, using a methodology that is responsive to regional variations and the specific circumstances of each Aboriginal community (…) the methodology used to determine fiscal transfers to all Aboriginal Governments (should be) transparent and applied in a broadly consistent manner while still respecting the individual circumstances of each Aboriginal community (… and fiscally, Canada's approach should be) flexible with respect to the program responsibilities an Aboriginal Government assumes and the service delivery mechanisms employed.[89]

The Nisga'a Treaty is based on the following principles;

- Emphasizes the importance of Nisga'a culture
- Just and equitable settlement of land claim questions
- Spells out a new relationship based on mutual recognition and sharing
- Self-reliance, self-actualization and self-determination

<u>Ontario Municipal Transfer Payment Agreement</u>

The Transfer Payment Accountability Directive (sets out the administrative accountability framework for the oversight of specific activities funded through transfer payments. This directive lists the following priorities as important for guiding its interpretation:

- "Accountability – The government is accountable for protecting the public interest. Ministries hold recipients responsible to deliver the requested services for the funds received.
- Value for money – Ministries are efficient and effective in using public resources for transfer payments.
- Risk-based approach – Transfer payment oversight is in proportion to any risks associated with the recipient and the activity.

- Fairness, integrity and transparency – The decision to provide transfer payments and the oversight of transfer payment activities is impartial, fair and transparent and conforms to applicable legislation and corporate policy direction.
- Focus on outcomes – Objectives of transfer payment activities are clearly defined and contribute to the achievement of public policy outcomes.
- Common processes – Ministries follow required common processes, tools and templates to support consistent oversight of transfer payments.
- Information sharing – Relevant and appropriate information and data are collected, managed and shared across the government.
- Communication – There is respectful ongoing and meaningful communication between ministries and transfer payment recipients."[90]

Territorial Formula Financing

The same principles that underlie equalization underlie TFF: that reasonably comparable standards of government service should be available to all citizens of the territories at reasonably comparable levels of taxation.[91] The *Federal-Provincial Fiscal Arrangements Act,* as well as the agreements with the three territories, take into account the high cost of providing government services in the North to widely dispersed, remote communities, with a small population base. As such, on a per-capita basis, more money is distributed in the territories than in the provinces, though the gross totals of the money distributed are much smaller than provincial equalization payments.[92]

Conditions Attached to the Transfer

In many of the cases examined, transfers come with conditions around how the assigned funding must be spent. In some cases these conditions are quite strict, and must be upheld in order for the recipient to be eligible for further support. In other cases, transfers are unconditional, either because the transfer is statutorily required, or because the donor recognizes an interest in ensuring the well-functioning of the recipient. In these instances, the recipient is given broad discretion to spend the money according to their own plans and priorities.

Examples from Environmental Scan

Indian Housing Block Grant Program (US)

Recipients are responsible for "self-monitoring," which the IHGB defines as being "responsible for monitoring their own grant activities to ensure compliance with applicable Federal requirements and their performance under their Indian Housing Plan (IHP)." This process is known as "self-monitoring." Recipients are responsible for preparing an annual (at minimum) "performance report providing an assessment of IHGB program progress and goal attainment under IHP."[93]

Land Claims/Modern Treaties

"Funding under self-government agreements is generally unconditional, assuming the appropriation of funds by Parliament, and the First Nation being in compliance with all of its obligations under the Self-Government Agreement, the Self-Government Financial Transfer Agreement, and the Programs and Services Transfer Agreement."[94]

Many of Nisga'a Government authorities, for example, "are subject to federal or provincial standards, where a 'meet or beat' approach is taken. Child welfare is a good example of how this works. Nisga'a laws have priority if they meet or exceed provincial standards for child protection — but federal and provincial laws requiring the reporting of children in care continue to apply. The provincial government can continue to act as needed to protect a child at risk within the agreement between the Nisga'a and B.C. (…) All Nisga'a laws operate alongside federal and provincial laws, similar to other jurisdictions in Canada where Canadians are subject to federal, provincial and municipal laws simultaneously." Nisga'a Government may "make laws in areas where some local authority is appropriate, such as environmental protection, health and social services, and traffic and transportation. However, in these areas, federal or provincial laws prevail. (…)

Nisga'a Conflict of Interest guidelines and financial accountability mechanisms must be comparable to those that apply to other governments in Canada; protections to ensure standards in services, health and safety have been built into the Treaty. Protections for non-Nisga'a residents who live on Nisga'a Lands are set out in the Treaty — this includes rights of consultation, participation and appeal where decisions of the Nisga'a Government directly and significantly affect them."[95]

Mutual Accountability Framework for Development Cooperation between the Government of Canada and the Government of the Philippines, 2015-2020

As stipulated in the signed agreement, transfer amounts are subject to "An annual budgetary appropriation by the Parliament of Canada based on Canada's evolving foreign policy priorities (…) Favourable assessments of progress made toward achieving expected results in operational projects (…) Overall performance on Canada's Bilateral Development objectives in the Philippines."[96]

Territorial Formula Financing

The annual TFF transfers are unconditional.

BC First Nations Health Authority

The BC First Nations Health Authority has agreed to commitments for a new structure of tripartite governance for First Nations health and improve and clarify the relationships and reciprocal accountability of the parties. They also envision:

- a comprehensive health plan for each First Nation;

- services that meet the needs of First Nations communities and individuals no matter where they live;
- greater control by First Nations;
- effective linkage between First Nations delivered services and those delivered by provincial health authorities; and
- Health Canada's evolution from a designer and deliverer of health services to a funder and governance partner."[97]

Conditions or expected outcomes are laid out in 10-year health plan that sets in motion the changes necessary to improve the health of First Nations in British Columbia and to close the gaps in health status between First Nations people and other British Columbians.

Transparency

Most transfer agreements have provisions around transparency, which the parties bind each other to observe. Typically these involve reporting or disclosing how funds were spent and distributed, in some cases to citizens, in others to designated third parties or institutions tasked with monitoring the transfer.

Examples from Environmental Scan

Indian Housing Block Grant Program (US)

Applications for the program are kept confidential between HUD and applicant. Annual reports by grant recipients on how the program funds were spent are made publically available.

International Joint Commission for the Great Lakes

There is not a great deal of transparency for the Commission's funding and operations. While the IJC issues annual activity reports, hosts public meetings in watersheds, and publishes a website, most of its operations remain internal matters for the respective governments. Funding information is opaque and internal, and records of internal deliberations are difficult to come by for the general public.

Territorial Formula Financing

The allocation of funds to the territorial governments under TFF is transparent in the sense that the formula by which funding amounts are determined is enshrined in publicly available statute, though some additional transparency is desired by territories around the exact methodologies used by the Federal-Provincial Relations Division of the Department of Finance, specifically around when and where changes are made to funding methodologies without adequate consultation with the territorial governments.[98] As TFF is provided unconditionally, it is not possible to determine

precisely how territorial governments are using this funding, save through the territorial legislature's budgeting.

Dispute Resolution Mechanisms

In the event of disputes or differences of opinion between donors and recipients, most transfer mechanisms put processes in place to ensure that disputes are arbitrated and resolved to the satisfaction of both parties. In some cases, as in the case of treaties between states, when there is no higher power from which a judgment can be submitted, processes are put in place whereby dissenting, minority opinions can be submitted to the relevant governments. Often different governments within a federation will set up a third party to which disputes about funding can be submitted, in the form of a court or an implementation committee. In some cases, periodic intergovernmental negotiations are the forum within which disputes are aired and resolved.

Examples from Environmental Scan

Indian Housing Block Grant Program (US)

Federal regulations set out processes for Tribes or Tribally Designated Housing Authorities to challenge HUD assessments based on decennial census data, and to provide more accurate data to HUD to recalculate the formula. Should the Tribe or HUD be unable to resolve the dispute by the date of the formula allocation, the dispute is carried forward to the next funding year and resolved in accordance with NAHASDA regulations.

An Indian tribe may challenge the Need portion of the IHBG formula provided the data are gathered, evaluated, and presented in a manner that is fair and equitable for all participating tribes. Tribes have until March 30 of each year to submit challenges to their Needs data in consideration for the upcoming fiscal year.[99]

International Joint Commission for the Great Lakes

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.[100]

Land Claims/Modern Treaties

Implementation Committees are responsible for resolving disputes between the parties to the agreement. They consist of senior officials who represent each party, and in the case of disagreements between these representatives on the implementation committee the matter sent for resolution to an Arbitration Panel.

For example, Nisga'a Treaty "includes important rules, which set out what will happen to address any conflicts or inconsistencies between laws." These include:

- Collaborative negotiation
- Mediation
- Technical Adviser Panel
- Neutral evaluation
- Elders Advisory Council
- Arbitration

Mutual Accountability Framework for Development Cooperation between the Government of Canada and the Government of the Philippines, 2015-2020

According to the framework agreement participants from both parties are expected to "meet periodically during an inter-sessional meeting of the established Working Group on Development Cooperation under the Canada-Philippines Joint Commission for Bilateral Cooperation to review their respective commitments and performance targets, review progress made and challenges encountered.[101]

Territorial Formula Financing

Disputes are resolved at either the official level, at First Ministers Meetings, or at meetings between the various finance ministers of the parties.[102]

Monitoring Accountability and Performance

The agreements examined contain various methods and processes for ensuring accountability for results, and reporting on performance. In some cases, accountability is enforced upon the recipient of funding by the donor in the form of compliance reports and audits. In other, more constructive cases, parties lay out goals that they mutually seek to achieve, and then establish a framework, usually a committee, or working group, to examine results after a certain period of time has elapsed, and to report back to the parties involved.

Examples from Environmental Scan

Indian Housing Block Grant Program (US)

The Department of Housing and Urban Development (HUD) works with tribes to monitor accountability and performance through the annual reports that Tribes or Tribally Designated Housing Authorities submit to HUD detailing how program funds were spent, and what outcomes were achieved through the spending. HUD has the authority to develop performance measures, which the recipient must meet as a condition for compliance with NAHASDA. These performance measures are:

- The recipient has complied with the required certifications in its IHP and all policies, and the IHP has been made available to the public.

- Fiscal audits have been conducted on a timely basis and in accordance with the requirements of the Single Audit Act, as applicable. Any deficiencies identified in audit reports have been addressed within the prescribed time period.
- Accurate APRs were submitted to HUD within 90 days after the completion of the recipient's program year.
- The recipient has demonstrated progress in implementing the activities in the IHP activities.
- The recipient has substantially complied with the requirements of NAHASDA and all other applicable Federal statutes and regulations"

Recipients are also required to maintain and retain financial and program records (financial, program, supporting documents, etc.) for 3 years, and they must complete a "self-monitoring assessment of adherence to IHBG program requirements and applicable statutes and regulations at least once a year.[103]

International Joint Commission for the Great Lakes

While the 1909 Treaty creates separate national sections and provides funding through both governments, the Commission strives to operate as single entity, speaking with one voice and receiving advice from its staff and boards without regard to citizenship. While staff members are employees of a particular government and Commission office, they are accountable first to the full Commission. The individual section offices reporting to their corresponding funding governments achieve financial responsibility, accountability and respect for the provisions of the BWT. Cost-sharing is accomplished through project planning, tracking expenditures by section office and rebalancing funding, if necessary. The Commission maintains a shared budget for its jointly operated regional office. Coordinated capital investments in the fields of information management and operational support systems are key to maintaining an efficient, effective and unified Commission.[104]

Land claims/Modern Treaties

According to a report based on case studies by the AGC, there is both a lack of performance measures and a lack of performance reporting. With regard to the former, the report states: "Because land claims agreements do not contain any milestones or targets, progress toward the objectives and overall performance is also unknown. We found that while the five-year review called for in the Nunavut land claim agreement was unable to arrive at any overall measure of progress toward success, it did point out that a major failure of the first five years was 'ineffective implementation.' It indicated that there was a general failure to think in terms of effective management.

Under the Gwich'in land claim, for example, the implementation committee decided not to conduct an extensive five-year review but to wait for an eight- to ten-year review of the implementation plan. The committee subsequently postponed that review, pending negotiations of the implementation plan for the next 10 years of the claim. With regard to a lack of performance reporting, the report explains:

Annual reports on land claims agreements are not helpful in holding the federal government accountable. The implementation committee for each land claim agreement must prepare and submit annual reports to the signatories. We expected annual reports like these to contain information that is useful to stakeholders in holding to account those responsible for meeting the objectives of the claims. They should be able to tell the reader what is working and what is not. Yet the agreements provide no direction on the content of these reports, other than the requirement in the Nunavut agreement that the report include 'any concerns of any of the panel members.' When we looked at the annual reports, we found that they were not results-based; they focused primarily on activities and events rather than on useful accountability information. For example:

They contained no overview of how outstanding obligations will be implemented and how they relate to objectives.

- There were no planned timelines for implementing performance targets.
- There was no information on performance, particularly against objectives.
- There was no process to ensure accuracy of the reported information, including information from other departments.[105]

Ontario Municipal Transfer Payment Agreement

The Auditor General of Ontario has the authority to conduct an audit on grant recipients. The Agreement denotes three categories of transfer payments: Time-limited payments; Ongoing payments, and Support payments. Each category has its own unique performance measures. For Time-limited payments the funding "decision is discretionary," the recipient is assessed "on ability to achieve results. and the agreement "establishes performance measures for (the) recipient. Measures (are) generally focused on outputs or short-term outcomes." For Ongoing payments, the funding decision may or may not be discretionary or legislated, and the recipient is "assessed on ability to achieve results." The agreement "establishes performance measures for (the) recipient," and these measures generally focus "on intermediate outcomes." For Support payments, the funding decision may or may not be discretionary or legislated, and the recipient is "assessed on "eligibility only." The agreement "does not establish performance measures," but it may have requirements that are not performance related."[106]

Territorial Formula Financing

Territorial legislatures are the institutions that hold territorial governments accountable for the dispensing of funds provided under TFF, and for performance. Some accountability is provided at the official level through First Ministers Meetings and meetings of Ministers of Finance. The Federal-Provincial Relations Division of the Department of Finance Canada undertakes a range of functions with respect to TFF, including calculating territories' entitlements and delivering the actual funds.[107] The federal government collects no data for the specific purpose of accountability or

performance measurement for TFF. Funding is unconditional. Expenditure reporting and accountability for money spent are functions exercised through the territorial legislatures. As the TFF funding is unconditional, there are no performance measures imposed by the federal government upon the territories. Territorial legislatures and citizens measure performance by holding their governments to account for money.

BC First Nations Health Authority

Expected outcomes for BC FNHA include:

- It must be fully accountable to First Nations.
- It should reduce bureaucracy and maximize services.
- Its policies and programs should be based on the comprehensive health plans of B.C. First Nations.
- It should improve efficiency in both administration & health service delivery
- It should be founded on a First Nations definition of health that is holistic and includes the physical, mental, emotional, spiritual and social aspects.
- It should support a comprehensive set of public health, health promotion and disease prevention and primary health services.
- It would operate in partnership (with clearly defined roles and responsibilities, authority and jurisdiction) with the health programs and authorities of the provincial and federal governments.
- It should include special provisions for effective service delivery where there are multiple jurisdictions and multiple service organizations, such as in the case of urban and off-reserve First Nations people.
- It should develop clear and systematic working relationships between First Nations health organizations and provincial health organizations and support clarification of roles and responsibilities, better co-ordination, shared goals and planning, and improved results for the First Nations communities of BC.
- It should work with other components of the BC health system through direct and indirect measures to improve health services across the continuum.[108]

Key performance indicators have remained constant since its inception as follows:

- Life expectancy at birth;
- Mortality rates (deaths due to all causes);
- Infant mortality rates;
- Diabetes rates;
- Status Indian youth suicide rates;
- Childhood obesity; and,
- Practicing, certified First Nation health care professionals.[109]

ANNEX B

ONTARIO MUNICIPAL PARTNERSHIP FUND

The Ontario Municipal Partnership Fund (OMPF) is Ontario's main transfer payment to municipalities, transferring $505 million in unconditional funding to 338 municipalities of relative size and wealth across the province.[110] Combined with the uploads of various municipal service responsibilities to the province, it totals more than $2.3 billion in payments to fund local government activities.[111] It uses the following mechanisms to allocate funds to governments based on relative need:

1. Assessment Equalization Grant
2. Northern Communities Grant
3. Rural Communities Grant
4. Northern and Rural Fiscal Circumstances Grant
5. Transitional Assistance[112]

The **Assessment Equalization Grant** provides funding to lower-tier municipalities with limited property assessment capacity due to lower property values and limited non-residential assessment. The grant amount is determined by calculating a total assessment differential for the municipality. This amounts to the difference between the total assessment per household and the threshold set by the province below which a municipality cannot fall. To arrive at the grant amount the difference is multiplied by the total number of households in the community.

The **Northern Communities Grant** allocates funding to northern municipalities in recognition of the unique challenges they face. The grant is based on the number of households in a community, multiplied by a per-household amount set by the province, which in 2016 was $214.50.

The **Rural Communities Grant** provides funding to lower-tier municipalities based on the proportion of their population residing in rural or small communities. A Rural and Small Communities Measure score is assigned to a municipality, with municipalities scoring 75% or more on the index receiving the full per-household amount of $134.50, and other communities being allocated less on a sliding scale. The municipality's score is then multiplied by its total number of households to determine the final grant.

The **Northern and Rural Fiscal Circumstances Grant** was introduced during the 2014 redesign of the OMPF, and is provided to municipalities eligible for funding through the Northern Communities and/or Rural Communities Grants. The grant provides targeted support in addition to these fixed per-household amounts, in recognition of the fact that

not all northern and rural municipalities have the same fiscal circumstances. A community is assigned a score on the Northern and Rural Municipal Fiscal Circumstances Index, which ranks municipalities on a scale of zero to ten, with ten representing the most challenging relative circumstances, and zero representing relatively positive circumstances. That score determines the per-household amount to which a community is entitled, and that amount is then multiplied against the number of households in the community to determine the total grant amount.

The **Northern and Rural Municipal Fiscal Circumstances Index** used to determine the size of an eligible community's Northern and Rural Fiscal Circumstances Grant measures the fiscal capacity of a given municipality relative to other northern and rural municipalities in the province. It is determined using six indicators:

- Weighted Assessment Per Household
- Median Household Income
- Average Annual Change in Assessment (New Construction)
- Employment Rate
- Ratio of Working Age to Dependent Population
- Percentage of Population Above Low-Income Threshold

The first two indicators constitute the primary indicators, and the following four constitute secondary indicators. The indicators are scored on a range from -100% to 100%, reflecting how the value of a municipality's indicator compares to the median for comparable northern and rural municipalities, represented by zero. A municipality with a negative score is below the median, and a municipality with a positive score is above it.

A community's place on the index is determined through three steps. First, the municipality's primary and secondary indicators are scored based on their relationship to the median for northern and rural municipalities, as determined by indicators across the province. Second, an average indicator score is calculated based on the municipality's average of both primary and secondary indicators. Third, using the results of these scorings, the community is placed on a scale running from 0 to 10, based on the relative results of each municipality's average indicator score: the lower the ranking, the more relatively positive the community's fiscal circumstances, and the higher the ranking, the more challenging the circumstances. As a result, a community with a score of 5 has relatively typical fiscal circumstances, close to the median for northern and rural communities.

Transitional Assistance is a temporary measure designed to assist municipalities in adjusting to the program as redesigned, and to provide stability as the new circumstances are adjusted to. This assistance ensures that municipalities receive a guaranteed level of support based on their 2014 OMPF allocation. Specifically, municipalities in the north will receive at least 90 per cent of their 2014 allocation, while municipalities in other regions of the province will receive at least 80 per cent of their

2014 allocation. These minimum levels of support will be enhanced, up to 100 per cent, for eligible northern and rural municipalities with more challenging fiscal circumstances, as measured by the northern and rural MFCI.[113]

The OMPF ensures that baseline levels of service are delivered by all municipalities in the province, despite wide variations in fiscal capacity and tax base. The system ensures that those municipalities that most require support receive it in a targeted way, while allowing large, wealthy municipalities capable of supporting themselves to do so.

ANNEX C:

HISTORICAL OVERVIEW OF FISCAL FEDERALISM

Canada's federal system has evolved over more than a century, and continues to develop to this day, adapting to changing social, economic, and political realities with relative flexibility. The following constitutes a high-level overview of the most important developments in Canadian fiscal federalism over the course of our history, with a particular focus on the frameworks of accountability that have developed both to support the efficient allocation of funds to the country's needs, and to ensure democratic responsibility to the people is safeguarded and expanded.

The provinces of what was then known as British North America came together, after a complex series of negotiations, into a single federal dominion in 1867. The original constitutional document, the British North America Act of the Westminster parliament, enumerated the division of powers between the provinces and the newly created federal government. Responsibility for defence, security, foreign relations, and international trade, among other matters, was assigned to the federal government, with the provinces retaining control over local matters, including the regulation of hospitals, schools, natural resources, and municipalities. Power was shared between the federal and provincial governments on immigration, agriculture, and other issues. The residual powers not specifically enumerated in the constitution were reserved to the federal government, making initially for a strong federal government, and relatively weak provinces. Significantly, the exclusive jurisdiction over matters pertaining to 'Indians and land reserved for the Indians,' was given to the federal government.

The federal government had considerable powers of taxation, with only direct taxation over property left in the hands of the provinces, and as a result had considerably more fiscal capacity than the lower orders of government. The nature of the division of powers was to change dramatically over time, as areas of provincial responsibility became increasingly complex and expensive to deliver without federal assistance. Interpretation of the residual powers in the courts would also tend to interpret provincial spending power as broadly as possible, and federal power more narrowly.

For more than 50 years after confederation, customs and excise duties provided the bulk of federal revenue, amounting to as much as 90% of the federal budget in 1913. During the First World War, however, the expenses of maintaining and deploying standing armies to fight overseas considerably taxed the fiscal resources of the Canadian state, and led to the deployment, in 1917, of the country's first income tax, initially conceived as a temporary measure. These were followed in 1920 by the

introduction of the first sales taxes. The provinces, which had prior to the war made most of their revenue from the management of natural resources and the issuance of licenses and permits, as well as substantial federal subsidies, hesitated to impose direct taxes, but introduced taxes on business profits and successions by the end of the 1800s. Municipal governments, on whom provinces devolved the ability to tax real and personal property, by 1930 had collective revenues surpassing those of the federal government.

The Great Depression and the Second World War significantly changed the fiscal landscape in Canada. Many municipalities were bankrupted and provincial credit was severely impacted. The decline in customs and excise duties during the Great Depression spurred the federal government to resort to greater income and sales taxation. The provinces began to do the same, and by the end of the depression all but two provinces levied personal income taxes. The Second World War, with its massive increases in government expenditure, saw profound changes to the country's fiscal architecture. To distribute the enormous financial burdens of fighting the war equitably, the major tax sources were gathered under a central, federal, fiscal authority. In 1941, the provinces agreed to surrender personal and corporate income tax fields to the federal government for the duration of the war, and for one following year, in exchange for fixed annual payments. By 1946, direct taxes accounted for 56% of federal revenue, and federal control was not rescinded entirely. Since then, there has been significant difficulty reconciling the constitutionally enshrined tax powers of both orders of government, and the challenges involved have since dominated many federal-provincial negotiations.

In Canada, fiscal federalism has two core aspects:

- The so-called fiscal imbalance between the federal and provincial governments, and
- Economic inequalities between the various provincial and territorial governments.

The federal/provincial imbalance became critical over time due to the discrepancy that emerged between the provinces' limited revenue generating capacities and their increasingly expensive service delivery responsibilities under the constitution. As health care, education and social welfare became large, expensive areas of responsibility with the introduction of complex, cradle-to-grave welfare and universal health care systems, provinces began to look to the federal government to make up the shortfall, unable to finance such programs on their own, comparatively narrow fiscal resources.

Fiscal Transfers to the Provinces: Canada Health and Social Transfers

To address the federal/provincial imbalance, the federal government began making transfer payments to the provinces following the enactment of increasingly significant

social legislation in the late 1930s, but these transfers have become larger and their machinery more complex over the years. They have their origins in the wartime 'Tax Rental' agreements that were signed between the provinces and the federal government during the 1940s, the first being signed in 1941, which transferred 'tax points' from the provincial to the federal governments in order to fund the war effort, in exchange for a cash contribution initially calculated on a per-capita basis, and then as a percentage of personal and corporate income taxes from 1957. Tax points represent income tax room ceded by one order of government to another, to allow either the federal or provincial governments to collect a greater share of tax revenues without raising taxes for the overall population. The federal government continues to include tax points in the calculation of its transfers, although broader willingness to recognize these amounts as transfers has tended to diminish.

The tax rental agreements were eventually replaced in 1962 by tax collection agreements that enable provincial governments within the federation to levy taxes through a single administration and collection agency. The federal government has signed such agreements with all provinces except Quebec, and collects income taxes on behalf of all provinces through the Canada Revenue Agency. Each province is given the flexibility to set its own income tax rate, though an incentive to harmonize provincial taxes with federal ones is created by administering tax programs free of charge if they mimic their national counterparts. Using the Canada Revenue Agency to administer tax collection avoids inefficient overlap and duplication, reducing overall administration costs to taxpayers.

From 1957 to 1976, health and social funding were provided as cash grants, or as cost-sharing mechanisms to encourage provincial establishment of national programs. The establishment of the Canada Assistance Plan in 1966 provided conditional funding to share costs of social assistance programs, with federal stipulations including the prohibition of residency requirements for citizens to access social services. The transfer of money was governed by the Welfare Services guidelines, which specified which services were cost-shareable under the CAP, how the individual province/territory went about claiming money back from the federal government, and how the size of the federal contribution was determined.

In 1977 Established Programs Financing, which initially took the form of equal parts tax transfer and cash transfer, replaced various cost-sharing programs for health and post-secondary education. The principle that federal funding should grow in line with the economy was established. In 1984, the same year that the Canada Health Act was enacted, EPF was made conditional on compliance with the principles enshrined in the Act, and provisions for withholding funding were introduced. In 1995 both the Canada Assistance Plan and Established Program Financing were combined into the Canada Health and Social Transfer, a single block grant to each province. The CHST provided funds to provincial and territorial governments in support of health care, post-secondary education, social assistance and social services. Like the Established Program

Financing transfer, the CHST was a combination of the 1977 tax transfer and a cash transfer and the total was allocated on an equal per capita basis.

The government now transfers funds to provinces under a variety of programs and under varying terms. The two most significant transfers are the Canada Health Transfer and the Canada Social Transfer; they form separate tranches of block grant funding that allocate monies to the provinces for health and social programs. The transfers are block grants in the sense that there is no detailed indication by the federal government as to how they should be spent. Provinces need only ensure that their programs comply with broad statements of principle to be eligible to receive the money. For the Canada Health Transfer, these principles are enshrined in the Canada Health Act, and include universality, comprehensiveness, portability, accessibility, and public administration. There is no compliance mechanism to determine accountability for provincial spending of this money, as the continual negotiations between the federal and provincial governments are in practice where such accountability is rendered. Currently, the federal government sets an annual growth rate for the Canada Health and Social Transfers, in line with a three-year moving average of nominal gross domestic product growth, with a guaranteed growth of at least 3% a year.

Federal accountability for how provincial and territorial governments spend transferred funds has evolved alongside the changing fiscal arrangements. In the 1950s and 60s, federal transfers were conditional cost-sharing grants that encouraged the establishment of national programs and ensured comparable quality across provinces. As these programs became more established, there was less necessity for the rigorous and comprehensive reporting and auditing initially required on the part of the federal government. Federal support for national priorities began to shift to block funding based on the acceptance by the provinces of broad principles and shared objectives. The block funding structure gives provinces and territories greater flexibility in designing and administering programs. As a result of this evolution, today governments focus on accountability to the public, rather than to other levels of governments. This recognizes that governments are accountable directly to their residents for their spending in their areas of responsibility.

Fiscal Transfers Between Provinces: Equalization

The imbalance among provinces emerges because different provinces have different economic and fiscal capacities, being of varying sizes and levels of affluence, yet there is a strong belief that the standard of public services should be broadly equal across the country. To address this inequity, Canada has instituted a system of equalization payments to ensure that all the provincial and territorial governments offer ‘reasonably comparable levels of public services, at reasonably comparable levels of taxation.’ While such fiscal transfer payments date back to Confederation, a formal system of equalization payments was first introduced in 1957, and they were enshrined in Canada’s constitution in 1982.

Equalization payments are quantified on the basis of complex and sometimes-contentious funding formulas, which attempt to take into account per capita revenue generation capacity. A province's fiscal capacity is determined by measuring revenue from five sources: personal and business income taxes, consumption taxes, up to 50% of natural resource revenue, property taxes, and other miscellaneous sources of revenue. The formula calculates the difference between the per capita revenue yield that a particular province would obtain using average levels of taxation, and the national average per capita revenue yield at average tax rates. In effect, the system transfers monies from so-called "have" provinces to so-called "have-not" provinces, as defined by the formula. High-performing economies like Alberta, British Columbia, and Newfoundland, transfer a portion of their revenues to underperforming economies like the Atlantic provinces, Quebec, and recently, Ontario.

A particularly contentious issue is the extent to which revenues from non-renewable resource extraction should be taken into account. A dispute between Newfoundland and Canada over oil and gas revenues, and their potential impact on the province's share of equalization payments, for example, led to the signature of the 1985 Atlantic Accord, under the terms of which Canada agreed to allow Newfoundland to tax the new resources as if they were its own, with transitional protection, for a 12 year period from 2000 to 2012, from the drop in equalization revenues that would otherwise have resulted due to the increased natural resource revenues the province would be collecting.

Provincial to Municipal Transfers

Responsibility for municipal affairs falls to the provincial governments under the constitution. As such, municipal governments are creatures of provincial statute, without independent constitutional existence as an order of government. Over the last decades, however, an increasing amount of responsibility and accountability has been downloaded from the provinces to the municipalities, which have the right to collect property taxes to fund their operations. Property taxes represent the largest revenue stream for municipalities, accounting for approximately 48% of their total revenue. They fund such activities as water, sewage, garbage and recycling, police, recreation, transportation, and others.

Provinces have, in recent years, increased the size of their transfer payments to municipal governments while uploading certain costs back to the provinces to reduce the financial burden on municipalities and allow them to spend more of their revenues on critical infrastructure. In 2017, the Ontario Municipal Partnership fund, the province's largest transfer payment to municipalities, will provide $505 million in unconditional support to 338 municipalities across the province. Costs around the administration of Ontario Works benefits, the Ontario Drug Benefit, and the Ontario

Disability Support Program have also been uploaded, or will be uploaded in the coming years.

Devolution and Territorial Self-Government: Territorial Formula Financing

Canada's northern regions are divided administratively into three territories, which do not have the population to justify full provincial status in the federation. Historically, the federal government has directly administered these territories, but a policy of devolution over the past several years has seen significant powers transferred to the three territorial governments in Northwest Territories, Yukon, and Nunavut. Devolution, which began in the late 1960s and early 1970s, sought to give northerners more control over their own political, economic, and social destinies. However, the small population bases and limited fiscal capacity of the territories means that substantial support from the federal government is needed to fund the day to day operations of the territorial governments. This support is dispensed under a system of Territorial Formula Financing (TFF), an unconditional annual transfer from the federal government to the territories in order to provide their citizens with levels of public service that are reasonably comparable to those seen in the southern provinces, at reasonably comparable levels of taxation.

TFF helps territorial governments provide essential public services in the North, such as hospitals, schools, infrastructure, and social services while recognizing the often much higher cost of delivering these services in a Northern context, as well as the reduced economies of scale in delivery to mostly small, isolated, remote communities. TFF is similar to equalization payments to the provinces in that it is a fixed payment, enshrined in legislation, which is distributed to each territory according to a pre-determined formula that guarantees stable annual funding. The formulas determine each grant based on the difference between the territory's expenditure needs and its capacity to generate revenues from internal sources (income taxes, tobacco and alcohol taxes, gas taxes, etc.). The expenditure needs of each territory are adjusted annually to ensure that spending can grow in line with changes in relative population growth, as well as changes in provincial-local government spending.

Section 35 and the Rise of First Nations Self-Government

Fiscal federalism within Canada is becoming increasingly more complex with the rise of First Nations governments as autonomous partners within the Canadian federation. The Royal Proclamation of 1763, considered by First Nations the foundational document for the subsequent relationship between Indigenous and non-Indigenous Canadians, established the principle that treaties were necessary in order for non-Indigenous British and French-Canadian settlers to purchase land from the country's Indigenous inhabitants. Beginning in the second half of the nineteenth century, the new state of Canada became increasingly less interested in maintaining a treaty relationship, and

Confederation, the founding bargain of the Dominion of Canada, was concluded without consultation with the new country's Indigenous population. Canada's first constitution, the *British North America Act,* gave exclusive responsibility for 'Indians and lands reserved for the Indians' to the federal government, without Indigenous consent. The First *Indian Act* followed in 1876, consolidating a number of previous laws regarding First Nations. For most of Canada's early history, up to the 1950s, federal policy was built around assimilating First Nations into the wider Euro-Canadian society, with the policy including the notorious residential school system. The nations were broken up into over 600 individual tribal bands, and a system of government by band council was set up, replacing traditional First Nations governance structures with an artificial, imposed system. Band councils exercised highly limited, federally delegated power to govern a land base within reserves, but primary decision-making authority rested with the Department of Indian Affairs, and the department's representatives on individual reserves, the Indian Agents, exercised great power. In the 1950s, the transfer of programs to bands, provinces, and other federal departments and agencies got underway, and the Department of Indian Affairs gradually began to delegate its power.[114]

In 1969, a federal government White Paper on Indian Policy attempted to institute a policy of termination for the special status accorded to First Nations under the *Indian Act*, with the aim of fully integrating First Nations into mainstream Canadian society, breaking up the collective ownership of reserve land, and devolving all the powers exercised by the federal government over Indian affairs to the provinces.[115] Intense opposition resulted from First Nations communities, who argued for the preservation of their treaty rights, against the breakup of reserve land into private ownership, and for the necessity for some form of recognition by the Government of Canada of special First Nations status.[116] Sustained First Nations opposition led to the eventual withdrawal of the policy and mobilized national political organization among Aboriginal peoples in Canada. While Aboriginal peoples have asserted their rights to self-government since contact with Europeans, the drive for Aboriginal self-government began during the 1970s to take on greater force and coordination at the national level.[117]

Having functioned as wards of the state, governed by the federal Indian Act, for most of Canada's history, the rights of Canada's Indigenous peoples as distinct political entities were enshrined in Section 35 of the repatriated Canadian constitution in 1982. The 'existing aboriginal and treaty rights' of First Nations, Inuit and Métis peoples were 'recognized and affirmed,' but what those rights consisted of specifically was left unsaid, leading to a series of Supreme Court decisions recognizing various Indigenous rights, including the right to self-government.[118] Following the repatriation of the Constitution, four constitutional conferences were held between 1983 and 1987 to attempt to further define the constitutional right to Indigenous self-government. Parties failed to reach an acceptable agreement on the nature of the right, and government attention shifted to broader constitutional matters. The failure of the 1992 Charlottetown Accord, and the

subsequent retreat from matters of constitutional import, led to the stagnation of any further effort to enshrine Indigenous rights in the Constitution.

In 1982, a Special Committee of the House of Commons on Indian Self-Government was appointed to review legal and institutional issues related to the status, development, and responsibilities of band governments on reserve. It issued a report in 1983, known as the Penner Report, recommending that the federal government recognize First Nations governments as a distinct order of government within the Canadian federation, and begin to pursue processes aimed at making Indigenous self-government a reality.[119] While efforts to enshrine the right of self-government in the constitution ended with the failure of the 1992 Charlottetown Accord, other avenues to self-government have been explored by the federal government, and the Liberal government elected in 1993 committed itself to recognizing and implementing the inherent right of self-government without constitutional revision. Since then, several self-government arrangements have been developed, both in conjunction with, and independent from, land claim settlements. General political acceptance has led to the right being recognized by the federal government as an existing Section 35 right.

The James Bay and Northern Quebec Agreement, negotiated by the Cree and Naskapi First Nations of northern Quebec, was the first self-government agreement to be included as part of a land claim agreement, in 1975 and 1978. Provisions for local government were implemented in 1984 by the *Cree-Naskapi (of Quebec) Act*, which replaced the *Indian Act* for the Cree and Naskapi, and limited the responsibilities of the federal government in the day-to-day administration of band affairs and lands. All the Cree and Naskapi bands were incorporated and some of their lands constitute municipalities or villages under the Quebec *Cities and Towns Act*. Band corporations have by-law powers similar to those possessed by local governments under provincial legislation.

The James Bay and Northern Quebec Agreement also provided for a form of government for the Inuit signatories. *An Act concerning Northern villages and the Kativik Regional Government (Kativik Act)* established Inuit settlements in northern Quebec as northern village municipalities under provincial legislation. The Kativik Regional Government has the powers of a northern village municipality over those parts of the territory that are not part of the village corporations, and regional powers over the whole territory including the municipalities. The governments are not ethnic in character -- all residents, Aboriginal and non-Aboriginal, may vote, be elected and otherwise participate; however, over 90% of the population in the area are Inuit and receive benefits under the James Bay Agreement.[120]

Funding Agreements Between First Nations and the Federal Government

Since the 1980s, the Department of Indigenous and Northern Affairs has moved away from providing direct delivery of most services on reserve, towards delivery to First Nations themselves, funded through a variety of funding agreements. Indeed, INAC's role is now primarily that of a funding provider, as more and more services are devolved to First Nation institutions or communities to deliver. Initially, these new funding arrangements took the form of Contribution Agreements, which were heavily criticized by First Nations as being excessively burdensome and inflexible. Following the release of the Penner Report on Indian Self-Government in 1983, INAC obtained approval for a variety of different funding mechanisms intended to increase the flexibility of First Nations in program delivery, and to reduce the substantial administrative burden they faced under the Contribution Agreements. Alternative Funding Arrangements were approved for disbursal in 1983, and Flexible Transfer Payments in 1989. Funding arrangements were also rationalized so that individual First Nations would have only one funding arrangement for all programs funded through INAC, rather than many separate arrangements for each program delivered.

Funding under these arrangements is delivered mainly to First Nations band governments, and to Tribal Councils representing groups of First Nations governments for the purposes of aggregating and enhancing the delivery of services and programs. As the process of devolution was completed, the ongoing funding relationship as expressed in the Funding Arrangement became a critical, if not the defining feature of the relationship between Canada and individual First Nations. To this day, for most non-self-governing First Nations, the annual Comprehensive Funding Arrangement (CFA) or multi-year INAC or Canada First Nations Funding Arrangement (IFNFA/CFNFA) is the only formal signed agreement between Canada and the First Nation entity.

Fiscal Relations with Self-Governing First Nations

In 1973, the Government of Canada introduced a new policy on Comprehensive Land Claims. Since that date, and the subsequent adoption of the *Inherent Right Policy* in 1995, recognizing Indigenous self-government as an inherent right within the meaning of Section 35 of the Canadian Constitution, twenty-nine self-government agreements have been concluded with First Nations across the country.[121] The federal policy on implementation of the inherent right focuses on reaching practical arrangements within the framework of the existing constitutional architecture, that recognize the authority of Indigenous governments in areas that are internal to their communities and integral to their culture, languages, and institutions, while respecting their special relationship to their lands and resources.[122]

These settlements have provided for direct Indigenous ownership of over 600,000 square kilometers of land and transferred over $3.2 billion in capital while protecting

traditional ways of life, providing certainty with respect to land rights and title, and providing access to resource development opportunities.[123] The agreements, which can be comprehensive treaties including both land claim settlements and full self-government for all programs, or more narrow sectorial agreements granting self-government for a particular policy area, like education, remove the participating First Nation from the jurisdiction of the *Indian Act,* and allow a degree of self-determination that extends to the fiscal relationship.[124] In some instances, most notably in Nunavut, but also in the case of the James Bay agreement, and others, self-government agreements establish public governments to administer the territory affected by the relevant land claim. These governments have authority over all citizens residing in their territory, Indigenous and non-Indigenous, though Indigenous Canadians usually represent clear majorities in these cases.

The various agreements generally establish that the core of self-governing First Nations' finances will be the Financial Transfer Agreement, negotiated every five years with the federal government. This money is in addition to the capital payments generally scheduled to the agreement signatory under the terms of the initial land claim settlement.[125] The standard for these agreements is similar to that used for equalization payments in the country as a whole. In the Yukon, for example, where an umbrella agreement for the territory's First Nations was finalized in 1990, the amount of money to be transferred should be sufficient to enable the First Nation to 'provide public services at levels reasonably comparable to those generally prevailing in the Yukon, at reasonably comparable levels of taxation.'[126] The agreements also anticipate that First Nations will not want to exercise all of their jurisdiction immediately, and that the relevant province or territory will continue to deliver those services for which the First Nation does not immediately want to assume responsibility. In some cases, the agreements also provide First Nations governments with the ability to tax their own citizens, as well as anyone else residing within their territory. Provincial and territorial governments reduce their own taxation to avoid double taxation.[127]

ANNEX D:
PROFILE OF INAC'S USE OF ACCOUNTABILITY AGREEMENTS

INAC uses five types of funding authority to dispense funding to First Nations governments, listed here in accordance with the requisite level of flexibility: Grants, Alternative Funding Arrangements, Flexible Transfer Payments, and Contributions.

1. A **Grant** is the most flexible form of transfer payment, as it is not subject to a detailed accounting or normally subject to audit by INAC. Eligibility and entitlement is established in advance of distributing the grant, and the recipient may need to meet certain pre-conditions for its receipt, as well as being required to report on results achieved, but the funding can generally be distributed according to the needs of the individual First Nation. INAC's grant for band support funding, for example, assists band councils to meet the costs of local government and administration. Band councils submit an application form with data that is used to establish the funding level, then maintain budgets and accounts for the funding that are available to their members.
2. **Block Contribution Funding** provides funding over a period of up to ten years, as well as the flexibility to transfer funds across programs and retain surpluses. This flexibility comes with the responsibility for deficits. Eligible First Nations and Tribal Councils can design programs and allocate funds to meet community needs and priorities provided that certain minimal program requirements are met. First Nations and Tribal Councils wishing to enter into an arrangement under the AFA authority must meet various entry requirements and readiness assessment criteria, as well as the requirements of individual program terms and conditions.
3. **Flexible Contribution Funding** is an option that is available to First Nations governments allowing funds to be moved within cost categories of a single program during the active lifetime of the relevant funding agreement. First Nations must meet certain assessment criteria to be eligible for this funding mechanism. A program also requires at least a two year relationship with a recipient in order to receive this funding, usually as part of a multi-year funding agreement. The recipient can redirect funding among the various cost categories of the specific program being funded, as established in the funding agreement. Unspent funds must be returned to INAC at the end of the project, program, or agreement.

4. **Fixed Contribution Funding** is provided as an option to First Nations governments where annual funding is based on predictable formulae or fixed costs. It is distributed on a program basis with incentives to ensure that programs and services are managed effectively within a fixed budget. Surpluses can be retained for use at the discretion of the First Nation or Tribal Council, provided that certain minimum program requirements are upheld. Reporting requirements are supposed to assess program performance, rather than assessing for how each dollar was spent.
5. **Contributions** are conditional transfer payments dispensed for specific purposes that cannot be altered, subject to performance conditions outlined in a funding agreement, account and audit. There is provision for advances to be paid, and there is no provision for the retention or carry forward of surpluses at the end of the fiscal year, with unused monies returning to INAC. Contributions are usually used to fund proposals or reimburse variable costs such as income assistance. This is the basic funding unit INAC uses to fund First Nations, and the most commonly used.

INAC uses these five authorities as building blocks to construct various funding arrangements for First Nations and Tribal Councils. Since 2011, the principal funding arrangements currently in use are:

- First Nations and Tribal Councils National Funding Agreements,
- Streamlined Funding Agreements for First Nations (Optional)
- Canada Common Funding Agreements for First Nations and Tribal Councils which are similar to First Nations and Tribal Councils National Funding Agreements, except that they consolidate programs and funding available from departments other than INAC.

Prior to the signature of a new or renewed funding agreement, INAC assesses the applying First Nation or Tribal Council according to certain criteria:

- Experience in administering programs,
- Sound organization for purposes of program management,
- Processes and procedures in place for program management and financial control,
- Mechanisms in place to support accountability,
- A sound financial position, or, if problems exist, the existence of a plan in place that has been operating effectively for at least six months to remedy the problem, and
- A sufficiently detailed plan covering the duration of the agreement showing how the agreed-upon level of funding will be administered over the relevant fiscal year, as well as projected expenditures for each subsequent fiscal year.

For those First Nations that have signed **Self-Government Agreements**, the funding arrangement takes the form of a **Self-Government Financial Transfer Arrangement**. These multi-year grants cover all the programs and services delivered under the relevant Self-Government Agreement, and require a less onerous reporting framework limited to annual audited financial statements. Self-governing First Nations are accountable to their own members, as outlined in the First Nation's constitution. These arrangements typically include provisions for Own Source Revenue and for taxation by the First Nation government, usually with off-set provisions in the Financial Transfer Agreement phased in over a number of years.[128]

In the case of non-self-governing First Nations, accountability frameworks are still put in place in order to render the band government accountable to its own members. These systems are generally designed to include provisions for transparency, conflict of interest, benefits for elected and unelected officials, disclosure, and redress. In practice, however, most of the accountability for money spent is still rendered to INAC.[129] There are no specific provisions to hold back funding in the event of non-compliance, but funding may often be withheld for non-receipt of annual audited financial statements, or any of the other 168 separate reporting requirements the AG estimates are mandated for non-self-governing First Nations annually.[130]

INAC still has the power to intervene in instances of default, as established in the terms and conditions of most funding agreements. When the terms and conditions are not being met, the band's auditor has given an adverse opinion with respect to the band's financial statements, when a deficit exceeds 8% of total annual revenues, or when the health, safety, or welfare of band members is being compromised. In these instances, there are three levels of federal intervention:

- The establishment of a remedial management plan, when the recipient of INAC aid is willing and has the capacity to redress and remedy the problem,
- The institution of co-management, when the recipient is willing, but lacks the capacity to remedy the problem, or, in the most extreme cases,
- Third-party management, when the recipient is high risk, or unwilling to address or remedy the default.

In these last two cases, the Minister of Indigenous and Northern Affairs appoints either a co-manager, or a third party manager, to assist the First Nation in addressing the situation as it has arisen.[131] This system is widely unpopular, with third party managers rarely being present in the communities they are ostensibly serving, and First Nations submitted to their judgement rarely, if occasionally, graduating back to self-determination.[132] The AG has identified problems with the system, including the lack of a dispute resolution mechanism, a lack of capacity building initiatives for chiefs and councils, and little provision for First Nations input in the third-party manager selection process.[133]

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