

**POLICY PAPER:
IMPLEMENTING INDIGENOUS SELF-DETERMINATION THROUGH LEGISLATION IN CANADA**

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SUMMARY

First Nations should pursue policy which implements legislation that recognizes and affirms self-determination as a section 35(1) right, in accordance with UNDRIP, by creating legislation which ousts provincial law from Indian reserves, and allows Indigenous law and governance to operate in its own sphere of authority. Areas of Legislative Jurisdiction should be pursued in relation to:

1. Control of Federal Service Delivery through Self-Determination Recognition Legislation.
2. Protection of Culture and Communities through National Legislation related to:
 - a. Indigenous Child Welfare
 - b. Indigenous Languages
 - c. Religious Freedoms
 - d. Cultural Heritage
 - e. Dispute Resolution and Tribal Courts
3. Indigenous Economic Development and Resource Protection through Legislation related to:
 - a. Gaming
 - b. Business Development and Support
 - c. Oil, Gas, Minerals
 - d. Forests, Air, Agriculture and Water

Legislation and Indigenous Self-Determination in Canada and the United States

Canada and Indigenous peoples should work together to produce legislation which recognizes and affirms Indigenous self-determination.¹

The federal government should exercise paramountcy powers under section 91(24) of the *Constitution Act, 1867* to oust provincial power from Indian reserves on an 'opt-in' basis (by Indian Bands and/or broader National groups voting to accept such action) and thereby advance Indigenous jurisdiction under section 35(1),² and the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP].³ My reading of the caselaw persuades me that if Canada acted to recognize and affirm inherent self-determination on these two grounds, courts would generally defer to Parliament's understanding of section 35(1) and UNDRIP if embedded in future legislation.⁴

To explore legislative options this policy paper compares federal legislation concerning Indigenous peoples in Canada and the United States.⁵ While far from perfect, Indigenous peoples in the United States have created receptive policy frameworks with Congressional allies which builds law on principles of self-determination.⁶ Unlike Canada, the recognition and affirmation of Indigenous Rights does not exist in the United States' Constitution. Thus, while we must be careful in drawing analogies across national borders, there are also important lessons to learn by looking at the United States. The

constitutions of Canada and the United States are similar in one important respect; both allocate authority for legislation in relation to Indians to the federal government.⁷

The US federal government regularly uses 'paramountcy-like' power to advance inherent Indigenous authority by preempting state law's application to Indian reservations, thus carving out a space for Indigenous governance.⁸ Canadian governments should do the same but they have not generally displaced provincial power in favour of Indigenous governmental authority.⁹ Furthermore, Indigenous peoples have also distrusted federal governments when it comes to legislative initiatives, being concerned legislative solutions could be framed as federal delegation (which could be repealed by subsequent governments).¹⁰ As a result, Indigenous self-determination does not animate Canadian legislation in any significant way.¹¹

By way of contrast, in the United States "[t]ribal sovereignty' forms the bedrock of US legislation.¹² While I must emphasize that Indigenous peoples in the United States face significant challenges,¹³ particularly related to the Supreme Court,¹⁴ the modern Congressional statutory acceptance of self-determination has made a notable difference.¹⁵ It has meant that "no Indian legislation has been passed over Indian opposition since...1968".¹⁶

Legislation furthering Indigenous self-determination in the United States has focused on three areas:

- 1) Indigenous control over federal government services for Indigenous people,
- 2) the protection of Indigenous cultures and communities, and
- 3) Indigenous control in relation to natural resources and economic development.¹⁷

Each of three areas will be briefly examined to highlight potential fields for Canadian legislative action.¹⁸

1) Indigenous control of Federal Services

Like Canada, the United States has experienced a deeply troubling colonial history in its relation with Indigenous peoples.¹⁹ Nevertheless, over forty years ago President Nixon officially renounced past practices that attempted to 'terminate' tribes.²⁰ At the same time he formally announced a national policy goal of 'strengthening the Indian's sense of autonomy without threatening his sense of community.'²¹ The Congress soon followed President Nixon's lead.²² In 1975 it passed the *Indian Self-Determination and Educational Assistance Act* to **facilitate Indian control of Federal Services**.²³ Among the congressional findings, which are embedded in the *Act*, is the recognition that "the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons."²⁴ In 1994, this *Act* was supplemented by the *Tribal Self-Governance Act* which allows for the transfer of federal programs to tribes and facilitates congressional support of projects designed to enhance self-determination.²⁵ These *Acts* compel the federal government to fund tribal programs which are planned and administered by Indian Nations themselves. **Legislation facilitating Indian control of government services also extends to tribally controlled colleges and universities,²⁶ primary and secondary schools,²⁷ housing,²⁸ social assistance,²⁹ policing,³⁰ and health care.**³¹ When these initiatives began in the early 1970's tribes only controlled 1.5% of the delivery and administration of federal services to Indian people, whereas today they control

over 50% of this sector.³² While there is much work ahead, Indian control of Indian services has strengthened the economic, social and cultural health of Indian tribes.³³

a) Repeal Section 88 of the *Indian Act*

Indigenous peoples in Canada do not generally **plan and deliver services** in a manner consistent with self-determination and to the same degree as in the United States.³⁴ In fact, First Nations policy development and delivery in Canada is almost exclusively under federal control. The main piece of legislation dealing with First Nations governance in the Canadian context is the *Indian Act*.³⁵ It is explicitly designed to break-down First Nations socio-political relations and forcibly absorb individual Nation members within broader Canadian society.³⁶ The *Indian Act* narrowly defines and heavily regulate Indigenous peoples' citizenship,³⁷ land rights,³⁸ succession rules,³⁹ political organization,⁴⁰ economic opportunities,⁴¹ fiscal management,⁴² & educational options.⁴³

Let me explain what I regard as the lynch-pin of the problem. The *Indian Act* largely subjects First Nations to provincial legislation and regulation without their consent.⁴⁴ Such an idea usurps First Nations' authority.⁴⁵ Section 88 of the *Indian Act* drastically constrains jurisdictional spaces which should be filled by Indigenous sovereignty.⁴⁶ It does so by delegating vast fields of political activity to provincial governments by referentially incorporating, as federal law, provincial laws of general application.⁴⁷ This severely limits First Nations' political power in Canada.⁴⁸ It also creates very few incentives for the federal government to work with First Nations and pass legislation recognizing and affirming Aboriginal and treaty rights throughout the country. The federal government's 'transfer' of legislative responsibility from itself and First Nations to provincial governments prevents First Nations from exercising self-determination. **Section 88 must be repealed.** The removal of this section, and its replacement with the legislative recognition of inherent self-determination under s. 35(1) and UNDRIP are at the heart of this policy paper. **All other recommendations in this paper flow from this proposal.**

Section 88 does not enhance self-determination when it makes provincial laws applicable to "Indians".⁴⁹ At a federal level, the section allows the federal government to almost completely abandon its section 91(24) constitutional responsibility concerning "Indians and lands reserved for Indians". By 'passing the buck' to the provinces the federal government does not face the consequences of its delegation of authority to the provinces. First Nations must comply with provincial laws which they have no real role in crafting or administering. In fact, if provinces were to 'single out' Indians in the passage of provincial legislation such action would be ultra vires, or unconstitutional, because acting in relation to Indians is beyond provincial authority.⁵⁰ Thus, section 88 of the *Indian Act* removes incentives from both the provincial and federal governments to work with Indians on the detail of laws which most effect Indian peoples' lives. This is why it must be repealed and replaced with self-determination recognition legislation in general and specific terms, as described in this paper.

b) Service Delivery, Legislation, Accountability & Self-Determination

First Nations in Canada largely remain subject to federal control when federal services are delivered to their members. The Auditor General of Canada (AGC) identified three problems with this arrangement as it relates to First Nations.⁵¹

First, the federal government has not created **clarity about the service levels** that First Nations receive relative to the general population. This has resulted in First Nations receiving substantially fewer dollars per capita than others when it comes to basic government service, which is discriminatory.⁵² These discrepancies work drive assimilation because they create negative incentives which impel people to leave the reserves and seek services elsewhere.⁵³ As the AGC wrote: “It is not always evident whether the federal government is committed to providing services on reserves of the same range and quality as those provided to other communities across Canada”.⁵⁴

Second, First Nations in Canada **do not effectively plan and control the delivery of services** because the federal government has not created a legislative base to hold themselves accountable in this field. In this respect, the AGC observed:

...for First Nations members living on reserves, there is no legislation supporting programs in important areas such as education, health, and drinking water. Instead, the federal government has developed programs and services for First Nations on the basis of policy. As a result, the services delivered under these programs are not always well defined and there is confusion about federal responsibility for funding them adequately.

When governments act through policy as opposed to legislation they retain greater discretion in carrying out their plans. This allows governments to exercise broader control over Indians. There are generally no legal consequences when a government acts contrary to its policies. The federal government has not cultivated its own accountability and transparency in relation to First Nations service delivery. This is ironic given the decade-long federal fetish focusing on First Nations accountability.⁵⁵

Third, as a result of problems in federal funding mechanisms, First Nations in Canada do not effectively “control their relationships both among themselves and with non-Indian governments, organizations and persons”, as is the legislative goal in the US context. The failure to provide such mechanisms in Canada has led to **great uncertainty about funding levels within First Nations**. This makes it nearly impossible for First Nations communities to engage in stable long-term planning. The AGC has noted that the Canadian government’s ambiguous funding mechanism also creates problems related to the day-to-day management of reserves. Money to operate First Nations’ governments is often received months after approved programs have already begun, placing great strain on community resources. Moreover, most funding agreements only have a one year life-span, which creates high transaction costs which include duplicative and burdensome negotiation and reporting mechanisms. This places further stress on scarce community administrative resources. Finally, in the area of First Nations control of services, the Auditor General reported that there is a lack of organizational assistance to support local service delivery. As a result, First Nations have not been able to develop a stable and efficient bureaucracy to ensure certainty, transparency, and accountability in the administration of their resources.⁵⁶

2) Protection of Indigenous Cultures and Communities

Canada does not follow a self-determination framework when it comes to the second area of legislative focus, the protection of Indigenous cultures and communities. Legislation dealing with these issues in

the United States is detailed, supportive of self-determination, and calibrated to recognize important differences existing amongst First Nations in that country. Congress has passed legislation related to religious freedoms,⁵⁷ cultural heritage,⁵⁸ the protection and enhancement of Indigenous languages,⁵⁹ the encouragement, development protection of Indigenous arts and crafts,⁶⁰ and the development of a national museum.⁶¹ Canadian governments should create similar fields of protection, through recognizing and affirming section 35(1)'s inherent jurisdiction, protected through 91(24) legislation which pre-empts province power through the federal Crown's paramouncy power.

a) Child Welfare

Canadian legislation is exceedingly thin on the ground when it comes to recognizing, protecting and enhancing First Nations cultures.⁶² For example, while the provinces have acted in the field of **Indigenous child welfare**,⁶³ there is no national legislation dealing with issue despite the inordinate number of children in care.⁶⁴ One of the most significant pieces of legislation for enhancing Indigenous self-determination is the *Indian Child Welfare Act of 1978* (ICWA).⁶⁵ The *Act* was designed to prevent high rates of removal of Indian children from their families and communities,⁶⁶ and has been very successful in this regard.⁶⁷ Thus, unlike the United States where the proportion of Native American children in care is now very low, in Canada an Aboriginal child is 9.5 times more likely than a non-Aboriginal child to be in government-supervised care. The situation is particularly troublesome in the west. In British Columbia, Aboriginal children comprise over 50% of the children in care, though Aboriginal children only make up 9% of the general population. In Manitoba, over 13% of Aboriginal children are not living with their parents but are in government care. In fact, Aboriginal children comprise about 20% of the child population, but represent over 70 % of the children in care in Manitoba. In Saskatchewan approximately 2 % of children in the province are Aboriginal, yet they also represent over 67% of the children in care.⁶⁸ Lamentably, these numbers are much higher than was the case when the US government passed ICWA decades ago, in 1978. Furthermore, Canadian numbers are shockingly higher than contemporary US rates where Indian children now only represent approximately 3% of children in care. Federal law recognizing self-determination seems to have worked to stem the flood of Indigenous children leaving their communities and families, while generally supportive provincial legislation has not made much of a difference in Canada. The crisis in Canada is compounded by the severe underfunding of federal First Nations child welfare services, particularly when compared to the broader population.⁶⁹ Litigation is being pursued by First Nations advocates to address these deficiencies.⁷⁰ In light of these facts, it is plain to see that, despite the strong provincial presence in the field of Native Child Welfare, US federal legislative initiatives recognizing tribal jurisdiction are dramatically more effective in keeping families together.⁷¹

b) Religious Freedoms

Indigenous peoples in Canada also do not enjoy targeted legislative protection in relation to **religious freedom**. It is true that Human Rights Acts exist in federal and provincial law and have provisions which provides for "a right to equal treatment with respect to services, goods and facilities, without discrimination because of...creed".⁷² Furthermore, as a result of section 67 of the *Canadian Human Rights Act* similar protections apply on First Nations reserves.⁷³ These provisions make it possible for

First Nations to challenge actions which limit their religious freedoms related to non-government action.⁷⁴ However, human rights codes play next to no role in addressing Indigenous religious freedoms.⁷⁵ Furthermore, governments have frequently undermined Indigenous spirituality throughout the past through the operation of residential schools,⁷⁶ the outlawing of potlatches, giveaways, feasts, and dances,⁷⁷ and the planning, approval and implementation of settlement and development on Indigenous sacred sites.⁷⁸ The Government in Canada has not passed any stand-alone legislation limiting its own actions relative to such actions. Furthermore, the government has not passed laws which prevent corporations, farmers, developers, provinces and municipalities from undermining Indigenous religious freedoms, particularly in relation to land and resources.⁷⁹

c) Cultural Heritage

Indigenous peoples in Canada also lack rigorous national legislative protection related to **cultural heritage**.⁸⁰ By way of contrast the United States has a relatively strong regime of heritage protection in the *Native American Graves Protection and Repatriation Act* (NAGPRA).⁸¹ NAGPRA directs federal agencies and museums to return Native American human remains and sacred objects to appropriate native groups and organizations. It also prevents the appropriation and disturbance of graves sites, and provides for the return or proper care of such objects through consultation with the tribes. While there are clear limits to the *Act's* effectiveness, NAGPRA has been very important in symbolically and practically enhancing respect for historic Native American material culture.⁸² As noted, Canada lacks a comparable legislative framework recognizing and affirming broad-based Indigenous cultural and intellectual property protection.⁸³ Furthermore provincial legislation in this area has also proven to be significantly deficient in recognizing and affirming Indigenous culture and heritage.⁸⁴

d) Language Protection

First Nations in Canada also lag appreciably behind the United States in the area of formalized **language protection**.⁸⁵ Canada is officially bilingual (French and English) but there is no legislation recognizing and affirming the country's original languages. This is a problem because Indigenous peoples have lost 10 of their 50 languages in the last one-hundred years as a result of modernization and colonization.⁸⁶ Furthermore, only a minority of Indigenous people within Canada speaks or understands an Aboriginal language.⁸⁷ At current rates of support and transmission it is estimated that only three Indigenous languages will survive until 2100.⁸⁸ Fortunately, there is evidence that endangered languages can be saved.⁸⁹ There are more second-language Indigenous speakers in Canada than those who speak them as a mother tongue.⁹⁰ Canada could build on these developments and officially act to reverse Indigenous language loss throughout the country. A necessary first step would be the development of legislation encouraging Indigenous language retention and uptake.⁹¹ As noted, this has occurred in the United States through the *Native American Languages Act*.⁹² Of course, language legislation must be reinforced by financial and administrative mandates, which has not occurred in the United States.⁹³ Nevertheless the *Act* creates an important framework and starting point for supporting Indigenous language revitalization. While legislation must always be supported by broader action, Canada has not even taken this initial step towards enhancing Indigenous self-determination in this respect.⁹⁴

e) Tribal Court & Dispute Resolution

Another area which is vital to Indigenous self-determination relates to **dispute resolution**.⁹⁵ When Indigenous peoples practice their own laws they identify and apply the principles they want to guide their lives.⁹⁶ This reinforces respect for community authorities, including ancient teachings and present-day norms.⁹⁷ The Canadian Parliament, unlike the Federal Congress, has not recognized and affirmed inherent Indigenous dispute resolution authority.⁹⁸ In the United States, while tribal courts were initially designed to assimilate Indigenous peoples,⁹⁹ tribes are slowly subverting these plans and are making courts vehicles for self-determination.¹⁰⁰ They are slowly transforming communities' conceptualization of their own powers.¹⁰¹ Congress has recognized their importance for maintaining law and order for many years.¹⁰² In fact, Congress recently passed the *Tribal Law and Order Act* to strengthen Tribal Courts and thereby more effectively confront public safety challenges facing reservation communities.¹⁰³ Tribal Courts are developing as significant cultural forces in the United States. Canada would do well to facilitate Indigenous dispute resolution in ways which enhance self-determination.

3) Indigenous Economic Development, Environment and Natural Resources

A peoples' self-determination is strongest when their lands and people are physically healthy and self-sustaining.¹⁰⁴ Canada has not generally produced legislation to advance Indigenous self-determination in the fields of economic development and natural resource protection. Among the legislative supports enjoyed by Indigenous peoples in the United States related to economic development are the: *Indian Gaming Regulatory Act*,¹⁰⁵ *Indian Financing Act*,¹⁰⁶ *Indian Tribal Regulatory Reform and Business Development Act*,¹⁰⁷ *Indian Tribal Economic Development and Encouragement Act*,¹⁰⁸ *Native American Business Development, Trade Promotion and Tourism Act*.¹⁰⁹ Legislation relating to Native American control over the environment and natural resources is found in the *Clean Air Act*,¹¹⁰ *Clean Water Act*,¹¹¹ *National Indian Forest Resources Management Act*,¹¹² *American Indian Agricultural Resource Management Act*,¹¹³ and the *Indian Mineral Development Act*.¹¹⁴ While many challenges remain, these legislative initiatives have boosted living standards for native peoples in the United States.¹¹⁵ This has also helped them to make significant gains in protecting their lands and resources.¹¹⁶

i) Economic Development Legislation and Self-Determination

a) Gaming

For example, US legislation in the field of gaming has created enormous revenue for Indigenous peoples, growing from \$200 million in 1988 to exceed \$25 billion in net revenue in recent years.¹¹⁷ Furthermore, substantial revenue has been generated as spin-offs from gaming facilities (hotels, restaurants, entertainment, and shopping) exceeds \$3 billion.¹¹⁸ Moreover, "Indian gaming facilities, including non-gaming operations, directly support approximately 346,000 jobs and pay about \$12 billion in wages to employees."¹¹⁹ While these benefits are not evenly spread among tribal entities,¹²⁰ they do represent a significant gain for reservation economies. In fact, in some areas, tribal growth has significantly benefitted entire regions far beyond reservation boundaries.¹²¹ Non-native people benefit greatly from tribal development where this has occurred.¹²² This has not generally occurred in Canada. Indigenous

peoples do not have solid federal support for gaming.¹²³ The federal *Criminal Code* simultaneously prohibits gambling and creates exceptions to allow provinces to regulate the field.¹²⁴ Since First Nations were not successful in establishing gaming as an Aboriginal right within section 35(1) of the Constitution,¹²⁵ Indigenous peoples generally must work with the provinces to participate in this activity.¹²⁶ The failure of the Canadian federal government to legislatively recognize and affirm First Nations in a manner similar to the US *Indian Gaming Regulatory Act* represents a significant loss of economic opportunity for Indigenous peoples in Canada.

b) Business Development and Support

First Nations in Canada also lack legislative support related to business development. There is an exceedingly weak policy framework for encouraging economic development among First Nations communities which merely focuses on decision-making, assessment and communications.¹²⁷ In contrast, as noted above, the United States has numerous legislative mechanisms to facilitate Native American economic self-determination.¹²⁸ The *Indian Reorganization Act* created tribal business committees which enabled communities to have the legal personality necessary to enter into contracts and other transactions.¹²⁹ The *Indian Financing Act* creates access to reimbursable private capital funds for economic activities by tribes or tribal members.¹³⁰ It also guarantees and insures commercial loans to individual Indians and organizations. The *Indian Tribal Regulatory Reform and Business Development Act* provides mechanisms for congressional review of law and regulations which effect business on reservations.¹³¹ The *Indian Tribal Economic Development and Encouragement Act* removes uncertainty when entering into contracts with tribes by ensuring that congress and the courts do not ‘second-guess’ tribal bargains.¹³² At the same time, the statute mimics consumer protection and fair dealing statutes to facilitate fairness in tribal transactions.¹³³ In addition the *Native American Business Development, Trade Promotion and Tourism Act*, enhances tribal sovereignty by providing for financial, technical and administrative assistance in growing Indigenous economies.¹³⁴ Section 6 of the *Act* is premised on the congressional finding that “the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes”.¹³⁵ There are no similar statements in law regarding Indigenous economic development in Canadian law.¹³⁶

ii) Environmental and Natural Resources Protection

a) Oil and Gas and Minerals

In Canada there are a very few statutes singling out and recognizing the ability of First Nations to develop and conserve environments and resources in accordance with their own aspirations. There is one exception to this pattern, where Canadian and US law is somewhat similar in oil and gas legislation. In Canada the *Indian Oil and Gas Act* enables First Nations to manage and develop these resources on reserve land with federal intervention and assistance.¹³⁷ In the United States the *Indian Mineral Development Act* authorizes tribes to enter into agreements for the extraction, processing or other development of energy resources, including oil and gas.¹³⁸ Canada needs to act affirmatively to

recognize and affirm Indigenous resource rights concerning use and benefits of natural resources within an UNDRIP and self-determination framework.

b) Forests, Air, Water and Agriculture

Canadian legislation does not enhance self-determination when considering environmental and resource protections. For example, there is nothing in Canada remotely similar to the ***National Indian Forest Resources Management Act, Clean Air Act, Clean Water Act, and the American Indian Agricultural Resource Management Act***.¹³⁹ In the United States each of these Acts recognizes significant inherent authority within tribes to exercise all the powers of states in protecting their environments. The *National Indian Forest Resources Management Act* allows tribes to protect, conserve, utilize, manage and enhance their forest lands. It provides for civil actions against trespass which can be enforced in tribal courts, and it mandates that such judgments are required to be given full faith and credit by tribal and state courts.¹⁴⁰ The *American Indian Agricultural Resource Management Act* creates a similar regime in relation to arable and range lands. The *Clean Air Act* and *Clean Water Act* are pinnacle pieces of legislation and both provide that “tribes shall be treated as states under these laws and have the option of taking over federal responsibility for setting and enforcing environmental standards on reservations.”¹⁴¹ It is regrettable that similar initiatives have not been undertaken in Canada, despite the unique constitutional protections Indigenous peoples enjoy in Canada.

In fact, in the Canadian context, Parliament has even rolled back the relatively weak environmental and resource protections which once existed relative to Indigenous lands. In 2012 two omnibus legislative initiatives made it easier for the Canadian government to develop lands over which Indigenous peoples may have Aboriginal title, rights or treaty protections.¹⁴² In this case, in passing permissive omnibus legislation, Parliament removed specific protections in the *Navigable Waters Protection Act* which previously triggered federal environmental assessments and Crown duties to consult and accommodate Indigenous Peoples. Pipelines were also specifically exempted from review under the omnibus bills (although the National Energy Board must still consider navigations issues through its approval process). Furthermore, the *Canadian Environmental Assessment Act* (CEAA) was replaced with changes which completely eliminate environmental assessments for so-called minor projects. Additionally, the *Fisheries Act* was modified to more directly protect fish, but not fish habitat, and a definition of Aboriginal Fisheries was imposed which requires “serious harm” to stop development’s harmful to such fisheries. Changes which will have negative effects on Indigenous environments and resources were also made to the following Acts: *Hazardous Materials Information Review Act, Canada Oil and Gas Operations Act, National Energy Board Act, Species at Risk Act, First Nations Fiscal and Statistical Management Act, Indian Act*. These Acts are not attentive to Indigenous self-determination in structuring Canada’s wider policy framework. In fact, this legislation is likely to harm Indigenous peoples’ abilities to “control their relationships both among themselves and with non-Indian governments, organizations and persons” which the goal of US legislation and policy.¹⁴³

ENDNOTES

¹ This policy document reproduces and builds on legislative proposals made in John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto, 2016) at chapter 5; John Borrows, "Legislation and Indigenous Rights," in Patrick Macklem and Douglas Sanderson eds., *From Recognition To Reconciliation Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016); John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 177-206.

² Aboriginal and treaty rights are constitutionally recognized and affirmed in section 35(1) of Canada's Constitution Act, 1982, which proclaims: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

³ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007). The *Declaration on the Rights of Indigenous Peoples* proclaims that "Indigenous peoples have a right to self-determination." A discussion of the development and implications of this fact is found in Erica I.A. Diaz, "Equality of Indigenous Peoples Under the Auspices of the United Nations: Draft Declaration on the Rights of Indigenous Peoples" (1995) 7 *St. Thomas Law Review* 493; James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 151-182; Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Princeton: Theytus Books, 1998) 107-171.

⁴ For an example of a reading of the cases which shows court's willingness to accept federal support for Indigenous self-determination, see *C.P. v. Matsqui Indian Band* [1995] 1 S.C.R. 3.

⁵ For a comparison of Canadian and US Indian policy see Roger L. Nichols, *Indians in the United States and Canada: A Comparative History* (Lincoln: University of Nebraska Press, 1999); Jill St. Germain, *Indian Treaty-Making Policy In The United States And Canada, 1867-1877* (Lincoln: University of Nebraska Press, 2001).

⁶ "The social, political and legal activism of Indian leaders and their advocates in the 1950's, 60's and 70's resulted in an unprecedented volume of Indian legislation, most of it favorable to Indian interests, and all of it enacted at the behest of the tribes or at least with their participation." David Getches, Charles Wilkinson, Robert Williams, Jr., L.M. Fletcher, eds., *Cases and Materials on Federal Indian Law* (St. Paul, MN: West Publishing, 2011) at 220.

⁷ Section 91(24) of the *Constitution Act, 1867* declares that exclusive legislative authority of the Parliament of Canada extends to "Indians, and Lands reserved for the Indians", *British North America Act, 1867*, 30-31 Vict., c. 3 (U.K.). The "Indian trade and commerce clause", located in article 1, section 8, clause 3 of the United States constitution, states that the federal Congress shall have power: "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." For a critique of the United States Supreme Court's treatment of the Indian commerce clause power see Nell Jessup Newton, "Plenary Power Over Indians: It's Scope, Sources and Limitations", (1984) 132 *University of Pennsylvania Law Review* 195; Philip Frickey, "Domesticating Federal Indian Law", (1996) 81 *Minnesota Law Review* 31; Robert Clinton, "There is No Federal Supremacy Clause for Indian Tribes" (2002) 34 *Arizona State Law Journal* 113.

⁸ For a discussion of the preemption power in federal Indian law, see *Williams v. Lee* (1959) 358 U.S. 277, 79 S. Ct. 269 (U.S.S.C.); *Warren Trading Post v. Arizona Tax Commission*, (1965) 380 US 685 (U.S.S.C.); *McClanahan v. Arizona State Tax Commission*, (1973) 411 US 164 (U.S.S.C.); Robert Clinton, "Isolated in their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Governance, (1981) 33 *Stanford Law Review* 979; Jackie Gardina, "Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts", 35 (2010-2011) *American Indian Law Review* 1.

⁹ See, generally, J. Anthony Long and Menno Boldt, eds., *Governments in Conflict?: Provinces and Indian Nations in Canada*, (Toronto: University of Toronto Press, 1988).

¹⁰ Indigenous peoples and Parliamentarians in Canada have not been very successful in achieving mutually satisfactory legislative change. For an insightful film chronicling the challenge of constitutional negotiations among Canadian federal, provincial and Aboriginal leaders, see Maurice Bulbulian, *Dancing Around the Table, Part One and Part Two* (National Film Board of Canada, 1987). For a general discussion of these conferences see Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Vancouver: University of British Columbia Press, 1993). For a view that these conferences did produce benefits, see Kathy Brock, *The Politics of Aboriginal Self-government: A Canadian Paradox* (2001) 34 *Canadian Public Administration* 272.

¹¹ The paradigmatic legislation in Canada is the *Indian Act*, which was designed to undermine Indigenous self-determination, see John Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy," in Ian Getty and Antoine Lussier, eds, *As Long As the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1990), 29.

¹² Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (New York: W.W. Norton and Company, 2005) at 248.

¹³ For an excellent critique of federal legislative initiatives over the last 40 years see Jeff Corntassel and Richard Witmer II, *Forced Federalism: Contemporary Challenges to Indigenous Nationhood* (Norman: University of Oklahoma Press, 2008). The authors argue that tribes are compelled to negotiate with states under many of the federal laws outlined in this paper, and that this results in a dilution of the tribe's nationhood and self-determination.

¹⁴ For a critique of the US Supreme Court's approach see Walter Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Golden, CO: Fulcrum Publishing, 2010); Robert Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005); David Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997).

¹⁵ See generally, John Wunder, ed., *Native American Sovereignty* (New York: Taylor and Francis, 1999).

¹⁶ Charles Wilkinson, *American Indians, Time and the Law* (New Haven: Yale University Press, 1987) at 83. The issue of Indian 'consent' in other areas of US law is much more troubling, see Matthew Fletcher, "Tribal Consent", (2012) 8 *Stanford Journal of Civil Rights and Civil Liberties* 45.

¹⁷ Robert Anderson, Bethany Berger, Philip Frickey, Sarah Krakoff, eds., *American Indian Law, Cases and Commentary* (St. Paul: West Publishing, 2010) at 155.

¹⁸ There are well over 40 significant pieces of legislation addressing Indigenous self-determination in the United States, see United States Code (USC) Title 25 – Indians. The words of Roger Gibbons, written in 1984 still ring true: Unlike the situation in the United States where over 4000 separate unsystematized statutory enactments relating to Indian policy exist. ..., Canadian public policy in the field of Indian Affairs is concentrated within a...single piece of legislation, last subjected to any comprehensive revision in 1951.

Roger Gibbons, "Canadian Indian Policy: The Constitutional Trap", (1984) IV *Canadian Journal of Native Studies* 1 at 2.

¹⁹ Robert J. Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010); Lindsay G. Robertson, *Conquest by Law How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2007); Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2007); *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990).

²⁰ Unfortunately, termination can still occur through judicial disestablishment, see Judith V. Royster, "The Legacy of Allotment", (1995) 27 *Arizona State Law Journal* 1; Charlene Koski, "The Legacy of Solemn v. Bartlett: How Courts Have Used Demographics to By Congress and Erode the Basic Principles of Indian Law", (2009) 84 *Washington Law Review* 723.

²¹ Richard Nixon, "Message from the President of the United States Transmitting Recommendations for Indian Policy" (July 8, 1970) *H.R. Doc. No. 91-363*, 91st Congress, 2nd Session.

²² In Canada, during this period, Prime Minister Trudeau proposed the assimilation of First Nations in Canada, for an influential critique of this policy see Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1969).

²³ *Indian Self-Determination and Educational Assistance Act* 25 U.S.C. 450; David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, (1996) 84 *California Law Review* 1573.

²⁴ The Act enhances Indian control by allowing tribes to enter into contracts and receive grants to administer federally funded services. *Indian Self-Determination and Educational Assistance Act* 25 U.S.C. 450.

²⁵ *Tribal Self-Governance Act*, 25 U.S.C. 450n, 458aa to 458gg. This Act also builds on the same base as the *Indian Self-Determination and Assistance Act* by proclaiming that "[t]he Tribal right of self-governance flows from the inherent sovereignty of Indian Tribes and nations." The Office of Self-Governance which administers the *Tribal Governance Act* oversees a budget of close to 500 million dollars to ensure that tribes continue to develop their governance capacity. For general commentary see Tadd Johnson and James Hamilton, "Self-Governance for Indian

Tribes: From Paternalism to Empowerment”, (1994-1995) 27 *Connecticut Law Review* 1251. For an examination of the Act’s operation in one field”, see Mary Ann King, “Co-Management or Contracting - Agreements between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act”, (2007) 31 *Harvard Environmental Law Review* 475.

²⁶ *Tribally Controlled Colleges and Universities Assistance Act*, 25 U.S.C. 1801.

²⁷ *Indian Education Act*, 25 U.S.C. 2601-2651.

²⁸ *Native American Housing Assistance Self-Determination Act*, 25 U.S.C. 4101.

²⁹ Programs administered by the tribes include: Temporary Assistance for Needy Families, Food Stamps, Child Support Enforcement, etc., see Nell Jessup Newton, Robert Anderson, et. al., eds., *Cohen’s Handbook of Federal Indian Law*, 2005 (Newark, NJ: LexisNexis, 2005) at 1400-1402.

³⁰ *Indian Law Enforcement Reform Act*, 25 U.S.C. 2801-2809.

³¹ *Indian Health Care Act*, U.S.C. 1613-1682; *Indian Alcoholism and Substance Abuse Prevention and Treatment Act*, 25 U.S.C. 2401-2478.

³² Robert Anderson, Bethany Berger, Philip Frickey, Sarah Krakoff, eds., *American Indian Law, Cases and Commentary* (St. Paul: West Publishing, 2010) at 155.

³³ Miriam Jorgensen, ed., *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson: University of Arizona Press, 2007) at 146-174, 223-245.

³⁴ Emmanuel Brunet-Jailly, “The Governance and Fiscal Environment of First Nations’ Fiscal Intergovernmental Relations in Comparative Perspectives”, Prepared for National Centre for First Nation Governance, March 2008, pages 9-15 at http://fngovernance.org/ncfng_research/emmanuel_brunet-jailley.pdf.

³⁵ One small step away from the *Indian Act* is the *First Nations Land Management Act*, S.C. 1999, c. 24 which allows First Nations to opt-out of certain sections of the *Indian Act* “to create their own system for making reserve land allotments to individual First Nation members. They also have authority to deal with matrimonial real property interests or rights.” See <http://www.aadnc-aandc.gc.ca/eng/1317228777116> [checked June 22, 2012]. For commentary see Tom Flanagan, Christopher Alcantara and André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen’s Press, 2010).

³⁶ John Tobias, “Protection, Civilization and Assimilation: An Outline History of Canada’s Indian Policy,” in James Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada*, (Toronto: University of Toronto Press, 1991) at 127; Brian E. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986), particularly the chapter entitled “General Aspects of Policy and Administration”, at 37-59.

³⁷ Larry Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (Toronto: Carswell, 1996); Bonita Lawrence, *“Real” Indians and Others: Mixed Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004).

³⁸ The reserve system is described in Richard Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990); broader land issues are discussed in Kerry Wilkin, ed., *Advancing Aboriginal Claims: Visions / Strategies / Directions*, (Saskatoon: Purich Publishers, 2004).

³⁹ Shin Imai, *Aboriginal Law Handbook*, 2nd, ed., (Toronto: Carswell, 1999) 240-244.

⁴⁰ Brian Crane, Robert Mainville & Martin Mason, *First Nations Governance Law* (Toronto: LexisNexis, Butterworths, 2006) 101-129; Robert A. Reiter, *The Law of First Nations* (Edmonton: Juris Analytica Publishing Inc., 1996).

⁴¹ *Sharing the Harvest: The Road to Self-Reliance* (Ottawa: RCAP, 1993) at

⁴² Skeena Native Development Society, *Masters in Our Own House: The Path to Prosperity* (Terrace: Skeena Development Society, 2003) at 59-74.

⁴³ For an annotated description of the *Indian Act* see Shin Imai, *Indian Act and Constitutional Provisions* (Toronto: Thomson Carswell, 2006).

⁴⁴ Darlene Johnston, *The Taking of Indian Lands in Canada: Consent Or Coercion* (Saskatoon: Native Law Center, 1989).

⁴⁵ An innovative argument which develops First Nations autonomy in Canada along familiar constitutional lines is Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and the First Nations” (1991) 36 *McGill Law Journal* 308.

⁴⁶ For a history and legal analysis of section 88 of the *Indian Act*, see Kerry Wilkins, “Still Crazy After All These Years: Section 88 at Fifty”, (2000) 38 *Alberta Law Review* 458.

⁴⁷ See *R. v. Dick*, [1985] 2 S.C.R. 309; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* [2002] 2 S.C.R. 146.

⁴⁸ For arguments questioning the constitutionality of section 88 of the Indian Act see Leroy Little Bear, "Section 88 of the Indian Act and the Application of Provincial Laws to Indians" in J. Anthony Long and Menno Boldt, eds., *Governments in Conflict? Provinces and Indian Nations in Canada*, (Toronto: University of Toronto Press, 1988); Kent McNeil, "Aboriginal title and Section 88 of the Indian Act", (2000) 34 *University of British Columbia Law Review* 157.

⁴⁹ This paragraph is drawn from John Borrows, "Canada's Colonial Constitution" in John Borrows, *The Right Relationship: Historic Treaties* (Toronto: University of Toronto Press, 2017), chapter 1.

⁵⁰ See *R. v. Dick*, [1985] 2 S.C.R. 309; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* [2002] 2 S.C.R. 146.

⁵¹ Office of the Auditor General of Canada, *2011 June Status Report of the Auditor General of Canada* at chapter four. Metis people are even further disenfranchised because governments in Canada do not recognize Metis governance even in limited ways found in the *Indian Act*.

⁵² For challenges in the area of child welfare, see *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343 (CanLII). For challenges in the area of education, see First Nations Child and Family Caring Society, *Information Sheet #2: First Nations Education*, July 2013 at http://www.fnccaringociety.com/sites/default/files/Information%20Sheet%202_First%20Nations%20Education_1.pdf.

First Nation children on reserve are underfunded \$2,000-\$3,000 per child (FNCFCFS, 2013; AFN, 2010). Unlike provincial schools, the federal government provides: \$0 for libraries; \$0 for computers, software and teacher training; \$0 for extracurricular activities; \$0 for First Nation data management systems; \$0 for 2nd and 3rd level services (including core funding for special education, school boards, governance and education research); \$0 for endangered languages; \$0 for principals, directors, pedagogical support, and the development of culturally appropriate curricula (AFN, 2010; FNCFCFS, 2013). In 2010/2011, AANDC provided \$1.5 billion in funding for First Nation education on reserve and \$304 million for building construction and maintenance. The Parliamentary Budget Officer (PBO) released a report in 2009 with an analysis of actual costs for the delivery of education, finding that schools on reserve are systematically underfunded by less than half (58%) of the actual costs needed to provide equal and equitable access to safe schools and education (Rajekar & Mathilakath, 2009)

⁵³ The Indian Act is designed to assimilate First Nations, see "The Indian Act" in *Report of the Royal Commission on Aboriginal People, Volume 1, Looking Forward, Looking Back* (Ottawa: Minister of Supply and Services Canada, 1996) at 255-332; John Tobias, "Protection, Civilization and Assimilation: An Outline History of Canada's Indian Policy," in James Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada*, (Toronto: University of Toronto Press, 1991) at 127; Brian E. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986). In the late 1960's the Trudeau government proposed completing the process of assimilation through the White Paper, see Sally Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981). After the constitution was patriated First Nations suspected the White Paper was still government policy which was being pursued by devolution of federal services to the provinces, see J. Anthony Long and Menno Boldt, *Governments in Conflict? Provinces and Indian Nations In Canada* (Toronto: University of Toronto Press, 1988).

⁵⁴ Office of the Auditor General of Canada, *2011 June Status Report of the Auditor General of Canada* at chapter four.

⁵⁵ John Borrows, "Stewardship and the First Nations Governance Act" (2003-2004) 29 *Queen's L.J.* 103.

⁵⁶ For a discussion of the importance of effective bureaucracies in First Nations see Stephen Cornell and Joseph Kalt, *What Can Tribes Do?: Strategies and Institutions in American Indian Economic Development* (Los Angeles: UCLA American Indian Studies Centre, 1994).

⁵⁷ *American Indian Religious Freedom Act*, 42 U.S.C.A. 1996. Section 1 of the Act states "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." The Act accomplishes its purposes by creating policy space for tribes to work with federal agencies to identify and protect sacred places. For leading cases related to this Act see *Employment Division v.*

Smith, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988). For commentary see John Celichowski, “A Rough and Narrow Path: Preserving Native American Religious Freedom,” (2000) 25 *American Indian Law Review* 1.

⁵⁸ *Native American Graves Protection and Repatriation Act* (NAGPRA), Pub. L. 101-601, 25 U.S.C. 3001 et seq., 104 Stat. 3048.

⁵⁹ *Native American Languages Act*, 1990, 25 U.S.C. 2901-2906. The Act begins by reciting the following provisions: The Congress finds that—

(1) the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages;

(2) special status is accorded Native Americans in the United States, a status that recognizes distinct cultural and political rights, including the right to continue separate identities;

(3) the traditional languages of Native Americans are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values ...

(8) acts of suppression and extermination directed against Native American languages and cultures are in conflict with the United States policy of self-determination for Native Americans ...

⁶⁰ *Indian Arts and Crafts Enforcement Act*, 2000, Pub. L. No. 105-497, 25 U.S.C.A. 305-305(e). The Act prohibits misrepresentation in marketing of Indian arts and crafts and authorizes the recovery of damages for all gross profits accrued by the seller or fake Indians arts and crafts.

⁶¹ *National Museum of the Indian Act Amendments* of 1996, Pub.L. No. 104-278, 20 U.S.C.A. 80q.

⁶² Sonia Harris Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children: Protecting the Vulnerable Under International Law* (Burlington, VT: Ashgate Publishing, Ltd., 2012).

⁶³ *Child, Family and Community Service Act* [R.S.B.C. 1996] c. 46, see sections 2 (e) & (f), 4(1), 35(1)(b), 70 (1)(j), 71(3); *Child and Family Services Act*, 1990 C-11 ss. 1(2)4, 1(2)5, 13(3), 34(2)(d), 34(10)(f), 35(1)(e), 36(4)(c), 37(3)3, 37(4), 39(1)4, 47(2)(c), 54(3)(f), 57(5), 58(2)(b), 58(4), 61(2)(d), 64(4)(d), 64(6)(e), 69(1)(e), 80(4)(f), Part X, 223 (Ontario); *Youth Protection Act*, 2002, P-34.1, ss. 2.4(5)(c), 37.5 (Quebec); *Child and Family Services Act*, C-7.2 1989-90, ss. 4(c), 23, 37(4)(c), 37(10), 37(11), 53, 61 (Saskatchewan); *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12(Alberta); *Children and Family Services Act* c. 5, 1990, Preamble, ss. 2(g), 7(2), 6(1), 9(i), 20(d), 36(3), 39(8)(c), 42(3), 44(3)(c), 47(5), 88(1)(e) (Nova Scotia); *Children’s Act* c. 22, ss. 107, 109, 131(k) (Yukon); *Family Services Act* c. F-2.2 1980 ss 1(g), 3(1), 45(1)(a), 45(3)(a) (New Brunswick); *Child, Youth and Family Services Act*, c-12.1 1998, ss. 7(f), 7(g), 9(c), 75(2)(e) (Newfoundland); *Child and Family Services Act*, S.N.W.T. 1997, c. 13, Preamble, ss. 2(f), 2(i), 2(l), 3, 7(l), 7(m), 7(n), 15, 25 (b.1), 25 (c), 54 (3), 56, 57, 58, 58.1, 58.2, 59, 91(i) (North West Territories); *Consolidated Child and Family Services Act (Nunavut)* S.N.W.T. 1997, c. 13, Preamble, ss. 2(f), 2(i), 2(l), 3, 7(l), 7(m), 7(n), 15, 25 (b.1), 25 (c), 54 (3), 56, 57, 58, 58.1, 58.2, 59, 91(i) (Nunavut).

⁶⁴ In February 2007 the Assembly of First Nations estimated that there were approximately 27,000 First Nation children in care in First Nations and provincial agencies, on and off reserve. They made the point that this number is three times the number of children that were in residential schools at the height of their operation, see Assembly of First Nations, *First Nations Child and Family Services, Questions and Answers*, at <http://64.26.129.156/article.asp?id=3372>.

⁶⁵ *Indian Child Welfare Act*, 25 U.S.C. 1901-1931. ICWA states: “The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.”

⁶⁶ Prior to the enactment of ICWA state government agencies removed between 25% and 35% of all Indian children from their families, nationwide, see Matthew Fletcher, “The Origins of the Indian Child Welfare Act: A Survey of the Legislative History”, *Indigenous Law & Policy Center Occasional Paper 2009-04* April 10, 2009, at <http://www.law.msu.edu/indigenous/papers/2009-04.pdf>; for further context see Matthew Fletcher, Wenona T. Singel, and Kathryn E. Fort eds., *Facing the Future: The Indian Child Welfare Act at 30* (Lansing: Michigan State University Press, 2009).

⁶⁷ After ICWA, Indian children now only represent approximately 3% of children in care, see General Accounting Office, GAO-05-290, *Indian Child Welfare Act, Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States* 4 (2005) at page 1. The leading case concerning ICWA is *Mississippi Band of Choctaw Indians v. Holyfield*, (1989) 490 US 30, 109 S.Ct. 1597, 104 L.Ed. 2nd 29 (U.S.S.C.). However, see *Adoptive Couple v. Baby Girl* (2013) 398 S. C. 625, 731 S. E. 2d 550, where the Supreme Court reads ICWA to only apply to “intact” Indian families, which opens room for undermining the statute when Indian families are in disarray.

⁶⁸ Justice Ted Hughes, *BC Children and Youth Review: An Independent Review of BC’s Child Protection System*, April 7, 2006 at 48.; Manitoba Aboriginal Affairs Secretariat, *Aboriginal People in Manitoba*, Winnipeg, 2006 at 42; Saskatchewan Institute of Public Policy, “A Profile of Aboriginal Children in Regina”, January 2004 in *Commission on First Nations and Metis Peoples and Justice Reform*, Saskatoon, 2004 at 10-7.

⁶⁹ *2011 June Status Report of the Auditor General of Canada*, chapter 4, at pages 23-25, see http://www.oag-bvg.gc.ca/internet/docs/parl_oag_201106_04_e.pdf

⁷⁰ The First Nations Child and Family Caring Society and the Assembly of First Nations has filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amounts to discrimination on the basis of race and national ethnic origin, contrary to section 5 of the Canadian Human Rights Act, RCS 1985, c. H-6 (the Act). They have also filed a claim of retaliation alleging that the Canadian government NAC and Department of Justice officials monitored her personal and private Facebook page. See *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2013 CHRT 16 (CanLII); *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2012 CHRT 24 (CanLII).

⁷¹ In fact, ICWA recognized that state jurisdiction was a significant problem for native families. ICWA’s congressional finding 5 reads: “that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” *Indian Child Welfare Act*, 25 U.S.C. 1901-1931.

⁷² For example, Ontario’s *Human Rights Code* provides for “a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.” R.S.O. 1990, c. H.19, s. 1; 1999, c. 6, s. 28 (1); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (1).

⁷³ *An Act to amend the Canadian Human Rights Act* S.C. 2008, c. 30, section 67 the Act reads:

1. Section 67 of the *Canadian Human Rights Act* is repealed.

1.1 For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

1.2 In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality. ...

As a result of this legislation, First Nations will be challenged by their own members to comply with human rights law in the coming years.

⁷⁴ Moreover, though not legislatively based, First Nations have access to the Canadian Charter of Rights and Freedoms which, in section 2(a), reads: “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.” First Nations could also make claims to religious freedoms under section 35(1) of the *Constitution Act, 1982*. For a discussion of the challenges in constitutional recognition of First Nations religious freedoms, see John Borrows, “Living Law on a Living Earth: Aboriginal Religion, Law and the Constitution” *Constitutional Law, Religion and Citizenship in Canada* (Vancouver: UBC Press, 2008).

⁷⁵ There are only a handful of Human Rights Board decisions dealing with the issue of Aboriginal religion, and they have not found discrimination on the basis of religion, see *Blais v. Canadian Union of Public Employees Local 3902*, 2011 HRTO 2113 (CanLII); *MacDonald v. Anishnawbe Health Toronto*, 2010 HRTO 329 (CanLII); *Kelly v. B.C. (Ministry of Public Safety and Solicitor General) (No. 2)*, 2009 BCHRT 363 (CanLII); *George v. Jamin and others*, 2009

BCHRT 19 (CanLII); *Smith v. B.C. (Ministry of Public Safety and Solicitor General) and another*, 2008 BCHRT 36 (CanLII).

⁷⁶ J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996); John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986* (Winnipeg: University of Manitoba Press, 1999).

⁷⁷ Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas and McIntyre: 1990); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) 56-102; Sidney L. Haring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 268-270.

⁷⁸ Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2005).

⁷⁹ While environmental assessment legislation and planning laws might have some role to play in this regard, such legislation generally ineffective in preventing negative impacts on First Nations spiritual practices, see Heather Dorries, *Rejecting the 'False Choice': Foregrounding Indigenous Sovereignty in Planning Theory and Practice* (University of Toronto, Geography, February, 2012) Ph.D. dissertation [unpublished].

⁸⁰ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, Vol. 3* (Ottawa: Queen's Printer, 1996), Chapter 6, 'Arts and Heritage' (585-651). A discussion of the limited ways in which Indigenous cultural heritage is protected in national legislation see Catherine Bell and Robert Patterson, eds., *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform* (Vancouver: UBC Press, 2009) at 35-37. Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2009) 367-414. However, it is important to note that the *Cultural Property Export and Import Act*, R.S.C., 1985, c. C-51 does provide a way to secure the return of cultural items taken from First Nations.

⁸¹ *Native American Graves Protection and Repatriation Act* (NAGPRA), 25 U.S.C. 3001-3013.

⁸² Julia A. Cryne, "NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts" (2010) 34 *American Indian Law Review* 99; Steven J. Gunn, *The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus*" (2010) 36 *William Mitchell Law Review* 503.

⁸³ For examples of impact of this failure see Jennifer Kramer, 2006, *Switchbacks: Art, Ownership and Nuxalk National Identity* (Vancouver, Canada: UBC Press); Susan Roy, *These Mysterious People: Shaping History and Archaeology in a Northwest Coast Community* (Montreal: McGill-Queen's Press, 2010); Barry Steven Mandelker, "Indigenous People and Cultural Property Appropriation: Intellectual Property Problems and Solutions", (2000) 16 *Canadian Intellectual Property Review* 367.

⁸⁴ For example, British Columbia's *Heritage Conservation Act* has not protected First Nations burial sites or culturally modified trees, see *Heritage Conservation Act*, R.S.B.C. 1996, c. 187, s. 13(b); *Nanosee Indian Band v. R.*, 1994 CanLII 1806 (BC SC); *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31 (S.C.C.); Ontario's *Cemeteries Act*, R.S.O. 1990 c. C.4 has also not provided significant protection for Aboriginal burial sites, see Peggy Blair, "The Non-Protection Of Canadian Aboriginal Heritage (Burial Sites And Artifacts)", (Scow Institute: October 2005) pages 6-7 at <http://www.scowinstitute.ca/library/documents/RPHeritageSites.pdf>.

⁸⁵ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, Vol. 3* (Ottawa: Queen's Printer, 1996) at 602-621.

⁸⁶ Mary Jane Morris, *Aboriginal Languages in Canada: Emerging Trends and Perspectives on Second Language Acquisition* (Ottawa: Statistics Canada, 2007) at <http://www.statcan.gc.ca/pub/11-008-x/2007001/9628-eng.htm> [checked May 23, 2012].

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ J.A. Fishman, ed., *Can Threatened Languages be Saved? Reversing Language Shift, Revisited: A 21st Century Perspective* (Clevedon, UK: Multilingual Matters, 2001); Summer Kupau, "Judicial Enforcement of 'Official' Indigenous Languages: A Comparative Analysis of Maori and Hawaiian Struggles for Cultural Language Rights" (2004) 26 *University of Hawaii Law Review* 495-535.

⁹⁰ "In 2001, more people speak an Aboriginal language than had an Aboriginal mother tongue (239,600 versus 203,300). This suggests that some speakers must have learned their Aboriginal language as a second language. It appears that this is especially the case for young people. Learning an Aboriginal language as a second language

cannot be considered a substitute for learning it as a first language.³ Nevertheless, increasing the number of second language speakers is part of the process of language revitalization, and may go some way towards preventing, or at least slowing, the rapid erosion and possible extinction of endangered languages.”

Mary Jane Morris, *Aboriginal Languages in Canada: Emerging Trends and Perspectives on Second Language Acquisition* (Ottawa: Statistics Canada, 2007) at <http://www.statcan.gc.ca/pub/11-008-x/2007001/9628-eng.htm> [checked May 23, 2012].

⁹¹ Joshua Fishman has discussed the strengths and limits of legislative intervention in revitalizing endangered languages in J.A. Fishman, ed., *Can Threatened Languages be Saved? Reversing Language Shift, Revisited: A 21st Century Perspective* (Clevedon, UK: Multilingual Matters, 2001) at 1-23; Nancy H. Hornberger, Martin Pütz, eds., *Language Loyalty, Language Planning, and Language Revitalization: Recent Writings and Reflections from Joshua A. Fishman* (Clevedon: Multilingual Matters, 2006).

⁹² Section 104 of the US *Native American Languages Act* states:

It is the policy of the United States to— (1) preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages; (2) allow exceptions to teacher certification requirements for Federal programs, and programs funded in whole or in part by the Federal Government, for instruction in Native American languages when such teacher certification requirements hinder the employment of qualified teachers who teach in Native American languages, and to encourage State and territorial governments to make similar exceptions; (3) encourage and support the use of Native American languages as a medium of instruction in order to encourage and support— (A) Native American language survival, (B) educational opportunity, (C) increased student success and performance, (D) increased student awareness and knowledge of their culture and history, and (E) increased student and community pride; (4) encourage State and local education programs to work with Native American parents, educator, Indian tribes, and other Native American governing bodies in the implementation of programs to put this policy into effect; (5) recognize the right of Indian tribes and other Native American governing bodies to use the Native American languages as a medium of instruction in all schools funded by the Secretary of the Interior; (6) fully recognize the inherent right of Indian tribes and other Native American governing bodies, States, territories, and possessions of the United States to take action on, and give official status to, their Native American languages for the purpose of conducting their own business; (7) support the granting of comparable proficiency achieved through course work in a Native American language the same academic credit as comparable proficiency achieved through course work in a foreign language, with recognition of such Native American language proficiency by institutions of higher education as fulfilling foreign language entrance or degree requirements; and (8) encourage all institutions of elementary, secondary and higher education, where appropriate, to include Native American languages in the curriculum in the same manner as foreign languages and to grant proficiency in Native American languages the same full academic credit as proficiency in foreign languages.

Native American Languages Act, 1990, 25 U.S.C. 2901-2906, section 104.

⁹³ Allison Dussias, “Indigenous Languages Under Siege: The Native American Experience” (2008) 3 *Intercultural Hum. Rts. L. Rev.* 5; Allison Dussias, “Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages” (1999), 60 *Ohio St. L. J.* 901; James Fife, “The legal framework for indigenous language rights in the United States” (2005) *Willamette Law Review* 325 at 355-357.

⁹⁴ Brock Pitawanakwat, *Anishinaabemodaa Pane Oodenang – A Qualitative Study of Anishinaabe Language Revitalization as Self-Determination in Manitoba and Ontario*, Dissertation, University of Victoria, 2009

⁹⁵ For two excellent detailed examples of Indigenous self-determination and the practice of tribal law see Raymond Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (Minneapolis: University of Minnesota Press, 2009); Justin Richland, *Arguing With Tradition: The Language of Law in Hopi Tribal Court* (Chicago: University of Chicago Press, 2008).

⁹⁶ Tom Tso, “The Process of Decision Making in Tribal Courts”, (1989) 31 *Arizona Law Review* 225; Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995); Gloria Valencia-Weber, “Tribal Courts: Custom and Innovative Law”, (1994) 24 *New Mexico Law Review* 225; Elizabeth E. Joh, “Custom, Tribal Court Practice, and Popular Justice”, (2000/2001) 25 *American Indian Law Review* 117-132.

⁹⁷ For discussion and examples see Justin Richland and Sarah Deer, eds., *Introduction to Tribal Legal Studies*, 2nd Ed. (Lanham, MD: Altamira Press, 2010) at 312-326.

⁹⁸ Parliament's failure to more formally recognize Indigenous legal orders is inconsistent provisions in the *Declaration on the Rights of Indigenous Peoples*, UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <http://www.unhcr.org/refworld/docid/471355a82.html>. Article 9 asserts that "Indigenous peoples have the right to belong to indigenous communities or nations according to their own traditions and customs". Article 19 provides that "Indigenous peoples have the right [...] to maintain and develop their own decision making institutions". Article 33 recognizes that Indigenous peoples have the "right to maintain a justice system in accordance with their legal traditions".

⁹⁹ Vine Deloria and Clifford Lytle, *American Indians and American Justice* (Austin: University of Texas Press, 2003) at 111-116,

¹⁰⁰ Christine Zuni, "Strengthening What Remains", (1997) 7 *Kansas Journal of Law and Public Policy* 18. For a discussion of how tribal court power can continue to grow, by pushing back jurisdictional intrusions by Federal Courts see Matthew Fletcher, "Indian Courts and Fundamental Fairness: 'Indian Courts and the Future' Revisited" (2010) 81 *University of Colorado Law Review* 973.

¹⁰¹ Matthew L.M. Fletcher. "Rethinking Customary Law in Tribal Court Jurisprudence" (2007) 13 *Michigan Journal of Race & Law* 57.

¹⁰² However, Congress has not usually provided sufficient resources for Tribal Courts to ensure their most effective operation, see Nell Jessup Newton, "Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts" (1997/1998) 22.

American Indian Law Review 285-353.

¹⁰³ *Tribal Law and Order Act*, 25 U.S.C. 1302 (3)(a)-(f). For commentary see David Patton, "Tribal Law and Order Act of 2010: Breathing Life into the Miner's Canary", (2012) 47 *Gonzaga Law Review*. See also *Indian Tribal Justice Technical and Legal Assistance Act*, 25 U.S.C. 3651-3681; *Indian Child Protection and Family Violence Act*, 25 U.S.C. 3201-3211.

¹⁰⁴ For a discussion of First Nations development in Canada see Robert Anderson, *Aboriginal Entrepreneurship and Business Development* (North York: Captus Press, 2002); Wanda Wuttenee, *Living Rhythms: Lessons in Aboriginal Economic Resilience and Vision* (Montreal: McGill-Queen's, 2004); Dwight Dorey and Joseph Magnet, *Legal Aspects of Business Development* (Toronto: LexisNexis Butterworth's, 2005); Harold Bherer, Sylive Gagnon and Jancinte Roberge, *Wampum and Letters Patent: Exploratory Study of Native Entrepreneurship* (Montreal: Institute of Research on Public Policy, 1990); Rosalyn Kunin, *Prospering Together: The Economic Impact of Aboriginal Title Settlements in BC* (Vancouver: Laurier Institution, 2001); Skeena Native Development Society, *Masters in Our Own House: The Path to Prosperity* (Skeena Native Development Society, 2003).

¹⁰⁵ *Indian Gaming Regulatory Act*, 25 U.S.C. 2701-2721.

¹⁰⁶ *Indian Financing Act*, 25 U.S.C. 1451-1544.

¹⁰⁷ *Indian Tribal Regulatory Reform and Business Development Act*, 1999, Pub.L.No. 106-447.

¹⁰⁸ *Indian Tribal Economic Development and Encouragement Act*, 25 U.S.C. 4301-4307.

¹⁰⁹ *Native American Business Development, Trade Promotion and Tourism Act*, 25 U.S.C. 4301-4307.

¹¹⁰ *National Indian Forest Resources Management Act*, 25 U.S.C. 3101-3120.

¹¹¹ *Clean Air Act*, 42 U.S.C. 7474(c).

¹¹² *Clean Water Act*, 33 U.S.C. 1377(e).

¹¹³ *American Indian Agricultural Resource Management Act*, 25 U.S.C. 3701-3713.

¹¹⁴ *Indian Mineral Development Act*, 25 U.S.C. 2101-2108.

¹¹⁵ Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* (Harvard Project on American Indian Economic Development, January, 2005) at

<http://hpaied.org/images/resources/publibrary/AmericanIndiansonReservationsADatabookofSocioeconomicChange.pdf>; Lorie Graham, "An interdisciplinary Approach to American Indian Economic Development", (2004) 80 *North Dakota Law Review* 597-655; Steven Andrew Light, Alan P. Meister, and Kathryn R.L. Rand, "Indian Gaming and Beyond: Tribal Economic Development and Diversification", (2009) 54 *South Dakota Law Review* 375.

¹¹⁶ Douglas Brockman, "Congressional Delegation of Environmental Regulatory Jurisdiction: Native American Control of the Reservation Environment" (1992) 41 *Washington University Journal of Urban and Contemporary*

Law 133-161; Dean Suagee, "Tribal Environmental Policy Acts and the Landscape of Environmental Law", (2009) 23 *Natural Resources & Environment* 56.

¹¹⁷ Thaddieus Conner and William A. Taggart, "Indian Gaming and Tribal Revenue Allocation Plans: A Case of 'Play to Pay'" (2011) 15 *Gaming Law Review and Economics* 355.

¹¹⁸ Alan Meister, *Casino City's Indian Gaming Industry Report* (Newton: Casino City Press 2008) at 10-11, 14.

¹¹⁹ *Ibid.*

¹²⁰ Stephen Cornell, "The Political Economy of American Indian Gaming", (2008) 4 *Annual Review of Law and Social Science* 63; Matthew Fletcher, "Bringing Balance to Indian Gaming", (2007) 44 *Harvard Journal on Legislation* 39.

¹²¹ For a discussion of backlash against this expansion see Matthew Fletcher, "Indian Tribal Businesses and the Off-Reservation Market", (2008) 12 *Lewis and Clark Law Review* 1047.

¹²² For a Canadian discussion of the benefits to non-Aboriginal peoples, resulting from Indigenous economic development, see Andre LeDrassay, "A Brief Tax (On A Me) of First Nations Taxation and Economic Development" in Royal Commission on Aboriginal Peoples, *Sharing the Harvest: The Road to Self-Reliance*, (Ottawa: Supply and Services, 1993) 215.

¹²³ William V. Ackerman and Rick L. Bunch, "A Comparative Analysis of Indian Gaming in the United States", (2012) 36 *American Indian Quarterly* 36. For a discussion of the wider context of Aboriginal gaming in Canada see Yale Belanger, *Gambling with the Future: The Evolution of Aboriginal Gaming in Canada* (Saskatoon: Purich Publishing, 2006).

¹²⁴ *Criminal Code*, R.S.C. 1985, c. C-46 ss. 206-207.

¹²⁵ *R. v. Pamajewon*, [1996] 2 S.C.R. 821. For commentary on this case see Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*", (1997) 42 *McGill L.J.* 1011; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 *American Indian Law Review* 37.

¹²⁶ *R. v. Bear Claw Casino Ltd.*, [1994] S.J. No. 485, [1994] 4 CNLR 81 (Sask. Prov. Ct.); *Saskatchewan Indian Gaming Authority (SIGA) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*, [2000] S.J. No. 266 (Sask. Q.B.) (SIGA) at para. 11.

¹²⁷ See *Federal Framework for Aboriginal Economic Development* (Ottawa: Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, 2009) at <http://www.aadnc-aandc.gc.ca/eng/1100100033501>.

¹²⁸ For a contextual treatment of these laws see Robert Miller, *Reservation "Capitalism": Economic Development in Indian Country: Native America: Yesterday and Today* (Santa Barbara: AFL-CLIO, 2012).

¹²⁹ *Indian Reorganization Act*, 25 U.S.C. 477.

¹³⁰ *Financing Economic Development of Indians and Indian Organizations*, 25 U.S.C. 1451-1544.

¹³¹ *Indian Tribal Regulatory Reform and Business Development Act*, 1999, Pub.L.No. 106-447.

¹³² *Indian Tribal Economic Development and Encouragement Act*, 25 U.S.C. 4301-4307. For commentary on this act see Anna-Emily C. Gaupp, "The Indian Tribal Economic Development and Contracts Encouragement Act of 2000: Smoke Signals of a New Era in Federal Indian Policy?" (2001) 33 *Connecticut Law Review* 667.

¹³³ In particular, the statute insists the tribes give notice of their sovereign immunity when making contracts. For a discussion of tribal sovereign immunity as it relates to contracts in Indian country see Chloe Thompson, "Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know", (2010) 49 *Washburn L.J.* 661.

¹³⁴ *Native American Business Development, Trade Promotion and Tourism Act*, 25 U.S.C. 4301-4307.

¹³⁵ Moreover, the Act creates the Office of Native American Business Development in the Department of Commerce to provide resources to tribes. Furthermore, as one avenue of development it requires the Secretary of the Interior to establish projects to enhance tourism opportunities for tribal entities, see 25 USC § 4305.

¹³⁶ Legislation facilitating economic development in Canada is largely limited to enhancing taxation powers under the *Indian Act*. For example, First Nations can also implement property taxation under the *First Nations Fiscal and Statistical Management Act*, S.C. 2005, c. 9. The FSMA created four First Nation institutions to facilitate development: First Nations Tax Commission; First Nations Financial Management Board; First Nations Finance Authority; and First Nations Statistical Institute. These institutions are still fragile and, except for the First Nations Tax Commission are still being established. Unfortunately, in 2012 the federal government withdrew financial support for the First Nations Fiscal Institute, which will make it more difficult for the First Nations Financial Management Board and First Nations Finance authority to do their work, see Windspeaker, Volume 30, 2012, at

<http://www.ammsa.com/publications/windspeaker/ottawa-kicks-peg-out-foundational-organizations> [checked June 15, 2012]. For a discussion of the operation of these boards see Aboriginal Affairs and Northern Development Canada, *A Report to Parliament on the Legislative Review of the First Nations Fiscal and Statistical Management Act* (March 2012) at <http://www.aadnc-aandc.gc.ca/eng/1334169647868/1334169697578> [checked June 15, 2012]. Parliament also passed the *First Nations Commercial and Industrial Development Act*, S.C. 2005, c. 53, to provide for the adoption of provincial regulations on reserve, compatible with those off reserve. Unlike US models which work from a self-determination framework, this Act seeks to assimilate reserve-based activities into provincial law. In 2010 this Act was amended by the 2010, FNCIDA was amended by Bill C-24, the *First Nations Certainty of Land Title Act*, S.C. 2010, c. 6.

¹³⁷*Indian Oil and Gas Act*, R.S.C., 1985, c. I-7. This Act is complemented by the *First Nations Oil and Gas and Moneys Management Act*, S.C. 2005, c. 48, which allows First Nations to opt out of the *Indian Oil and Gas Act* and manage their own exploration activities revenues from oil and gas. Furthermore, the *Indian Oil and Gas Regulations*, SOR/94-753, provides for the manner in which oil resources on reserve are developed. For commentary on this Act and regulations see Andrew Black, "Devolution of Oil and Gas Jurisdiction to First Nations in Canada", (2008) 45 *Alberta Law Review* 537.

¹³⁸ *Indian Mineral Development Act*, 25 U.S.C. 2101-2108. For complementary legislation see the *Indian Energy Act*, 25 U.S.C. 37 3501-3506, which assists tribes in energy development through grants, loans, technical assistance and streamlined approval procedures.

¹³⁹ *National Indian Forest Resources Management Act*, 25 U.S.C. 3101-3120; *Clean Air Act*, 42 U.S.C. 7474 (c); *Clean Water Act*, 33 U.S.C. 1377(e); *American Indian Agricultural Resource Management Act*, 25 U.S.C. 3701-3713.

¹⁴⁰ For commentary on this Act see Daria Mondon, "Our Land is What Makes Us Who We Aare: Timber Harvesting on Tribal Reservations after NIFRMA" (1997) 21 *American Indian Law Review* 259.

¹⁴¹ Robert Anderson, Bethany Berger, Philip Frickey, Sarah Krakoff, eds., *American Indian Law, Cases and Commentary* (St. Paul: West Publishing, 2010) at 157. For commentary see James Grivala, "The Origins of EPA's Indian Program" (2006) 15 *Kansas Journal of Law and Public Policy* 191; Regina Cutler "To Clear the Muddy Waters: Tribal Regulatory Authority under Section 518 of the Clean Water Act" (1999) 29 *Environmental Law* 721; Judith V. Royster, "Practical sovereignty, political sovereignty, and the Indian Tribal Energy Development and Self-Determination Act", (2008) 12 *Lewis & Clark Law Review* 1065-1101.

¹⁴² See *Jobs, Growth and Long-term Prosperity Act*, S.C., c.19, 29TH JUNE, 2012 (BILL C-38) and *Jobs and Growth Act, 2012*. S.C., c.31, 14TH DECEMBER, 2012, (BILL C-45).

¹⁴³ *Indian Self-Determination and Educational Assistance Act* 25 U.S.C. 450.