

Enhancing Trust and Federal Horizontality in Crown - First Nations Fiscal Relationships

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This discussion paper is intended to inform the First Nations - Canada Joint Committee on the Fiscal Relationship. The statements in this discussion paper reflect the findings and conclusions of the authors and not the Government of Canada or Indigenous stakeholders who participated.



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EXECUTIVE SUMMARY

Imagine a Canada where First Nations have clean water, equal access to services, education and health outcomes that are comparable to other Canadians, healthy homes, strong employment and secure communities. A Canada free of First Nations stereotypes and systemic biases toward First Nations people. A Canada where all orders of government do everything possible to enhance life chances for First Nations people. This Canada requires resolve of all Canadians and collaboration among First Nations, federal, provincial, territorial and municipal governments. In this Canada, First Nations governments would set local program priorities and make difficult decisions on allocating scarce resources. While the role of the federal public service would be greatly diminished in this Canada, the Government of Canada would have a strong and unitary relationship with each First Nation, a relationship where all federal officials work cohesively to support and enable the success of a First Nation government. In this Canada, there would be deep trust in the capabilities and character of First Nations governments, and Crown - First Nations relationships would be characterized by mutual-trust.

Introduction

This discussion paper is intended to inform the First Nations - Canada Joint Committee on the Fiscal Relationship. The statements in this discussion paper reflect the findings and conclusions of the authors and not the Assembly of First Nations, Government of Canada or other stakeholders who participated. This discussion paper explores and examines how federal transfer payment regimes can be strengthened through more horizontal approaches. To ensure that our research and suggested solutions are useful and practical, it was necessary to establish a common understanding of what we seek to achieve through enhanced federal horizontality. Based on our interviews and research, we developed the following definition:

Enhancing federal horizontality in the delivery of First Nations transfer payments is the act of integrating, coordinating and streamlining policies, administrative regimes and transfer payment mechanisms to:

- ▶ *reduce federal government involvement in First Nations programming where First Nations governments are capable and willing to assume responsibility;*
- ▶ *improve the effectiveness of First Nations programming in achieving desired results and contributing to improved socio-economic outcomes;*
- ▶ *harmonize and streamline the funding relationships between First Nations governments and the federal government;*
- ▶ *reduce administrative burdens on First Nations governments and other recipients;*
and
- ▶ *support First Nations governments and other First Nations institutions in*

strengthening their governance and management capabilities and accountability relationships.

Importance of Promoting Trust in Crown - First Nations Fiscal Relationships

We were not asked to write a discussion paper on the importance of trust, but our stakeholder interviews and research made it clear that any efforts to improve federal horizontality needed to promote trust in Crown - First Nations relationships. Indigenous stakeholders consistently pointed out that the existing funder-recipient relationships of federal government departments and Indian Act band councils obstruct the building of trust.

If Indigenous and non-Indigenous Canadians are to create and embark on a pathway toward a harmonious and shared future, there will need to be mutual trust in Crown - First Nations relationships. The Truth and Reconciliation Commission (TRC) remarked that a lack of understanding about Indigenous histories, rights and conflicts “reinforces racist attitudes and fuels civic distrust between Aboriginal peoples and other Canadians”. Trust between First Nation, federal, provincial and territorial governments can create space for good faith negotiations, cooperation, experimentation and shared achievements. Sadly, the policies, rules and approaches devised to administer First Nations fiscal transfers over the last 150 years were created during times when Canada held deep distrust in the capabilities and character of First Nations governments. Any efforts to enhance federal horizontality in the delivery of First Nations fiscal transfers must avoid promulgating federal policies, administrative regimes and funding approaches that impede the building of trust, or breed distrust.

Building trust is anything but simple. Choosing to be loyal, respectful and faithful are conscious choices, but the same cannot be said for trust. As author Stephen Covey describes it, “trust is equal parts character and competency”. Trust is not so much a choice, it is earned and built, and once lost, is hard to regain. Courts and human rights tribunals can enforce respect for legal, treaty and fiduciary obligations and Indigenous rights, but trust cannot be enforced.

For perfectly valid reasons, First Nations people and their governments have grown suspicious of the words and intentions of provincial, territorial and federal governments. Rebuilding trust of First Nations peoples and governments will require time, thoughtfulness, hard work and persistence. Removing the barriers to trust is an essential first step, one that federal officials have great influence over. This includes replacing federal transfer payment regimes with fiscal relationships that are truly government-to-government, including practices that promote strong and capable First Nations governments and reinforce trust in Crown - First Nations relationships.

It is easy to argue that “trust building” be placed above other objectives when designing First Nations fiscal relationships and related transfers. However, for federal bureaucrats whose careers bridge many governments, it can be difficult and scary to make bold decisions that might be unpopular with a future government, particularly where legal and policy frameworks remain unclear. Decisions to flow funding to organizations without demonstrated capabilities are easily contorted into irresponsible investments by auditors and can become fodder for opportunistic individuals bent on showcasing “mismanagement” in government. To temper the public service’s tendency toward caution and incrementalism, governments must be clear about their objectives, expected results and risk tolerances. This includes being open and transparent about the need for trade-offs, including the willingness to accept negative consequences (e.g. willingness to accept less influence over programs and targeted results to achieve improved relationships, stronger partners, and improved socio-economic outcomes).

Speaking at the LaFontaine-Baldwin Symposium in 2002, George Erasmus, co-chair of the Royal Commission on Aboriginal Peoples (RCAP) remarked that “public discourse with Aboriginal Peoples has been overtaken with inertia in recent years”. First Nations people know first-hand that the human consequences of this inertia can be dire, including tragic and irreversible human consequences. For many years, this inertia has been fueled by distrust. Distrust of federal officials in First Nations governments and distrust of First Nations people in federal politicians and bureaucrats.

The current government has sent strong signals through its words and actions that it understands the need to build trust in the immediate term in order to advance longer term objectives. An excellent example of this is the federal government’s July 2017 decision to place a moratorium on the consideration the own source revenues of First Nations under Self-Government Agreements when calculating their fiscal transfers. By temporarily halting the consideration of “own source revenues” in calculating transfers, the federal government made clear that building trust in the immediate term was necessary to advance longer term objectives.

In highlighting opportunities to enhance federal horizontality in Crown - First Nations fiscal relationships we have been mindful that any measures taken must be compatible with the objective of rebuilding trust in Crown – First Nations relationships.

Challenges of Delivering First Nations Programming within Canada’s Federal System of Government

In policy settings where governments look to program-specific results as the standard for diagnosing problems, driving program delivery and evaluating executive performance, there is an intrinsic bias toward policy and program interventions that favour program-specific outputs,

at the risk of focusing too little on enhancing outcomes for individuals and communities served by these programs. Strategies to counterbalance these potential biases are explored in this discussion paper. These include enhancements to program evaluation approaches, changes to the federal budget process, shifting away from costing toward longer-term cost-benefit analysis, enhancing the coherence of programs and policies and designing programs that are more integrated and interoperable.

Within Canada's Westminster model of federal government, Federal Ministers, the House of Commons, Treasury Board and the Minister of Finance all play important roles in ensuring that tax dollars are prudently spent and results are achieved. To meet their accountability obligations, these federal officials need comfort that government programs and investments are sound and assurances that results are being achieved in a cost-effective manner. These assurances require information and this information creates heavy administrative burdens on First Nations governments.

The 2006 Blue Ribbon Panel on Grants and Contributions concluded that, "not only is it possible to simplify administration while strengthening accountability, it is absolutely necessary to do the first in order to ensure the latter".¹ The Harvard Project on American Indian Economic Development, with its hundreds of research projects over more than 30 years, found that local government control, capable and culturally appropriate government institutions and access to adequate funding, are all necessary to tackle poverty. In the arena of international development, Canada and other developed nations have come to realize and accept that developing nations must set their own poverty reduction priorities, develop their own capabilities and rely on their own accountability regimes if they are to achieve meaningful and sustained progress. The body of research makes clear that local control and access to adequate funding are necessary pre-conditions to build capable Indigenous governments. For fear of failing to meet their accountability obligations, federal officials remain reluctant to relinquish control over program design and spending decisions to First Nations governments that have not already demonstrated the necessary capabilities.

Diminishing the Need for Federal Horizontality

With adequate fiscal support and autonomy, First Nations governments will grow stronger and escape the cycle of managing poverty and crises. With strong and more capable First Nations governments, there would be less need for federal government involvement. Put another way, there would be less imperative to develop complex horizontal approaches within the federal government if First Nations governments had the financial means and autonomy to govern.

To achieve a state of greater capacity, First Nations governments need adequate funding for their institutions, programs and services, and general government costs (e.g. financial management, communications, human resources management, information technology, planning and reporting, employee benefits, accommodations, council operating costs, rights research, bylaw development, community engagement, enforcement of community bylaws, among many others). First Nations leaders have long advocated for increased federal funding to support the costs of local First Nations governments and First Nations institutions that provide capacity supports to local governments. The common argument is that chronic underfunding (i.e. both for direct program delivery and administration and governance) has gutted the capacity of their governments and impaired their ability to proactively engage, plan, oversee and improve.

To better understand the federal government's role in funding the general government costs of First Nations governments, there are some key questions worthy of examining, including:

- What would it cost for a First Nation government to properly resource its governance and administration functions?
- What is the Federal Government's role in supporting these costs?
- What funding do First Nations governments currently have access to for core administration and governance functions (i.e. contributions from all funders and contributions from the own source revenues of First Nations)?
- How might the federal government improve its approaches to calculating and distributing funding for core administration and governance functions?
- How can the Federal Government indirectly support the capacity of First Nations governments (e.g. through supports to First Nations institutions, etc.)?

While the scope of this discussion paper did not include a full examination of these questions, they are briefly explored to help inform conversations, and possibly, support a more in-depth study at a later date.

Opportunities to Enhance Federal Horizontality and Trust in First Nations Transfer Payments

Our review of literature and the experiences of the individuals interviewed for this study point to some opportunities to enhance federal horizontality in the delivery of transfer payments, while also promoting strong and capable First Nations governments. The solutions that were most prominent are summarized below.

- ▶ **Coordinate and Increase Federal Investments in Planning Capacity and Results Frameworks:** Investments in community-based planning and results reporting for First Nations governments would help them build consensus and momentum in advancing local priorities and allow funders to better react to and support community priorities. While some federal programs already provide contributions for planning activities, a more

consistent and coordinated federal approach is needed. To monitor achievement of community-based priorities and plans, First Nations governments also need strong performance measurement regimes, including capacity to measure and report on the results achieved. Enhancing planning and reporting capacities would require direct investments in First Nations governments and indirect investments through First Nations institutions that can provide knowledge-sharing, materials and advice.

- ▶ **Increase Flexibility in Programs and Funding Approaches:** First Nations often lack opportunities to set their own strategies for local programs and services, as federal programming is generally tied to specific program activities. Additionally, some community needs are not covered by existing federal programming. Harmonizing how and when federal funders provide flexibility for local priority setting and budget decisions is necessary to achieve greater flexibility. Additional measures could include harmonizing program terms and conditions, increased use of flexible funding approaches, and less prescriptive programming would allow First Nations governments to develop program interventions that better address community needs. More flexible funding approaches (e.g. grant funding or statutory transfers with few conditions) could reduce conditionality and increase flexibility in intergovernmental transfers to First Nations governments with proven governance and program delivery capabilities. This may require more gradual transfer of control for programs where risks to human health and safety are highest.
- ▶ **Harmonize Program Terms and Conditions:** There are over one hundred sets of program terms and conditions for Indigenous programming, most of which only apply to one federal department. Many restrict the ability of federal and First Nations officials to be creative in how programs are delivered and some establish administrative requirements that are not risk-based. An opportunity exists to streamline and harmonize program terms and conditions for Indigenous programming to ensure that they reinforce a funding relationship and administrative regimes that are consistent with a government-to-government relationship. An opportunity to increase flexibility would be to include broad poverty reduction, capacity building and other authorities in all, or most, program terms and conditions (i.e. this would allow each program to support innovative strategies and initiatives that align to community needs).
- ▶ **Invest in Data and Research:** A lack of evidence-based research and data impairs policy-making and program design for all levels of government. Increased funding for research and data analytics could draw attention to the programming needs of First Nations and gaps in existing programs and services. This knowledge would support enhancements to First Nations, federal, provincial, and municipal programming. A concerted approach to

establishing and funding Indigenous research priorities in Canada, as is already done for international development, health and social research, could help to enhance the breadth and relevance of research. While the First Nations Information Governance Centre (FNIGC) is funded to gather and disseminate some data and knowledge, additional investments to improve access to quality data are necessary to support research and analysis. There is some coordination of Indigenous-focused research in Canada (e.g. for health research), but not a central Indigenous-focused research, collections and publishing organization. Such an organization exists in Australia, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), which had a budget of \$25.7Million in 2016-17².

- ▶ **Simplify Accountability Relationships for the Federal Cabinet and First Nations Governments:** Accountability for Indigenous policies and programs is divided between many Federal Ministers and federal departments. Collaboration occurs when there are crises or political imperatives, but it is more difficult to sustain collaboration on an ongoing basis. Reducing the number of Federal Ministers and departments responsible for delivering First Nations programming would reduce the number and complexity of accountability relationships between First Nations governments and the Government of Canada.

- ▶ **Reduce Administrative Burden on First Nations Governments to Strengthen Accountability:** Each federal department, and in some cases, each departmental program, establishes distinctive administrative requirements and conditions for First Nations governments. Few of these funding relationships emulate intergovernmental transfers that approach federal-provincial fiscal relationships or Canada's development assistance transfers to developing nations. Further, many administrative requirements attached to federal transfers are not risk-based, despite this being an explicit requirement of the Treasury Board Policy on Transfer Payments (PTP). Streamlining and harmonizing the web of rules could be achieved through a common federal transfer payment control framework. (e.g. directive to ensure consistency in selection of funding approach, mandatory consideration of community-based priorities and plans, common capabilities assessment for all federal funders, common funding agreement terms and conditions that reflect the intergovernmental nature of First Nations transfers, common compliance and monitoring regimes, and a minimalist approach to setting reporting requirements, etc.).

Considerations for the Establishment of New Federal Departments

On August 28, 2017, the Government of Canada announced plans to realign accountabilities and programming for Indigenous and northern programming, including the dissolution of INAC and

the creation of two new federal departments. The Prime Minister emphasized the “need to shed the administrative structures and legislation that were conceived in another time for a different kind of relationship”⁴ and emphasized that “the level of the ambition of this government cannot be achieved through existing colonial structures”.⁵ While the potential challenges and solutions highlighted throughout this paper are all relevant considerations for the shaping of these new departments, this discussion paper examines three additional questions related to the new department:

- ▶ how to dovetail and align the many parallel conversations about a First Nation’s pursuit of nation rebuilding, self-determination and self-governance;
- ▶ how to achieve true government-to-government relationships; and
- ▶ which programs to merge into the new Indigenous Services and Crown Indigenous Relations departments.

The discussion paper examines the many parallel conversations that exist between federal officials and First Nations governments about self-determination and self-governance, and suggests harmonizing these into one unitary conversation. To this end, an open-ended and exploratory conversation would replace rigid negotiation processes and scripted approaches. These conversations would occur with every First Nation government and nation group, not just those opting into the existing self-government process or the handful of other legislative processes to draw-down jurisdiction in specific sectors.

On the question of how to move towards true government-to-government relationships, this discussion paper explores opportunities to integrate and strengthen the federal approaches for working with First Nations governments. This includes opportunities to reduce the points-of-entry into the federal government for First Nations, harmonize federal messaging and interactions and elevate the primary contact with First Nations governments to the executive-level, as a matter of course and not only during times of crisis or political imperative.

On the question of which First Nations programs to merge into the new Indigenous Services Department, we examine the importance of considering the many small federal programs, including the potential for these programs to unlock new opportunities for First Nations. In considering where to position the larger First Nations programs, the paper examines the Australian and U.S. experiences and concludes that thoughtful consideration of the potential impacts of moving major programs into the new Indigenous Services Department is necessary to avoid unintended consequences.

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Imagine a Canada where First Nations have clean water, equal access to services, education and health outcomes that are comparable to other Canadians, healthy homes, strong employment and secure communities. A Canada free of First Nations stereotypes and systemic biases toward First Nations people. A Canada where all orders of government do everything possible to enhance life chances for First Nations people. This Canada requires resolve of all Canadians and collaboration among First Nations, federal, provincial, territorial and municipal governments. In this Canada, First Nations governments would set local program priorities and make difficult decisions on allocating scarce resources. While the role of the federal public service would be greatly diminished in this Canada, the Government of Canada would have a strong and unitary relationship with each First Nation, a relationship where all federal officials work cohesively to support and enable the success of a First Nation government. In this Canada, there would be deep trust in the capabilities and character of First Nations governments, and Crown - First Nations relationships would be characterized by mutual-trust.

1.1. Our Definition of Federal Horizontality?

This discussion paper explores and examines how federal transfer payment regimes can be strengthened through more horizontal approaches. To ensure that our research and suggested solutions are useful and practical, it was necessary to establish a common understanding of what we seek to achieve through enhanced federal horizontality. Based on our interviews and research, we developed the following definition:

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- ▶ *reduce administrative burdens on First Nations governments and other recipients;*
and

- ▶ *support First Nations governments and other First Nations institutions in strengthening their governance and management capabilities and accountability relationships.*

1.2. Historical Context

Understanding the historical context, including how we arrived here, is necessary to find a pathway forward. The *1996 report of the Royal Commission on Aboriginal Peoples* and the *2015 Final Report of the Truth and Reconciliation (Vol. 1 Part 1)*, provide a balanced perspective on historical events. We recognize that not everyone has the time for an in-depth review of these works and have included an abridged account of the history of treaty making and Crown - First Nations relationships in Annex A. We place emphasis on events that have influenced Crown – First Nations fiscal relationships and the legal and political organization of present-day First Nations governments. Our account is written based on the perspectives and understanding of the Ontario-based authors. A similar account from a different author (e.g. British Columbian, Northerner, etc.) would include additional events and court decisions that are most relevant to their respective contexts.

1.3. Importance of Promoting Trust in Crown - First Nations Fiscal Relationships

We were not asked to write a discussion paper on the importance of trust, but our stakeholder interviews and research made it clear that any efforts to improve federal horizontality needed to promote trust in Crown - First Nations relationships. Indigenous stakeholders consistently pointed out that the existing funder-recipient relationships of federal government departments and Indian Act band councils obstruct the building of trust.

If Indigenous and non-Indigenous Canadians are to create and embark on a pathway toward a harmonious and shared future, there will need to be mutual trust in Crown - First Nations relationships. The Truth and Reconciliation Commission (TRC) remarked that a lack of understanding about Indigenous histories, rights and conflicts “reinforces racist attitudes and fuels civic distrust between Aboriginal peoples and other Canadians”. Trust between First Nations, federal, provincial and territorial governments can create space for good faith negotiations, cooperation, experimentation and shared achievements. Sadly, the policies, rules and approaches devised to administer First Nations fiscal transfers over the last 150 years were created during times when Canada held deep distrust in the capabilities and character of First Nations governments. Any efforts to enhance federal horizontality in the delivery of First Nations fiscal transfers must avoid promulgating federal policies, administrative regimes and funding approaches that impede the building of trust, or breed distrust.

Building trust is anything but simple. Choosing to be loyal, respectful and faithful are conscious choices, but the same cannot be said for trust. As author Stephen Covey describes it, “trust is equal parts character and competency”. Trust is not so much a choice, it is earned and built, and once lost, is hard to regain. Courts and human rights tribunals can enforce respect for legal, treaty and fiduciary obligations and Indigenous rights, but trust cannot be enforced.

For perfectly valid reasons, First Nations people and their governments have grown suspicious of the words and intentions of provincial, territorial and federal governments. Rebuilding trust of First Nations peoples and governments will require time, thoughtfulness, hard work and persistence. Removing the barriers to trust is an essential first step, one that federal officials have great influence over. This includes replacing federal transfer payment regimes with fiscal relationships that are truly government-to-government, including practices that promote strong and capable First Nations governments and reinforce trust in Crown - First Nations relationships.

It is easy to argue that “trust building” be placed above other objectives when designing First Nations fiscal relationships and related transfers. However, for federal bureaucrats whose careers bridge many governments, it can be difficult and scary to make bold decisions that might be unpopular with a future government, particularly where legal and policy frameworks remain unclear. Decisions to flow funding to organizations without demonstrated capabilities are easily contorted into irresponsible investments by auditors and can become fodder for opportunistic individuals bent on showcasing “mismanagement” in government. To temper the public service’s tendency toward caution and incrementalism, governments must be clear about their objectives, expected results and risk tolerances. This includes being open and transparent about the need for trade-offs, including the willingness to accept negative consequences (e.g. willingness to accept less influence over programs and targeted results to achieve improved relationships, stronger partners, and improved socio-economic outcomes).

Speaking at the LaFontaine-Baldwin Symposium in 2002, George Erasmus, co-chair of the Royal Commission on Aboriginal Peoples (RCAP) remarked that “public discourse with Aboriginal Peoples has been overtaken with inertia in recent years”. First Nations people know first-hand that the human consequences of this inertia can be dire, including tragic and irreversible human consequences. For many years, this inertia has been fueled by distrust. Distrust of federal officials in First Nations governments and distrust of First Nations people in federal politicians and bureaucrats.

To illustrate how changes to Crown - First Nations fiscal relationships can reinforce trust, we examine a recent action of the Government of Canada. In July 2017, the federal government agreed to temporarily pause its practice of reducing fiscal transfers to self-governing First Nations

by a portion of their own source revenues. The calculations for determining a First Nation government's own source revenues involve point-in-time estimates of the revenues that a given First Nation government "should be able to collect" into the future. Considering that the underlying calculations are often historical and open to debate, and considering that myriad unforeseen conditions could negatively impact the revenues actually realized by a given First Nation, these own source revenue calculations are very contentious. The ability to raise revenues, un beholden to others, is a hallmark of strong democratic governments. Taxation regimes promote strong accountability relationships between a nation of people and their government. As the Chief Commissioner of the First Nations Tax Commission, Manny Jules, remarked, "taxation is a cornerstone of an autonomous, responsible government". While most Canadians and many First Nations people would agree that it is hard to envision a shared future in which First Nations governments are not incited and expected to raise their own revenues and contribute to their own government costs, by placing a "near-term" moratorium on the consideration of own source revenues, the federal government made clear that building trust in the immediate term was necessary to advance over the longer-term. By removing this trust barrier, the federal government created space for conversations about how the fiscal capacity of self-governing First Nations should be considered when calculating funding levels in the future.

In highlighting opportunities to enhance federal horizontality in Crown - First Nations fiscal relationships we have been mindful that any measures taken must be compatible with the objective of rebuilding trust in Crown – First Nations relationships.

1.4. Lessons from International Development

In exploring opportunities to enhance federal horizontality in First Nations transfers, including the question of how transfer payment regimes can enhance trust in relationships, it is helpful to look at best practices for international development assistance. Through the *2005 Paris Declaration on Aid Effectiveness and the Accra Agenda for Action* (Paris Declaration), donor nations committed to change how aid is provided to developing nations.⁹ The Paris Declaration sets out five Aid Effectiveness Principles, including:

- ▶ **Ownership:** Developing countries set their own strategies for poverty reduction, improve their institutions and tackle corruption.
- ▶ **Alignment:** Donor countries align behind these objectives and use local systems.
- ▶ **Harmonization:** Donor countries coordinate, simplify procedures and share information to avoid duplication.
- ▶ **Results:** Developing countries and donors shift focus to development results and results get measured.
- ▶ **Mutual accountability:** Donors and partners are accountable for development results.¹⁰

By adopting the Aid Effectiveness Principles, donor countries emphasized the importance of capacity building for recipient governments, understanding that this could mean reduced control and visibility over results and finances. To be clear, adopting the Aid Effectiveness Principles has not meant that conditionality and oversight are not present in international development assistance transfers. Rather, donor countries look for opportunities to fund developing nations in manners that reinforce the principles.

2. APPROACH

This study was sponsored by the Government of Canada and the Assembly of First Nations (AFN). Officials from various federal government departments, the AFN and other Indigenous-led organizations supported and guided the study. The proposed terms of reference and research questions were prepared by the study's authors and feedback was sought from members of the New Fiscal Relationship Working Group (NFR WG). The feedback was considered and the terms of reference were refined and approved by representatives of the NFR WG.

Interviews were conducted with officials from Indigenous and federal government organizations to gain an understanding of challenges, experiences and potential solutions. Interviewees were identified in consultation with the officials participating in the NFR WG and directly by the study team. Emphasis was placed on selecting interviewees in positions of influence in the Government of Canada and stakeholders with deep knowledge and experience in the subject. The study team conducted interviews independently. Standard questions were asked of every interviewee and additional follow-on questions were asked to better understand each interviewee's experiences, knowledge and perspectives. In total, forty-one interviewees were invited to participate in the study, and thirty interviews were conducted.

An extensive review of literature was performed, drawing on documentation provided by interviewees and documentation gathered through searches of the internet and research databases. Targeted research was performed on each potential solution to identify and explore experiences, best practices and lessons learned from the domestic and international contexts. To ensure objectivity and credibility of the study, emphasis was placed on research, facts and figures from authoritative and reputable sources. Initial internet and database searches were broad in nature in order to obtain an understanding of the information that was available. A list of sources was provided to members of the NFR WG to ensure that all important documents were included, and all suggestions for additional research materials were procured and reviewed. In total, over two hundred sources were considered and over fifty studies, initiatives, papers and reports from

various sources were examined in detail, covering Canadian, U.S., Australian, New Zealand, Norwegian, Latin American and international development contexts.

The literature review and interviews with stakeholders provided the foundation for analysis and synthesis. Preliminary hypotheses were developed based on the research and analysis and these were further examined and discussed through follow-up discussions with a number of the interviewees.

3. CHALLENGES OF DELIVERING FIRST NATIONS PROGRAMMING WITHIN CANADA'S FEDERAL SYSTEM OF GOVERNMENT

Stakeholder interviews and research highlighted two principle challenges for federal horizontality in Canada's system of federal government often referred to as a Westminster model of government. These challenges are summarized below.

3.1. Plurality of Accountability Relationships

In Canada's federal system of government, executive powers rest with the Governor in Council (i.e. the Governor General acting on the advice of the Prime Minister and the Federal Cabinet). The Federal Cabinet includes Cabinet Ministers designated as Ministers in charge of government departments. Ministers are granted powers to implement federal programs for their portfolio departments. Cabinet Ministers are accountable to the House of Commons for their actions and the actions of their departments and are also expected to take collective responsibility for, and defend, all Cabinet decisions.

Effective 2012, the concept of the Chief Accounting Officer role was added to the Financial Administration Act (FAA) and deputy heads of federal departments were made accountable to committees of the Senate and House of Commons on matters such as resource allocation decisions, internal controls and public accounts reporting. This new dual accountability, the Minister to the House of Commons and the deputy head to committees of the Senate and House of Commons, reinforced the need for Ministers and deputy heads to maintain control of program delivery decisions within their portfolio. This principle is further reinforced through the FAA, which restricts one Minister from delivering programming on behalf of another Minister. Section 29.2 of the FAA allows one department to deliver internal support services on behalf of another department,¹¹ but delivery of transfer payments is not included in the scope of this provision.

The plurality of accountability relationships between Federal Ministers and Parliament for First Nations programming acts as a barrier to achieving a unitary Crown – First Nations relationship. First Nations programming is fragmented across more than 30 federal departments and agencies,

and each of these departments and agencies has a corresponding accountability relationship with every First Nations government it funds. Typically, these accountability relationships are unidirectional, with First Nations accountability obligations principally crafted through a funding agreement.

While some stakeholders have called for changes to the FAA and reduced accountability expectations for Federal Ministers and deputy heads, changes of this nature seem unlikely as they would require changes to the federal system of government (i.e. these are not merely administrative changes that could be implemented for Indigenous-specific programming, they would be fundamental changes to how Parliament functions).

3.2. Funding Uncertainty Caused by Voted Appropriations and the Federal Budget Process

All expenditures made by the federal government require the authority of Parliament. Parliamentary authority is provided in two ways: annual appropriation acts that specify the amounts and broad purposes for which funds can be spent; and other specific statutes that authorize payments and set out the amounts and time periods for those payments. The amounts approved in appropriation acts are referred to as voted amounts, and the expenditure authorities provided through other statutes are called statutory authorities. Estimates documents are prepared to support appropriation acts. As such, the estimates provide additional information on voted amounts included in the appropriation act. Forecasts of statutory amounts are also presented to give a more complete picture of total parliamentary authorities to be used during the fiscal year.¹²

Most First Nations programming is funded through voted appropriations. Indigenous stakeholders and managers of federal programs call for increased use of statutory authorities to enhance predictability and stability of federal transfers to First Nations, similar in nature to transfers provided to provinces and territories (i.e. First Nations experience funding uncertainty because voted appropriations are either time-limited or subject to change at any time). Indigenous stakeholders pointed out that the federal policy-making and federal budget processes are not ideal mechanisms for allocating new federal investments or making budget cuts during times of fiscal constraint (i.e. a more nuanced community- or region-level approach is needed in their view). Also, First Nations governments point out that funding uncertainty restricts their ability to hire permanent staff, which makes it very challenging to attract and retain skilled community members back to their home communities (i.e. there are plenty of stable permanent jobs for qualified Indigenous workers outside of their respective communities).

While the federal budget process includes inputs from federal departments, the Standing Committee on Finance, provincial Finance Ministers, and some limited input from Indigenous

stakeholders, final decisions on where to allocate new investments are made by the Prime Minister and Minister of Finance. Federal Ministers have some discretion to make allocation decisions where their policy and spending authorities permit such flexibility, but most significant policy decisions are made by the Federal Cabinet (i.e. it is challenging for the Federal Cabinet to consider and accommodate the needs and priorities of 600+ First Nations when making decisions about programs and new investments).

Some Indigenous stakeholders interviewed for this study expressed a need for greater consideration of First Nations needs and distinctions, including differentiated investments by region or nation group. An approach like this exists for Indian Health Services in the U.S. and could be a useful model for Canada. Annex B examines how the participation of Tribal leaders enhances the effectiveness of the U.S. federal budget. Annex C includes a more in-depth examination of how statutory programs and appropriations might be used to enhance First Nations programming and strengthen Crown – First Nations relationships.

4. IMPROVING COHERENCE OF FEDERAL POLICIES AND PROGRAMS

In policy settings where governments look to program-specific results as the standard for diagnosing problems, driving program delivery and evaluating executive performance, there is an intrinsic bias toward policy and program interventions that favour program-specific outputs, at the risk of focusing too little on enhancing outcomes for individuals and communities served by these programs. Canada's Westminster model of federal government, with its firmly entrenched ministerial accountabilities, is such a policy setting. Federal Ministers and deputy heads are more likely to emphasize the results that they can directly influence and measure (e.g. graduation rates, number of children in care, level of housing stock, number of beds in shelters), over a more holistic emphasis on high-level outcomes. For the sake of clarity, while program results invariably contribute to improved outcomes, bureaucrats may not be encouraging the best program interventions in all situations. In such a context, program evaluation, policy development and program design processes are critical to ensuring focus on the results that truly matter.

The health sector is a good illustration of why coherent policies and programs are necessary to improve outcomes. In its research on the social determinants of health, the World Health Organization (WHO) has concluded that medical care has a relatively small influence over the achievement of health outcomes. It is accepted that an individual's behaviours, social circumstances and genetics have much greater influence over health outcomes than access to quality medical care. In its 2008 report, the WHO Commission on Social Determinants of Health (CSDH) examines how health outcome gaps are influenced by inequalities in the access to

resources and power.¹³ The WHO research found that access to education, social protection and infrastructure programming strongly influenced the achievement of health outcomes.¹⁴

To help governments make policy trade-offs in an environment of scarce resources, the WHO's research study entitled *The Economics of Social Determinants of Health and Health Inequalities* identifies methods for evaluating the investment worthiness of specific policy and program interventions.¹⁵ This research concludes that, while many governments tend to base policy and program decisions on an assessment of the cost-effectiveness of specific policy and program interventions (i.e. level of expenditure to achieve a certain program result), this type of analysis tends to result in a narrow focus on health effects, rather than longer-term health outcomes.¹⁶ The WHO argues that the more fruitful approach for advancing health outcomes is to consider the broader cost-benefit¹⁷ (i.e. comparing the projected benefits of better outcomes over many decades or generations, to the forecasted costs along the same timeline).

5. CALLS TO REDUCE THE ADMINISTRATIVE BURDEN ON FIRST NATIONS GOVERNMENTS

Most stakeholders interviewed for this study see success in moving forward with two distinct, but parallel, directions. The first direction is the steady evolution of legal and policy frameworks that recast Crown – First Nation relationships, including the fiscal relationship. The second direction is the simplification of administrative regimes for federal First Nations transfers.

While the second direction may seem to pale in significance to the first, its importance must not be understated. The *2006 Blue Ribbon Panel on Grants and Contributions* (Blue Ribbon Panel) had three conclusions, the second was as follows:

“not only is it possible to simplify administration while strengthening accountability, it is absolutely necessary to do the first in order to ensure the latter”.¹⁸

To paraphrase the message of the Blue Ribbon Panel, we can create space for First Nations governments to focus on what matters to their communities if we eliminate rules that obstruct good decision making and we reduce administrative tasks with low marginal-value. In doing this, the federal government would also respect and support the inherent right of Indigenous governments to self-determine local priorities and support strengthening of their governance and management capabilities.

Through practice and good decision making, First Nations governments will become more

capable and, ultimately, more successful in delivering on the priorities of their nation. It may seem reasonable to some Canadian voters and federal bureaucrats to ask how it is that we can place trust in First Nations governments when they have not yet developed the capabilities to effectively govern. It is a very clear dilemma for some, what comes first, trust or capability? What we can learn from the both the Blue Ribbon Panel and TRC is that, when starting from a place of distrust, where existing conditions breed distrust in relationships, we need to focus on establishing the conditions necessary for trust to grow and flourish.¹⁹ Put more simply, the federal government needs to lean more heavily on respect and loyalty until trust in First Nations governments can be built.

6. RETHINKING HOW THE POLICY ON TRANSFER PAYMENTS IS APPLIED TO FIRST NATIONS TRANSFERS AND ENHANCING FLEXIBILITY IN FIRST NATIONS FUNDING AGREEMENTS

The Treasury Board *Policy on Transfer Payments* (PTP) establishes broad authorities for the use of contributions and grants in the delivery of federal transfers. Appendix K of the Treasury Board's *Directive on Transfer Payments* (Directive) establishes additional funding approaches for transfer payments to "Aboriginal recipients".²⁰ These authorities can be further limited in the Program Terms and Conditions established for each program. Oftentimes, the limitations built into Program Terms and Conditions are there because past Cabinets, Treasury Boards, Ministers and Deputy Ministers wanted visibility to program results, and needed information to meet their own accountability reporting obligations.

Some Indigenous stakeholders who we interviewed were harsh in their criticism of the PTP, drawing our attention to the fact that Crown - First Nations fiscal relationships are diminished to a funder-recipient relationship in the PTP and its accompanying Directive. Some federal officials struggle to see how the PTP conditions on First Nations transfers are much different from purpose-built transfers provided to provinces and territories. One First Nations stakeholder observed that Appendix I of the Directive, which deals with transfers to "other orders of government", characterizes a very different relationship with provinces and territories, a relationship based on trust, while Appendix K makes clear that "Aboriginal recipients" must meet a host of conditions to be considered for the more flexible contribution funding approaches. Appendix K of the PTP permits flexibility, based on an assessment of recipient capacity (e.g. governance structures, program delivery capacities, management capacities, financial health and public accountability mechanisms)²¹, but federal departments seem to interpret and apply the directive differently.

Viewed from the perspective of First Nations governments, the emphasis of the PTP on risk-based approaches presents a quandary. Where the poor financial health and diminished capacity of a given First Nation government has been caused by chronic underfunding of programs and services, the First Nation government is often caught in a vicious cycle of managing poverty and reacting to crises. In such circumstances, it is unfair to label that First Nation government as having low capacity because they have not been given the chance to manage with autonomy and adequate resource levels. Further, where federal departments construct funding regimes that see flexibility as a binary choice (i.e. all or nothing approach to flexibility), low capacity becomes very difficult to overcome, a self-fulfilling prophecy of sorts.

In summary, the Indigenous criticism of the PTP is that it exudes distrust in Indigenous governments and stifles the ability of Indigenous governments to learn on the job, despite conventional wisdom that good governance and management require practice. If access to more flexibility and autonomy in transfers (e.g. access to block contributions, grants and other more flexible transfers) was somehow linked to the risk of negative human or financial consequences, the application of conditions might be more palatable. For example, a logical argument could be made for limiting the use of flexible transfers where program risk is very high and a recipient's capacity is low, while still permitting flexibility in other areas (e.g. a First Nation might have Block or grant funding for lower risk programs but not for programs related to child protection, violence prevention and shelters, administration of prescription drugs or the construction of major water systems).

The argument for increasing local decision-making is well supported in research and experience. The Harvard Project on American Indian Economic Development (Harvard Project), founded by Professors Stephen Cornell and Joseph P. Kalt at Harvard University in 1987, has been studying the pathways to improved socio-economic outcomes for decades.²² The Harvard Project's 30 years of research includes hundreds of research projects that collectively point to four conditions necessary to overcome poverty and improve conditions on indigenous reserves, these include:

- ▶ **Freedom to make decisions** about what development approaches to take, referred to as “tribal sovereignty” in the United States;
- ▶ **Capable institutions of governance** that ensure stable decision rules, establish fair and independent mechanisms for dispute resolution, and separate politics from day-to-day business and program management;
- ▶ **Emphasis on culture** in the governing structure, economic system, policies, and procedures; and
- ▶ **Leaders who inspire** people to take action by introducing new knowledge and experiences, challenging assumptions, and proposing change.²³

An evaluation of the PTP and its provisions for Indigenous transfers against the poverty-reduction conditions identified by the Harvard Project could prove to be a fruitful way of identifying potential improvements.

7. INCREASING THE USE OF FLEXIBLE FUNDING APPROACHES

One approach enhance federal horizontality in the delivery of First Nations transfers is to reduce federal rules and reporting requirements by adopting more flexible transfers, transfers that imply and promote trust in First Nations governments. The Government of Canada only provides comprehensive grant funding to one First Nation outside of a Self-government Agreement, Miawpukek First Nation (MFN) in Conne River, Newfoundland. Joint Indigenous and Northern Affairs Canada (INAC)-MFN evaluations find that MFN has been able to leverage its unique funding flexibilities to create opportunities and improve outcomes for its community members. Not surprisingly, MFN boasts socio-economic success above neighbouring communities, near full employment and an adequate stock of quality housing²⁴. MFN leverages its flexible grant funding to deliver innovative programs and advance community priorities. For example, MFN is committed to the principle of full employment for adults in the community which promotes part-time employment for all community members over full-time employment for some²⁵. This policy increases labour force participation, increases community involvement in government and reduces reliance on income supports. The joint INAC-MFN evaluations are completed at the end of every multi-year agreement cycle and consistently conclude that increased flexibility and autonomy have been instrumental in enhancing outcomes, building governance capabilities and enhancing management effectiveness. These gains are reflected in the community's housing stock, local infrastructure and employment levels. Annex E includes a more detailed examination of the MFN grant agreement.

Turning to the experience of Canada's Self-Governing First Nations, a 2015 study by Ravi Pendakur (University of Ottawa) and Krishna Pendakur (Simon Fraser University) included an analysis of outcomes achieved by First Nations communities with Self-Government Agreements (SGA) and Comprehensive Land Claim Agreements (CLCA). From the late 1980s and leading up to the mandate of the current federal government, the Government of Canada promoted self-government agreements for First Nations in unceded territories by linking the completion of a Comprehensive Land Claim to Self-government Agreements. The CLCA typically included material cash payments that could be used to acquire land and advance the self-determined priorities of a nation. The Pendakur study found marginal gains in income levels for First Nations that had only concluded a SGA (11% for men and no effect for women), but substantial gains for communities that had concluded both an SGA and CLCA (26% for men and 38% for women).²⁶

Interestingly, the study also found that having an SGA increased the Community Well-Being (CWB) score by about 4 points for Indigenous residents, but when combined with a CLCA, this dropped to a 3-point gain.²⁷ CWB is an index measuring socio-economic well-being in First Nations that leverages data on education, labour force activity, income and housing. These findings also reinforce the conclusions of the Harvard Project, including the conclusion that Indigenous governments need “genuine decision-making control over the running of tribal affairs and the use of tribal resources”²⁸ in order to achieve improvements in social and economic outcomes. The “genuine decision-making control” comes from having both authority and access to funds necessary to exercise that authority. The CLCA provides the additional funds necessary to exercise authority through policy and program interventions.

Increasing the use of flexible transfer payment approaches (e.g. grant, block contributions or other new creations) does not necessitate federal recognition of a nation’s decision to exercise its inherent right to self-governance, rather, the grant provides conditions necessary for the effective delivery of programs and achievement of outcomes. The flexibility of grants can provide First Nations governments the space to set their own priorities and develop capabilities necessary to gain the trust of their people and partners, thereby improving a nation’s chance of achieving self-governance. By limiting the use of more flexible contributions and grants, we stifle creative programming and restrict a First Nations government’s ability to focus on what matters to its people. This impairs the accountability relationships between First Nations governments and their people, thereby undermining trust in that relationship. While the self-government context teaches us that success is enhanced when a nation has “catch-up funding” obtained through a CLCA, and greater access to land and resource revenues, the MFN experience shows that meaningful improvements to socio-economic outcomes can also be realized with flexible intergovernmental transfers outside of a Self-Government Agreement.

On the question of grants, we conclude that this funding approach could be an effective way of achieving gains in socio-economic outcomes and building the capabilities of First Nations governments. To be clear, the grant would not resolve important issues about jurisdictional powers, law-making authorities and access to lands and resources. The grant instrument promotes trust building between the Crown and First Nations governments. If the Miawpukek experience and research of the Harvard Project are not compelling enough to justify expanded autonomy and flexibility for First Nations governments, a thorough cost-benefit analysis of the long-term benefits and long-term costs could help federal officials better understand the potential fiscal impacts of increasing the use of grants. In such an analysis, the financial benefits of improved socio-economic outcomes (e.g. lower cost to federal government for Indigenous programs and services, potential growth in First Nations tax bases, revenue generation from

increased development activity, etc.), would be compared to the potential additional costs or inefficiencies of having First Nations “learn on the job”.

8. DIMINSHING THE ROLE OF THE FEDERAL GOVERNMENT BY ENSURING THAT FIRST NATIONS GOVERNMENTS HAVE SUFFICIENT FUNDING

First Nations governments need access to sufficient funding for their government institutions, programs and general government functions if they are to enhance local programs and services, advance their self-determined priorities, rebuild their nations and institutions, and progress toward greater self-determination.

The general government functions include things like financial management, communications, human resources management, information technology, planning and reporting, employee benefits and pensions, accommodations, council operating costs, rights research, bylaw development, community engagement, enforcement of community bylaws, among many others). When the funding for these functions is constrained, First Nations governments lack basic capabilities needed to engage with their community members, establish a clear vision that their community can buy into, set community priorities, develop integrated plans, engage with potential funders and partners, and demonstrate accountability to community members. When First Nations also lack funding for basic programs and services, these issues are compounded because there is a strong tendency to forego administrative capacities to fund chronic program deficits (e.g. cut administration jobs and governance functions to shore up education and social services deficits).

With stronger and more capable First Nations governments, there would be less need for complex and costly federal government oversight regimes and interventions. Put another way, there would be less imperative to develop complex horizontal approaches within the federal government if the role of the federal government was greatly diminished. First Nations leaders have long advocated for increased federal funding to support the costs of local First Nations governments and First Nations institutions that provide capacity supports to local governments. A common argument is that chronic underfunding (i.e. both for direct program delivery and administration and governance functions) has gutted the capacity of their governments and impaired their ability to proactively engage, plan, oversee and improve. To better understand this issue and the federal government’s role, there are some important questions that are worthwhile examining, including:

- What are the funding related needs of First Nations governments in respect of core administration and governance functions?

- What is the Federal Government’s role in funding governance and administration functions of First Nations governments?
- What are the existing funding levels available to First Nations governments for core administration and governance functions (i.e. including both funding from funders and their own source revenues)?
- How might the federal government improve its approaches to ensure that federal funding levels for these core functions are sufficient?
- Should First Nations governments be expected to contribute to these costs from their own source revenues, and if so, how might these contributions be calculated?
- How can the Federal Government indirectly support the capacity of First Nations governments through supports to First Nations institutions?

8.1 What are the funding related needs of First Nations governments in respect of core administration and governance functions?

Where studies of the costs of these functions have been performed they are often specific to one nation’s situation. There are a number of complicating factors that impact these costs, such as geography, local purchasing power, availability of qualified local staff, relative efficiency of the government staff (i.e. considering experience and training levels of existing staff), degree of need in the community, among many others. The Canada Revenue Agency establishes that charitable organizations can spend 20% of their revenues on administration and governance overheads. A well-known U.S. charity watchdog, CharityWatch, rates organizations as having “excellent” efficiency if their overhead costs are under 25% and “good” efficiency if their overhead costs are under 35%.³² The cost of national and local government must certainly be higher than a charitable organization. It is not uncommon to see federal crown corporations, agencies and departments spend more than 25% on administration costs (i.e. as a proportion of total program delivery and overhead costs, but excluding the value of transfer payments). A thoughtful and objective analysis of the true cost of First Nations government is necessary to advance this issue.

8.2 What is the Federal Government’s role in funding governance and administration functions of First Nations governments?

A fundamental question is whether the Government of Canada should be responsible for funding local governance and administration costs, or whether such costs should be funded from property and other taxes collected by local First Nations governments. At the heart of this question is a deeper ideological question, one that divides electorates in many democratic states, about whether to favour low taxation and individualism over community and social responsibility. While these ideologies exist in Canada, Canada’s constitution provides strong direction to all levels of government. Section 36 of the Constitution Act (1982) affirms a commitment on the part of the federal and provincial governments to promote equal

opportunities for all Canadians and essential public services of reasonable quality to all Canadians.³³ Respect of this constitutional commitment is evident in the approach to territorial transfers where federal funding contributions vary from one territory to the next (e.g. in 2016 the Government of Nunavut drew 80%³⁴ of its funding from Federal transfers while Yukon Territorial Government drew 84%³⁵ of its funding from federal transfers) and equalization payments to provinces aimed at ensuring “reasonably comparable levels of public services at reasonably comparable levels of taxation”.³⁶

First Nations receive both direct federal funding supports for these functions and other indirect and time-limited supports (i.e. administration allocations attached to program funding and capacity development supports). An open and truthful dialogue is needed on the question of whether and how the fiscal capacity of First Nations (i.e. non-self-governing nations) should impact the calculation of federal transfers to First Nations governments. This dialogue will need to explore important issues and questions, some of which include:

- Is First Nations taxation and revenue raising important enough to make it a condition of eligibility for certain program funding? As an example, a First Nations government is not eligible to receive funding from INAC for income assistance shelter payments (i.e. housing costs for income assistance recipients living in community-owned housing) if it does not collect rental revenues from its other members who reside in community-owned housing. Are other policies such as this, including possibly one that links increased core governance and administration funding to the existence of revenue raising regimes necessary to promote revenue raising and taxation regimes in First Nations?
- Would conditions by federal funders that tie funding levels to the existence of taxation regimes encourage more communities to adopt taxation? Many First Nations communities in Canada believe their treaties entitle them to not pay taxes. One indigenous stakeholder interviewed noted that, in many First Nations communities, a chief or council member who raises the idea of taxation risk never being re-elected.
- Conversely, is it reasonable or fair to expect a First Nations government to contribute a portion of its revenues to core governance and administration costs when its basic programs and services are underfunded and community outcomes remain well below target?
- What is the role financial restitution, including settlement of past claims and payment of lump sum amounts to catch-up for past underfunding. As noted previously, the Pendakur study found that The Pendakur study found marginal gains in income levels for First Nations that achieved stronger socio-economic gains when they had received large cash settlements upon entering a self-government agreement.³⁷

- Is it reasonable for the federal government to expect First Nations governments to raise their own revenues where there are many unresolved land claim, jurisdiction, resource revenue sharing and other issues impairing their ability to activate community lands, resources and assets?
- What is the social impact and cost of chronically underfunding First Nations governments?

8.3 What are the existing funding levels available to First Nations governments for core administration and governance functions?

Unfortunately, the total amount of funding available to First Nations governments for core governance and administration functions is not well understood. The direct contributions from the Government of Canada include Band Support Funding and other direct Indigenous government support contributions. For 2016-17 these direct supports amounted to approx. 3% of total federal Indigenous programming (i.e. \$400 Million³⁸ of an estimated \$14 billion³⁹ for 2017). Other federal programs also provide funding for program administration, but not typically for core governance and administration functions. As noted previously, it is common to see administrative overheads topping 20% of total revenues in non-profit and government organizations.

8.4 How might the federal government improve its approaches to ensure that federal funding levels for these core functions are sufficient?

If the Government of Canada adopted a consistent horizontal approach to funding governance and administration costs, it would know how much administration and governance it provides to First Nations governments. Having knowledge of the funding levels is a necessary precursor to ensuring that sufficient funding is available to First Nations governments. Some possible solutions to this challenge are explored in Annex F.

8.5 How can the Federal Government indirectly support the capacity of First Nations governments through supports to First Nations institutions?

First Nations lack access to institutional functions and supports that are well established in most modern democratic governments. Due to their small populations and limited revenue bases, it is difficult to imagine a time where all of these institutional functions exist within each First Nations government in Canada. RCAP pointed out that there are broad needs when it comes to Indigenous institutional functions, including nation-level institutions, multi-nation institutions and national institutions. Institutional functions cited as being required by RCAP include housing management authorities, post-secondary education institutions, a statistical data clearing house, independent audit capacity, and standards setting and accreditation bodies, among others.⁴⁰

Others have also reinforced the importance of institution building, including then Auditor General of Canada Sheila Fraser in her June 2011 capstone report.⁴¹ Limited progress has been made in expanding First Nations institutions in the last 20 years (i.e. since the creation of the First Nations Statistical and Financial Management Act institutions in the early 1990s).

Shaping pan-First Nations safeguards and institutions is an important challenge for Canada's First Nations Peoples and their governments. While the Government of Canada has a vested interest in stable Indigenous-led institutions, it's very involvement in shaping and building Indigenous-led institutions can be perceived as imposing Canadian ideals, beliefs and motivations. RCAP recognized this precarious role, but also the power and influence held by the Government of Canada when it remarked, "by their actions, if not their words, governments continue to block Aboriginal nations from assuming the broad powers of governance that would permit them to fashion their own institutions and work out their own solutions to social, economic and political problems. It is this refusal that effectively blocks the way forward".⁴²

The present government appears willing to entertain proposals on the shaping of pan-First Nation institutions, but limited federal investments have been made in funding the capacity and conditions necessary to spur on institution building (e.g. research, discussion papers, forums for discussing the issues, innovative pilots and initiatives, and core funding for the incubation of institutional functions, etc.).

Annex D includes an overview of some of the institutional functions that are necessary to support and protect Indigenous governments, service delivery organizations and institutions. The absence of important institutional functions is a severe threat to the stability and existence of these Indigenous organizations. Any effective government has embedded checks and balances, including oversight by independent and credible institutional bodies and elected or appointed officials. In the context of First Nations governments, most of these institutional functions are either not fulfilled at all, or are very superficially conducted (i.e. they are limited in terms of their scope and depth of oversight).

The absence of these institutional functions in the First Nations context increases opportunity for poor decision making and increases risk of programming gaps, mismanagement, non-legal, non-compliance, and rights violations. Sadly, but understandably, when improprieties are identified by federal funders or community members, the reactions of the Government of Canada are often harsh. Federal bureaucrats have a history of revoking funding or decision-making authority from Indigenous-led institutions that make missteps, principally because there are no institutional functions responsible for oversight and intervention in respect of governance, program delivery and financial management issues. When funding is cut-off, the impacts on First Nations

communities and individuals can be dire because they rely heavily on the programs and services delivered by these organizations. Examples of situations where funding and programs have been cut for reasons noted above include the Manitoba Fire Fighters Association's mismanagement of flood evacuation funding,⁴³ the failure of the First Nations Statistical Institute to make "measurable progress towards the achievement of its outcomes",⁴⁴ the existence of "ongoing internal governance issues"⁴⁵ at the Metis Nation of Saskatchewan, and the failure of the First Nations University to resolve its "systemic problems related to governance and financial management",⁴⁶ to name but a few examples in a long list.s

Had strong and stable Indigenous institutional functions been in place to support and protect these Indigenous organizations, many of these crises might have been averted through early detection, support and intervention, or deterrence. Further, when corruption is suspected or confirmed, First Nations Peoples and their governments lack mechanisms to pursue it outside of the Canadian criminal justice system. While INAC has attempted to fill this void through its Investigation and Assessment Services Branch, more robust and independent Indigenous-led functions are needed (e.g. ombudsman(s) with appropriate powers, accountabilities and resources to investigate and pursue allegations of corruption).

9. OTHER OPPORTUNITIES TO ENHANCE FEDERAL HORIZONTALITY

Through our research and interviews, we have identified many other opportunities to strengthen federal horizontality in the delivery of First Nations transfer payments. These are summarized below.

9.1 Federal Investments in Planning Capacity and Results Frameworks for First Nations Governments

First Nations lack opportunities to set their own strategies for poverty reduction because federal programming is generally tied to specific program activities and many restrictions exist to limit investments in community-specific strategies and priorities. Some noteworthy progress has been made in enhancing community-based priority setting and planning in Indigenous health, lands management and infrastructure programming, but remains limited for most other federal programs. To achieve more community-centric programming and services, direct investments are needed to enhance the planning capacity of First Nations, this includes the capacity to engage with community members and stakeholders, set priorities and develop plans. The lack of predictability implicit within INAC's current approach of providing time-limited funding for Comprehensive Community Plans is unlikely to solve the longer-term challenge of improving planning capacity. Stakeholders interviewed noted that time-limited funding is most often used to hire external consultants rather than enhancing the community's permanent planning

capacity. Health Canada provides some permanent planning funding for its programs. Some stakeholders who were interviewed for this study noted that some communities have leveraged this funding to partially subsidize the salaries of permanent community planners. A more horizontal federal approach to funding planning capacity is needed, moving away from ad hoc investments toward permanent and sufficient funding for planning and other governance functions.

Strong performance measurement regimes will also be needed to ensure that First Nations governments are held accountable for achieving results. The backbone of these performance measurement regimes will be results frameworks that clearly describe the targeted results to be achieved. Ideally, joint-results frameworks will be established in collaboration with each First Nation and/or nation group to ensure that federal investments are targeted at community needs and priorities. Exclusively using community-focused results frameworks would not permit measurement of socio-economic gap closure at regional and Canada-wide levels, so a core group of indicators that are accepted by all First Nations governments and the Government of Canada would also be necessary.

Coupled with strong performance measurement regimes, results frameworks such as these would provide federal funders, Treasury Board, Finance Canada and parliamentarians with assurance that federal investments are focused on important community priorities and achieving results. More importantly, clear results and strong reporting will enhance accountability between First Nations governments and their members, strengthening the bonds of trust necessary for First Nations communities and governments to advance their self-determined goals.

9.2 Flexible Program Funding

Many federal programs provide little opportunity for setting local program priorities. Further, there is typically misalignment between a given community's needs and available federal programming. While investments in community planning and community results frameworks would make alignment possible, federal programs also need to be more flexible in permitting program interventions that can be tailored to unique community circumstances. This can be achieved through more broad Program Terms and Conditions, increased use of flexible funding approaches, and less prescriptive and restrictive results reporting requirements. Some federal officials interviewed for this study indicated that advancements have already been made in some program areas (e.g. community-based health promotion, primary healthcare, home and community care, and income assistance preventive measures). While flexibilities have been increased in some program areas, Indigenous stakeholders note that many of their community programming needs are not funded, so increased flexibility within each federal program is not a complete solution on its own.

9.3 Harmonized Program Terms and Conditions

There are over one hundred sets of Program Terms and Conditions for Indigenous programming, and only a handful are open to more than one federal department (e.g. the Program Terms and Conditions of the Strategic Partnerships Initiative are used by 16 federal funders).⁴⁷ These Terms and Conditions establish unique flexibilities and conditions for each federal program. In doing so, they often restrict the ability of federal and First Nations officials to be creative in how programs are delivered. They also create many parallel and incompatible program and administrative regimes that increase burdens on First Nations governments and obstruct collaboration between federal funders. An opportunity exists to streamline and harmonize Terms and Conditions for Indigenous programming to ensure that the funding relationship maximizes flexibility, minimizes administrative burden, promotes program integration and enhances opportunities for federal collaboration.

An option to harmonize and expand authorities, while recognizing the need for differentiation between programs, is to harmonize similar Program Terms and Conditions into a smaller number of common Program Terms and Conditions that all federal funders can access (e.g. community engagement and planning, institution-building, capacity building and nation-rebuilding, economic development programming, infrastructure and other capital investments, etc.). Another opportunity to increase the flexibility of Program Terms and Conditions would be to include broad poverty reduction and youth intervention authorities in every program's terms and conditions. For example, the Urban Programming for Indigenous Peoples (UPIP) program terms and conditions allow great flexibility, recognizing that needs and strategies differ greatly from community to community.

The UPIP Program Terms and Conditions⁴⁸ include broad authorities to:

- ▶ provide **core funding** to Indigenous service delivery organizations;
- ▶ invest in **local programs and services** not covered by other federal programs;
- ▶ promote and fund **local coalitions** involving all levels of government, community service providers and stakeholders; and
- ▶ fund **research and innovation** and pilot **innovative programs/services**.

9.4 Data and Research on Needs and Programming Gaps

First Nations communities rely heavily on local and provincial delivery agencies for the delivery of local programs and services (e.g. hospitals and health centres, family caring agencies, social services, on-reserve and provincial schools, emergency management response organizations, among many others) but provincial programs and federally funded on-reserve programs are

generally misaligned with the specific needs of the communities. Increased funding for research and data analytics could provide Indigenous governments the information they need to design and manage effective programs. This information can also draw attention of other governments to the needs of their Indigenous populations, for example, to ensure that provincial programs meet the specific needs of Indigenous residents.

While some sector-specific data-collection and research is undertaken in Canada to better understand how to overcome the outcome gaps experienced by Indigenous Canadians, there are very significant gaps in both data and research. The lack of evidence-based research and data impairs policy making. A coordinated and integrated approach to research would highlight best practices and opportunities to improve federal policy and program interventions. This would necessitate access to data on Indigenous programming and the needs of Indigenous peoples. The First Nations Information Governance Centre (FNIGC) receives federal funding to house the First Nations Regional Health Survey and the First Nations Regional Early Childhood, Education and Employment Survey. While the activities and supports. While the FNIGC offers data access to individuals pursuing academic research, policy development, and program planning, it is not funded to collect and disseminate all relevant data. Additionally, FNIGC data is available to researchers and policy makers on a pay-per-use basis, as opposed to an open data basis.

The International Development Research Centre (IDRC), the Canadian Institutes of Health Research (CIHR) and the Australian Institute of Health and Welfare (AIHW) are examples of research and development-focused research institutions that operate in an integrated fashion to advance and support policy making through credible information.

IDRC is a Canadian Crown corporation that “funds research in developing countries to promote growth, reduce poverty, and drive large-scale positive change”.⁴⁹ IDRC seeks to use research as a tool for addressing challenges through funding research, encouraging information sharing with policymakers, and ensuring that information is in the hands of those who are best suited to use it.⁵⁰ The IDRC employs a collaborative and regionally based approach to working with researchers, development practitioners, policymakers, orders of government, research institutes, and global funders to increase the impact of development initiatives.⁵¹ This approach represents a coordinated and collaborative approach to research and development as IDRC forges partnerships with relevant actors to increase available resources and their related impact, in order to strengthen local capacities. The success of the IDRC model could be applied to a First Nations focused research agency to leverage funding of governments, corporations, philanthropists and granting agencies and better direct scarce resources to research imperatives.

CIHR is a research investment agency that collaborates with various partners to strengthen health and the Canadian health care system.⁵² CIHR funds and directs health-care related research to improve health care services and products.⁵³ This goal is achieved through funding exploratory and targeted areas, building capacity to conduct health related research, and disseminating research information to ensure its use in future policies, practices, procedures, products and services.⁵⁴ CIHR consists of thirteen (13) research institutes that connect with the local research community to ensure a harmonized and interdisciplinary approach to research is employed.⁵⁵ One of the institutes is mandated with Indigenous health specifically. The Institute of Aboriginal Peoples' Health (IAPH) seeks to promote Indigenous research capacity and improve overall health outcomes for Indigenous people through supports and partnerships between communities and researchers at the local, regional and national levels.⁵⁶ CIHR and IAPH represent collaborative approaches to health research through connecting with partners, including government, universities and research centres, and leveraging local, regional and national research domains to improve the Canadian health care system. Other program sectors could also benefit from focused research on challenges facing Canada's Indigenous populations.

AIHW is an Australian institute that seeks to provide researchers and policy makers with access to secure and reliable data to examine key health topics and improve the delivery of health care services to Australians.⁵⁷ AIHW collaborates with various government departments (at the national, state, territory, and local levels), universities and research centres to ensure the availability of trusted information to improve health services⁵⁸. In addition to research, AIHW has an important role in "providing accurate statistical information, developing and collecting comprehensive data, analyzing and reporting on data, and data linkage services (i.e. comparing one data set to another)".⁵⁹ AIHW provides access to data in an open and accessible format, allowing for access to data that can be leveraged in the development of health-related policies and programs. AIHW represents a coordinated and horizontal approach to investing in health-related research to drive programmatic and policy decisions, while promoting collaboration amongst partners.

9.5 Simplifying Accountability Relationships for the Federal Cabinet and First Nations Governments

As previously examined, accountability for Indigenous policies and programs is divided between many Federal Ministers and federal departments. Federal officials interviewed for the study noted that cross-department collaboration happens when there is a crisis or political imperative, but it is more difficult to sustain collaboration on an ongoing basis. Further, while political will and cooperation among Federal Ministers and departments can help align policies and priorities, it is generally unsuccessful in harmonizing delivery of programs across federal departments. Reducing the number of Federal Ministers and departments responsible for delivering First Nations programming would help to ensure that accountability requirements on First Nations

governments are clear, consistent and achievable. A simplified and coherent set of accountability requirements would also contribute to program effectiveness and enhanced Crown – First Nations relationships.

9.6 Reduce Administrative Burden on First Nations Governments to Strengthen Accountability Regimes

As previously explored, the Blue Ribbon Panel reinforced the importance of reducing administrative burden on First Nations recipients. Presently, each federal department has a distinctive administrative regime for managing its First Nations transfer payment programs, and many of these departments place undue administrative burdens on First Nations recipients. Few of these funding relationships emulate intergovernmental transfers that resemble federal-provincial transfers or Canada’s development assistance transfers to foreign governments (i.e. characterized by the Aid Effectiveness Principles of local ownership, alignment of funders behind local systems, harmonization of administrative and reporting requirements, and focus on local results). Further, most administrative requirements attached to federal transfers are not risk-based, despite the PTP emphasizing the importance of this.

In many departments, the risk and control posture varies from program to program, and sometimes, region to region (e.g. INAC’s Post-Secondary Education Program delivery models were found to vary from region to region).⁶⁰ Streamlining and harmonizing the web of rules and program control frameworks could be achieved through the development of a common federal transfer payment control framework. Such a framework could include:

- ▶ a directive for selecting an appropriate funding approach (i.e. prevent withholding of flexibilities without cause);
- ▶ a common capabilities assessment that replaces INAC’s existing General Assessment process and tools;
- ▶ common funding agreement terms and conditions that seek to reinforce the intergovernmental nature of First Nations transfers;
- ▶ common compliance and monitoring regimes that minimize unnecessary reporting and place reliance on and reinforce First Nations accountability regimes wherever possible; and
- ▶ mandatory consideration of community-based priorities and plans, and minimalist approaches to recipient reporting, etc.).

10. CONSIDERATIONS FOR THE CREATION OF NEW FEDERAL DEPARTMENTS

On August 28, 2017, the Government of Canada announced plans to realign accountabilities and programming for Indigenous and northern programming. This will include the dissolution of INAC

and the creation of two new federal departments, one focused on Crown-Indigenous relations and northern affairs, and a second focused on Indigenous program delivery. In his communication, the Prime Minister emphasized the “need to shed the administrative structures and legislation that were conceived in another time for a different kind of relationship”⁶¹ and emphasized that “the level of the ambition of this government cannot be achieved through existing colonial structures”.⁶² While the potential challenges and solutions highlighted throughout this paper are all relevant considerations for the shaping of these new departments, we felt it would be helpful to examine a few questions, including:

- ▶ how to dovetail and align the many parallel conversations about a First Nation’s pursuit of self-determination and self-governance;
- ▶ how to achieve true government to government relationships; and
- ▶ which First Nations programs to merge into the new Indigenous Services Department.

10.1 Dovetailing and Aligning Federal Policies and Frameworks for Self-determination, Nation Rebuilding, Capacity Strengthening and Self-governance

When establishing the mandates and resource levels of new federal departments, the Government of Canada has an opportunity to harmonize the many policies and regimes that support self-governance and self-determination. Ideally, there would be one unitary Crown – First Nations conversation about self-determination, nation rebuilding, capacity strengthening and self-governance. To harmonize conversations about self-determination and self-governance, the discussions occurring at exploratory tables and self-government tables would need to be melded into a much broader conversation about community plans and priorities, self-determination and self-governance. Such an approach would also require that the many program-specific conversations and tools aimed at enhancing control over local programming, resources and land be dovetailed into a coherent and complementary set of tools and approaches.

Ongoing conversations would need to occur with every First Nation and nation group, not only those expressing interest in self-governance and self-determination. In this way, the existing self-governance conversations would flow naturally from more nascent discussions about a First Nation’s community priorities, strategic initiatives, capacity building needs and funding requirements. Under such an approach, there would be no motivation to favor sectoral self-governance agreements (e.g. the recent Anishinabek Nation Education Agreement) over administrative agreements to enhance First Nations control of programs (e.g. B.C. First Nations Health Authority and more the recent push for education governance agreements). The focus would shift to working with First Nations and nation groups to choose the right tools and approaches to allow them to achieve their self-determination and self-governance goals.

10.2 Moving Towards Government to Government Relationships through an Integrated Federal Approach

Presently, there are many parallel and disconnected relationships between First Nations governments and the federal government, these are described below.

- ▶ One relationship for exploring pathways to self-determination and self-government. These relationships are principally coordinated by Treaties and Aboriginal Government Sector of INAC, and the B.C. Treaty Commission in the Province of British Columbia, and include many other ministries and agencies.
- ▶ Several potential relationships with federal programs and institutions that administer processes to draw-down jurisdiction outside of the Indian Act and outside of self-government negotiations (e.g. oil and gas, health, education, lands management, taxation, financial borrowing, elections, etc.). Presently, these relationships can conflict or overlap with the pursuit of self-government.
- ▶ Many funder relationships with federal programs officers and funding officers who administer transfer payment programs and agreements, including some that provide supports for self-determination and capacity strengthening. There can be upwards of 50 of these parallel relationships in a First Nation, with federal officials spread across 34 federal departments and agencies.⁶³

A First Nations government's points-of-entry into the federal government are typically at positions well below the executive-level. There are some exceptions to this rule, including situations where INAC has taken a different approach to engaging with and supporting First Nations during a crisis or time of political imperative (e.g. Attawapiskat First Nation housing crisis, Kashechewan First Nation flooding recovery efforts, Ontario Ring of Fire communities, Mashteuiatsh First Nation administrative reduction initiative, Ross River Dena Council housing crisis, Lake St. Martin community reconstruction, Pangnirtung youth suicide crisis, and a handful of distress situations in First Nations from B.C. and the Maritimes). In all of these cases, federal relationships revert back to program officers and administrative officers once the immediate crisis or political imperative passes. Our interviews and research highlight that, while strong progress is generally made during the crisis or political imperative, longer-term government-to-government relationships with the Crown generally degrade when executive-level focus wains.

Achieving strong government-to-government relationships will require a complete shift in culture and approach. We recommend a shift toward an integrated federal approach that includes space for provincial and territorial involvement, and opportunities for leaders outside of the band council to be meaningfully engaged (e.g. school principals, corporate leaders, health care leaders and professionals, spiritual leaders, independent program agencies, elders and

youth, hereditary leaders, community activists, etc.). Such a relationship cannot be achieved within existing federal resources and delivery models and would require involvement of both the new Indigenous Relations and Indigenous Services departments.

This would include one approach for relating with each First Nation and nation group, a relationship necessarily led by federal officials at the executive-level. These executives could serve as the ambassador and client relationship manager to the First Nations governments and nation groups. Secondary assignments could also be made to ensure some continuity of relationships in the eventuality of turnover. Such an approach could likely be achieved without creating new executive positions, by refocusing existing resources invested in EX positions. For example, existing director positions in regions with responsibility for funding services, economic development, and various other programs would be primarily responsible for coordinating program with 5-10 First Nations, with additional or secondary roles as the subject-matter expert for certain programs (i.e. to maintain strong links between regions and central program leads). Resources presently assigned to federal regional development agencies and other departments that deliver Indigenous development programming would need to be re-profiled to the new Indigenous service delivery organization or an entity outside of the public service (e.g. development bank, special operating agency or Crown Corporation) to ensure that the accountabilities of Ministers do not impede effective Crown – First Nations relationships.

Such a model would still require program leads in the new Indigenous services department and some other federal departments where linkages to off-reserve federal programming are important (e.g. fisheries, unemployment insurance, immigration and border protection, Indigenous justice and courts, policing, justice, etc.). Further, an integrated approach of this nature would only be effective if the national program leads relinquished substantially all of the program delivery and funding decisions to regional officials responsible for program delivery. A model of this nature would require safeguards common to a bureaucracy where power is distributed, including strong program evaluation, program performance reviews, knowledge sharing activities, strong training in principles and approaches, independent audit and oversight functions, and strong complaint and dispute resolutions mechanisms. To ensure that regional practices and nation-specific program strategies remain effective, a model of this nature would benefit from jointly-led evaluations (i.e. federal, First Nations and provincial) of regional programming strategies (e.g. regional health authorities, local education boards, community-specific program interventions, etc.). Annex G further explores the opportunity for increased use of joint-evaluations.

10.3 Which First Nations Programs should be Merged into the New Indigenous Services Department

A First Nations stakeholder interviewed for this study advised that their community must complete over 100 government audit schedules with their year-end audited financial statements. Interestingly, only a handful of these audit requirements were for INAC and Health Canada, with the large majority being obligations to other federal and provincial funders. Many federal officials interviewed for this study believe that enhancements to Crown - First Nations relationships and program approaches will be achieved by consolidating and harmonizing the programming and approaches of the largest funders of First Nations programming (i.e. INAC programs, health services, labour participation programs, policing, etc.). Unfortunately, many of the policy and program levers needed to advance the more challenging issues facing First Nations rest outside of these departments (e.g. housing loans, forestry programs, labour market programs, regional economic development, mining, connections to off-reserve infrastructure, connections to power grids, etc.). If consolidation were limited to the largest portfolios, there would likely continue to be many parallel program relationships and lower achievement of results. We argue that it is equally important, or more important, to harmonize and consolidate programming of the smaller funders because these programs have the greatest potential to unlock new opportunities for First Nations.

In considering whether to merge the larger government programs into the new Indigenous Services Department, it is beneficial to consider the Australian and U.S. experiences. Both of these countries have taken steps at one point to consolidate a large number of Indigenous-focused programs into a smaller number of federal departments. Australia chose to consolidate virtually all of its programming into one department in the early 1980s and later determined that health programming needed to be separate. The U.S. chose to consolidate most of its Indigenous programs into Bureau of Indian Affairs (BIA), but decided to leave health services and housing in other departments. The lesson that can be learned from the U.S. and Australian experiences is that thoughtful consideration of the potential impacts of moving programs in Indigenous Services Canada (e.g. policing, forestry, fisheries, housing, etc.) could help to avert unintended consequences. Below, we examine the U.S. and Australian health services examples, which is not to suggest that these examples directly apply to First Nations health programming in Canada.

In 1984, the Department of Aboriginal Affairs (DAA) in Australia assumed responsibility for the delivery of health care services to Aboriginal and Torres Strait Islanders, thereby amalgamating all Aboriginal programs and services into one portfolio.⁶⁴ It was thought that this approach would be beneficial, as Aboriginal Controlled Health Services (ACCHS's) would receive primary health care funding directly from the DAA, which would increase Aboriginal control and provide more culturally appropriate health services.⁶⁵ The direct funding approach was meant to supplement health services provided through mainstream health care systems. This approach had negative and unintended consequences, including reduced focus on the needs of Indigenous Australians

in the mainstream health systems.⁶⁶ The effects of the failed consolidation of the health department are still being felt today, as the health outcomes for Aboriginal and Torres Strait Islanders are well below that of other Australians (i.e. life expectancy is 10.6 years less for Aboriginal males than non-Aboriginal males).⁶⁷ This has led to the development of the *National Aboriginal and Torres Strait Islander Health Plan (2013-2023)* that focuses on closing the health disparities gap through a coordinated approach.⁶⁸

In the US, Indian Health Services (IHS) is the agency with primary responsibility for the delivery of health care services for federally recognized American Indians and Alaska Natives.⁶⁹ The goal of the IHS is to raise the physical, societal, mental and spiritual health to the highest level possible, through comprehensive, culturally appropriate health services that are accessible to American Indian and Alaska Natives.⁷⁰ The IHS is housed within the Department of Health and Human Services, which has responsibility to improve and protect the health and well-being of non-Indigenous peoples. As such, there is a clear division in responsibility between the IHS and the BIA, allowing for similar portfolios to reside together within the same agency. American Indians and Alaskan Natives do experience health disparities in comparison to other non-Indian Americans (i.e. life expectancy is 4.4 years less than other US populations).⁷¹ It should be noted however, that life expectancy gaps in U.S. are lower than those in Australia and comparable to life expectancy gaps for Canada's First Nations Peoples (i.e. First Nations Peoples live 4 years less than other Canadian populations, while Canadian Inuit live 13.5 years less).

Annex A – Important Historical Context

European - First Nations Relationships in Canada

The period from first contact (i.e. mid-1600s) to today can be divided into two principle segments: Pre-Confederation, when European settlers formed relationships with First Nations and foreign imperial governments set political and economic policies, and Post-Confederation, when modern Canada established its own political bodies, independent from Britain, and continued to set policies as it expanded westward and northward.

Pre-Confederation

Relations between First Nations and early European settlers were as complex as relations amongst First Nations themselves. When the Europeans arrived in North America, they operated under certain colonialist assumptions, not least of which were the legal concept of “terra nullius” and the “discovery doctrine”. Together, these two concepts meant European explorers and settlers assumed that the territory they landed on belonged to no one, that they could legitimately occupy the lands without anyone’s consent, and that the act of “discovering” the land gave them legal title over it.⁷² However, the new European arrivals lacked both the numbers and the experience to thrive in North America independently. For pragmatic reasons, they formed relationships with First Nations. The earliest examples of treaties between European Settlers and First Nations were mutually beneficial oral agreements. Europeans required security for their still small and vulnerable communities while the First Nations saw many benefits to trading and working together with their new neighbours. Their treaties were mainly for economic and military gain, and the terms were largely well understood and respected by the Europeans.⁷³

The relationship reached a pivotal point with the issuance of the Royal Proclamation (1763) and subsequent Treaty of Niagara (1764). The Royal Proclamation was issued by King George after England’s victory over France in the Seven Years War, the aftermath of which resulted in France ceding much of their control over North America to England. The Proclamation “established a basis for government administration in the North American territories” and “established a constitutional framework for the negotiation of treaties with the Aboriginal inhabitants of large sections of Canada”.⁷⁴ The Royal Proclamation established and upheld the expectation of mutual respect between First Nations and what would later become the Canadian Government.⁷⁵ According to Venne (1997), “the Proclamation recognized Indigenous peoples as ‘Nations,’ as distinct societies with their own forms of political organization, with whom treaties had to be negotiated”.⁷⁶ However, the wording of the Proclamation is largely seen as being contradictory (or at least confusing), in that it seems to state at once that the land was within the Crown’s control while also reinforcing Indigenous autonomy.

The Treaty of Niagara between the British and First Nations representatives in Niagara in 1764 can be understood as the first and most concrete implementation of the spirit of the Royal Proclamation, in many ways making its contradictory and confusing statements more tangible. As Burrows' writes, the Treaty of Niagara affirmed the "nation-to-nation relationship between settler and First Nation peoples" and the "multination alliance in which no member gave up their sovereignty".⁷⁷

The Treaty of Niagara included, from the Indigenous perspective, several promises: "respect for the sovereignty of First Nations, the creation of an alliance, free and open trade and passage between the Crown and First Nations, permission or consent needed for settlement of First Nations territory, the English provision of presents to First Nations, mutual peace, friendship and respect".⁷⁸

The era immediately following the Royal Proclamation was characterized by a dramatic increase in the non-Indigenous population of the Eastern colonies under British control, and a shift away from fur-trading and exploration toward permanent settlements and agricultural development. These phenomena contributed to the decline of Indigenous wellbeing and prosperity, especially in the Eastern and Northern colonies, as their land began to be legally and illegally removed from their control, their way of life began to be seen as unproductive in the European industrial sense, and their populations continued to be ravaged by disease.⁷⁹ Ongoing negotiations with First Nations began to heavily feature relief payments from the Crown to First Nations, creating a more dependent and less equal relationship. Furthermore, as the English continued to emerge as the main power in the Canadian colonies and stabilized relations with the newly formed American states to the south, they gradually became less dependent on First Nations for their military alliances. The relationship between First Nations and Europeans was less and less based on mutual benefit and respect and the tone of subsequent treaties, agreements, and interactions continued to reinforce this going forward. As RCAP poignantly put it, many policies were put in place which effectively "displaced" Indigenous populations physically, culturally, socially, and politically.⁸⁰

At the same time, competition between the Hudson's Bay Company and new Northwestern Company reduced the reliance of both fur trading companies on First Nations intermediaries, causing a period of violence and conflict (but this was eventually resolved, for the most part, when the two companies merged and relations normalized). Interaction and close contact between the European traders/voyageurs and the First Nations hunters, as the fur-hunt spread west and south into the prairies, was a major contributor to the establishment of the Metis group in Manitoba and elsewhere.

In the 1780s, American Independence became a more likely reality. Finally, in 1783 the Treaty of Versailles⁸¹ (not to be confused with the 1919 Treaty of Versailles at the end of World War I), resulted in First Nations loyalists and war veterans seeking refuge and compensation in Canadian colonies, which the British obliged to a certain degree. They did this also in part because British military leaders valued military alliances with First Nations, due to fear of war with the newly independent Americans. To keep the alliances healthy, and to make up for previous grievances, more land set aside for First Nations and relatively equitable treaties/agreements were struck. As an example, the Six Nations of the Grand River was formed of displaced Indigenous communities from the present-day northern United States, most of which originated from Iroquois and Delaware nations. The Six Nations community signed the Haldimand Treaty in 1784⁸² and was granted large amounts of land bordering the Grand River in present-day southern Ontario. By many accounts, approx. 95% of the original land grant has been sold by or lost by the Six Nations community in the years since.

The First Nations alliances proved beneficial to Britain during the War of 1812. However, after the war, when the British relationship with Americans became more peaceful, “British Administrators began to regard First Nations as dependents, rather than allies”.⁸³ The European population of Canadian colonies continued to grow still. The attitude towards First Nations shifted and they began to be viewed as an “impediment to growth and prosperity”.⁸⁴ First Nations lost control and access to the majority of their lands.

Eventually, this new perspective led to a shift in focus, on the European side, from engaging in military and trading alliances to “civilizing the Indian”, (in the British tradition, “civilization” was synonymous with a Christian agriculture-based community) and a series of policies ensued. Early experiments were badly underfunded and mismanaged. Another turning point in 1830, when a new set of ‘civilization’ policies were introduced “designed specifically to help Indigenous people adjust to the new economic and political realities”⁸⁵ (namely, the decline of the fur trade in favour of agriculture and industry, and the decline of colonialist wars). The use of reserves became more prevalent, especially in the southern regions of the colonies. Reserves were created through a variety of legal instruments and types of agreements, with and without the consent of the Indigenous populations affected. Furthermore, those negotiating treaties and agreements both on the Indigenous side and the European side often lacked the authority or power to follow through on promises or to properly represent their population. This resulted in treaties being broken or left not implemented.

The next few decades were marked by a series of treaties, policies, and formal Acts of government which embodied this new attitude. In the 1850s, the Robinson Huron⁸⁶ and Robinson Superior⁸⁷ treaties “became the template for negotiated treaties in the West”⁸⁸ and for the post-

confederation Numbered Treaties. The Douglas Treaties⁸⁹ on Vancouver Island, meanwhile, were halted in 1854 when British Columbia refused to recognize Indigenous title. In 1857, the Gradual Civilization Act (1857)⁹⁰ reinforced these less formal attitudes and penchants in law. The Act allowed some Indigenous individuals to voluntarily trade their “Indian Status” for the rights of settler and a small tract of land.⁹¹ This policy was largely rejected by Indigenous communities at the time, as it divided their population, reduced their land, and created a sense of disconnection and otherness.

Post-Confederation to 1969

Shortly after Confederation, Canada began negotiating a series of Land Surrender Treaties known as the Numbered Treaties. Beginning in 1871 these treaties were intended to fulfil the requirements under the transfer, secure Canadian sovereignty, open land for settlement and exploitation, and reduce conflict between Indigenous peoples and settlers.

In 1876, a new Canadian Government passed the Indian Act,⁹² which bolstered previous acts such as the Gradual Enfranchisement Act and others. The RCAP final report wrote of the time of the implementation of the Indian Act,

“the negotiation of treaties continued, but side by side with legislated dispossession, through the Indian Act. Aboriginal peoples lost control and management of their own lands and resources, and their traditional customs and forms of organization were interfered with in the interest of remaking Aboriginal people in the image of the newcomers”.⁹³

The Indian Act remains to this day one of the most contentious pieces of Canadian legislation. Over the decades, the Canadian Government has alternately attempted to reinforce the Act and tried to repeal it, while First Nations advocates have an uneasy relationship with a law they see as at once protecting their inherent rights while at the same time relegating them to the inferior position of dependants.

Still in place today, the Indian Act was designed to regulate the management of Indian lands, resources, moneys, access to intoxicants, promote civilization, determine membership and Indian status, etc. “[The Crown] would carry out this responsibility by acting as a “guardian” until such time as First Nations could fully integrate into Canadian society”.⁹⁴ The UN Special Rapporteur wrote in his 2014 report that the Indian Act executed or enabled the execution of a number of human rights violations, including

“the banning of expressions of indigenous culture and religious ceremonies; exclusion from voting, jury duty, and access to lawyers and Canadian courts for any grievances relating to

land; the imposition, at times forcibly, of governance institutions; and policies of forced assimilation through the removal of children from indigenous communities and “enfranchisement” that stripped indigenous people of their aboriginal identity and membership” (pg. 4).⁹⁵

1883 marked the beginning of a particularly dark period in the relationship between First Nations and Canada, a period which continues to have significant impacts on those involved. The Residential Schools policy, instituted in 1883, established a number of church-run residential schools for Indigenous children and mandated forcible attendance. Over this period, an estimated 150,000 Indigenous children were removed from their homes and sent to residential schools with the explicit goal of assimilating the children into European-Canadian culture. The 2015 final report of the Truth and Reconciliation Commission tasked with investigating the Indian Residential School history and impact on Canadians found that the Residential School system left a legacy of social issues that continue to affect First Nations to this day.⁹⁶

The era following World War II marks another turning point in the relationship between First Nations and Canadians. Recognizing the contributions made by First Nations to the military effort, in 1946 Parliament undertook an effort to review its “Indian Policies” through a joint-committee and a series of hearings. This process resulted in many recommendations, however most were not enacted until much later. For example, the policy of involuntary enfranchisement was repealed in 1951,⁹⁷ along with a number of changes to requirements for Indian status, and in 1960,⁹⁸ First Nations won the right to vote in federal elections.

However, only a few years later, the Government publicly espoused a new set of contentious principles put forth in The White Paper on Aboriginal Policy (1969) (the White Paper). The White Paper set out a number of well-intentioned goals, including the removal of the constitutional basis of discrimination and the return of “Indian lands”.⁹⁹ However, it also promoted an end to all special treatment by the federal government and the placement of individual rights over collective rights. According to the RCAP final report (1996):

“the white paper sought to end the collective rights of Aboriginal people in favour of individual rights. Included were plans to eliminate the protection for reserve lands, to terminate the legal status of Indian peoples, and to have services delivered to them by provincial governments”.¹⁰⁰

Indigenous communities across the country rejected this document for two main reasons: first, the complete lack of consultation and Indigenous involvement was contrary not only to the supposed spirit of the White Paper itself but to the interests of Indigenous communities as well;

and second, the principles undermined their own conception of Indigenous rights and did away with what little protection they currently enjoyed. This led to a significant rise in the number of Indigenous representative groups and associations aimed at protecting interests and rights (i.e. National Indian Brotherhood, which later became the AFN, and many regional groups). Despite its good intentions, the White Paper created a “legacy of bitterness...and suspicion”.¹⁰¹

1970 to Present

The modern history of First Nations in Canada is marked by numerous legal cases confirming and conferring rights and recognition to First Nations. As an example, a 1973 Supreme Court decision confirmed Cree and Inuit title to large portions of Northern Quebec, marking the beginning of the era of the negotiation of Modern Treaties.¹⁰² The 1973 Calder case¹⁰³ led to the establishment of the first Land Claims Policy, however, the policy was at odds with the ongoing policy of “extinguishment” (meaning that land and resource rights are extinguished with a land claim settlement”). Over 20 modern treaties have been signed since this time and many more are under negotiation.

The Constitution Act of 1982¹⁰⁴ was an important landmark for Indigenous peoples in Canada. Indigenous representative organizations had been excluded from most Constitutional discussions leading up to 1982, but succeeded in adding two clauses to Section 35 which “recognized and affirmed” “the existing and aboriginal treaty rights of aboriginal peoples in Canada”.¹⁰⁵ While the Constitution Act 1982 does not define these rights, many legal cases have followed that seek to address this question. These cases are too numerous and complex to begin to describe here. The UN Special Rapporteur on the Rights of Indigenous Peoples wrote: “Canada’s 1982 Constitution was one of the first in the world to enshrine indigenous peoples’ rights, recognizing and affirming the aboriginal and treaty rights of the Indian, Inuit and Métis people of Canada”.¹⁰⁶

Indigenous collective rights were sometimes found to be at odds with the focus on individual rights in the Canadian Charter of Rights and Freedoms, to the point that the two types of rights are sometimes seen as mutually exclusive to a certain degree. Section 25 guaranteed that the Charter of Rights and Freedoms would not “abrogate or derogate...any rights or freedoms that have been recognized by the Royal Proclamation... and any rights or freedoms that may be acquired ... by way of land claims settlements”.¹⁰⁷ The Constitution was amended in 1983 to clarify these sections. The Constitutional process helped to galvanize First Nations to a certain degree and demonstrated pan-national cooperation towards common goals for the first time.

In 1987, an Indigenous leader from Manitoba, Elijah Harper, effectively blocked ratification of the Meech Lake Accord, demonstrating the power and influence of Indigenous leaders in Canada. Among other concerns, Indigenous leaders saw the Meech Lake Accord as recognizing and

accepting the notion of Quebec as a distinct society, while rejecting the same recognition for Indigenous nations. Indigenous concerns also included a lack of involvement of Indigenous nations in future amendments and the relegation of territorial governments.

The wording of the failed Charlottetown Accord (1992) included recognition of the “inherent right of Aboriginal Self-Government”. RCAP holds that while the Charlottetown Accord failed, it would be difficult to withdraw this assertion. Notably,

“Canada recognizes that the inherent right of self-government is an existing aboriginal right under the Constitution which includes the right of indigenous peoples to govern themselves in matters that are internal to their communities or integral to their unique cultures, identities, traditions, languages and institutions, and in respect to their special relationship with their land and their resources. This right of self-government includes jurisdiction over the definition of governance structures, First Nation membership, family matters, education, health and property rights, among other subjects”.¹⁰⁸

The 2008 “Statement of apology to former students of Indian Residential Schools” marked an important shift in the Government of Canada’s position toward Canada’s legacy of transgressions against Indigenous peoples.¹⁰⁹ In 2016, the Government of Canada removed its “objector status” from the “UN Declaration on the Rights of Indigenous Peoples”, consistent with its commitment to pursue nation-to-nation relationships with First Nations, built on recognition and respect.

The long evolution of the relationship between First Nations and Canada, regardless of intentions, has undeniably resulted in a problematic situation. The Special Rapporteur to the UN has called the situation in Canada “a crisis”, referring to the gap in human development indicators between Indigenous and non-Indigenous Canadians. The Truth and Reconciliation Commission has also called attention to the long-standing humanitarian issues stemming from Canada’s policies and practices towards Indigenous Peoples. The Auditor General of Canada has found that the lack of funding for social services in Indigenous communities is impeding progress and the closing of the socio-economic gap.¹¹⁰

Annex B –Participation of Tribal Leaders in the U.S. Federal Budget Process

Explicit involvement of Indigenous governments in the federal budget process can reinforce government-to-government relationships, build trust and help ensure that scarce resources are targeted on areas where they are most needed. The budget process of the U.S. federal government includes specific mechanism to increase the involvement of Tribal leaders. Examples of these mechanisms include the Tribal - Interior Budget Council (TIBC), the Budget Formulation Workgroup (BFWG) for Indian Health Services (IHS) and the National Indian Health Board (NIHB).

The TIBC resides within the US Department of the Interior (DOI), Indian Affairs, and consists of senior officials from Indian Affairs and elected or appointed tribal officials from each of the 12 Indian Affairs area offices.¹¹¹ The TIBC is overseen by two Tribal co-chairs, and provides a platform for tribal governments to engage and collaborate with federal government officials in the development of budget requests that directly impact Indian programs.¹¹²

Similarly, BFWG for IHS is an annual forum between government officials and Indian tribes and organizations to discuss budget formulation.¹¹³ Senior officials within IHS and two Tribal representatives from each area reside over the BFWG.¹¹⁴ This integrated engagement allows for the input of relevant information on tribal health priorities (from both the regional level and national level) to be incorporated into budgetary recommendations put forth to House and Senate Committees on Appropriations.¹¹⁵

The National Indian Health Board (NIHB) is similar in nature to the TIBC and BFWG, however it is a Tribal organization that represents all federally recognized tribes.¹¹⁶ The NIHB is advisory in nature, and consists of twelve board members, who are selected by the twelve area Indian Health boards. The NIHB provides input into the IHS annual budget cycle by providing support to the IHS Tribal Budget Workgroup which then puts forth recommendations on tribal priorities to the IHS.¹¹⁷

Annex C – Statutory Programs and Appropriations, a Necessary Condition for Building Trust in Crown – First Nations Relationships

In her June 2011 capstone report, then Auditor General of Canada Sheila Fraser highlighted the importance of a legislative base for important First Nations programs and provided some of the more obvious examples such as education, health and drinking water.¹¹⁸ Arguments have also been made for legislative bases in other important program areas such as child welfare programming, violence prevention programming, income support and labour market programming, policing, and social supports for disabled, elderly and dependent adults. More recently, legislation has been introduced to support regulation of safe drinking water for First Nations communities (2013) and considerable effort has been expended in the pursuit of legislation for First Nations education, including the high-profile failure of Bill C-33 and more recent engagement, exploratory discussions and co-development work. While the Safe Drinking Water for First Nations Act came into force on November 1, 2013,¹¹⁹ the process of developing supporting regulations is not yet complete (i.e. this act identifies eleven essential components that need to be addressed in regulations and the Government of Canada is in the process of engaging with First Nations). These two examples reinforce that achieving a legislative base for important First Nations programs can be an arduous and lengthy process.

There are three broad approaches to establishing a legislative base for programming. These approaches are characterized by different levels of commitment and certainty in program standards and funding levels. A summary of each is included below.

Legislative Base without Program Standards: This approach includes naming programs that are to be delivered without articulating program standards, and is typically accompanied by a caveat that investments are subject to appropriations being made available at the discretion of the government. A good example of this type of legislation is the Snyder Act of 1924 in the U.S, officially named the Indian Citizenship Act. The Snyder Act established a legislative base for certain programming¹²⁰ (i.e. education, health, policing, justice, infrastructure and water, among others) and was updated over time to keep pace with the times (i.e. “higher education” added in 1965¹²¹ and “housing improvement” added in 1989).¹²² While one might argue that legislation of this nature would bear little fruit for First Nations in Canada, it could be an important symbolic first step to acknowledge the importance of many important programs if it were complemented with permanent mechanisms or forums to further advance the legislative base.

Legislative Base with a Commitment to Develop Program Standards and Regulations: This approach generally involves creating a framework for the development of programming

standards and supporting regulations. It can also involve legislating a process by which legislation and supporting regulations will be developed. Until the regulations are developed and implemented, the legislation has limited impact. Canada's Safe Drinking Water for First Nations Act is an example of legislation of this nature. While the downside of this approach to establishing a legislative base is clear, immediate lack of enforceable standards and regulations, it may be the only reasonable approach in complex programming areas (i.e. jurisdictional questions, varied perspectives, highly variant needs from one region to another, challenges in agreeing politically). The Kelowna Accord Implementation Act could be viewed as another example of legislation of this nature.

Legislative Base that Defines Program Standards: This form of legislation is highly desirable in that it provides clarity, to varying degrees, on program standards and/or funding levels and generally establishes a means to review and adjust over time. It provides maximum certainty during the effective period of the legislation and can be very difficult for future governments to unwind (i.e. without considerable public backlash and alternative programming). Naturally, it is also the most challenging to develop and conclude with stakeholders. Examples of this type of legislation include legislation for health, education and housing in the U.S. Attempts at to move directly to this form of legislation are highly risky, as evidenced by the 2014 failure of Bill C-33 (i.e. the proposed First Nations Control of First Nations Education Act).

Evolution of US Indigenous Health Legislation – Lessons learned from the US

There are potential lessons learned from the U.S. experience in establishing and evolving legislation for Indigenous health care for “American Indians” and “Alaska Natives”. A graduated approach to implementing a legislative base for health care was taken in the U.S. between 1924 and 2010. A legislative base for health care was first introduced through the Snyder Act of 1924.¹²³ This legislation, which provided no set standards or guaranteed funding levels for health care was complemented by the 1976 Indian Health Care Improvement Act (IHCA). The IHCA was subject to a “reauthorization” process and supported by a national steering committee established for this purpose.¹²⁴ Some of the programming supported by this legislation evolved over time from “demonstration” projects to full programs. Effective 2010, the legislation was made permanent and the need for “reauthorization” was eliminated.¹²⁵

Lessons Learned from the Kelowna Accord

The Kelowna Accord was an agreement between Indigenous representative organizations, the Government of Canada and provincial and territorial officials. At the core of Kelowna was an open-minded and respectful “without prejudice” dialogue among indigenous, federal and provincial/territorial officials about how to reduce socio-economic outcomes gaps.¹²⁶ Kelowna

explicitly delinked gap-closing investments from discussions about rights, on the premise that nations cannot objectively or effectively rebuild their governments or their relationships with the Crown while their people are mired in poverty and distress.¹²⁷ Despite some pressure from opposition parties, the \$5.1 billion of new investments promised at Kelowna were not followed through and the accord is viewed as having been a failure.

While the parties involved were generally positive about the process and approach employed for the Kelowna Accord, it drew some criticism from regional and nation-group organizations who believed that the national Indigenous representative organizations engaged in the process did not adequately represent their interests or rights.¹²⁸ The Liberal Prime Minister behind the Kelowna Accord, Paul Martin, later described the approach and framework that were to be established through the Kelowna Accord in his remarks to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development in November 2006. At this time, Paul Martin was leader of the opposition and the Conservative Party of Canada led with a minority government.

“A new forum of federal, provincial, and territorial ministers, and aboriginal leaders would ensure progress and keep us on track. The accord specified this forum would meet annually and that it would be mandated to take corrective action. This forum, Mr. Chairman, should be meeting now. The days of empty promises were over, to be replaced by a focus on the results achieved and the successes won. What all of us believed is that we had to establish an accountability framework, and that the setting of goals, the reporting of data, and the court of public opinion would ensure that each government and each organization would challenge its respective officials and institutional partners to make progress. In that way, real results would benchmark the track that we were on, to share the best practices based on what each jurisdiction was doing better than another, to bring progress everywhere, and to ensure that no one was left behind.”¹²⁹ Paul Martin, November 9, 2006

Annex D – Supporting First Nations Institution Building

Why are systemic safeguards and institutions important?

Institutions hold various roles and functions, some safeguard government institutions and markets through supervisory mandates, while others represent, educate and enable.

Taken together, these institutional functions ensure that laws and regulations are enforced and that risk taking does not jeopardize the integrity and stability of governments, their institutions and the broader political and economic systems. Systems of safeguards also ensure preservation of rights, equality and freedoms. A strong system of safeguards includes laws, regulations and strong supervisory institutions. These supervisory institutions proactively identify problems to allow for proactive intervention, reducing impacts on governments, economies, other institutions and people. Strong supervisory bodies are characterized by:

- ▶ clear mandates;
- ▶ powers necessary to fulfill the mandate;
- ▶ compatibility with other institutions and political systems;
- ▶ independence;
- ▶ comprehensive and clear standards and/or regulations;
- ▶ sufficient resources;
- ▶ monitoring regimes that ensure consistently high-quality work; and
- ▶ oversight and feedback loops to identify and correct weaknesses in governance, risk management and control processes.

In the context of Canadian First Nations, greater influence, involvement and control over institutions would increase opportunity for the exercise of inherent rights (e.g. self-determination, self-government and land/resource development). This is not to say that existing Canadian institutions cannot and will not continue to play a meaningful role in protecting Indigenous rights, or that Indigenous-led institutions are necessary in all areas. In many instances, the objective may be increased Indigenous participation in federal and provincial law making, regulation and policy making.

Institutional Functions Common to Democracies and Market Economies

The table that follows describes the types of institutions common to a state with a democratic government and a market economy.

Role	Function	Purpose	Examples
Political Representatives	Political representation, rights representation, law making, policy making, taxation, budget allocation	Represent rights and interests of individuals, protection of rights, equality and freedom.	Federal and Provincial governments, First Nations governments
Supervisors	Systemic oversight, enforcement of laws and regulations, resolution of disputes, protection of individual and community rights	Enforcement of laws and regulations, protection of rights, equality and freedoms, ensure stable and responsible governments, ensure stable markets, monitoring systemic risks, regulatory licensing, accreditation and certification.	Courts, Tribunals, Alternative Dispute Resolution Mechanisms, Redress Mechanisms, Ombudsmen, Auditors General, Sectoral Review Committees, Central Banks, Financial Oversight Mechanisms, Water Boards, Environmental Review Boards, Land Commissions, Development Boards, Industry Regulators, etc.
Advocacy and Interest Groups	Represent specific interests through advocacy, lobbying and thought leadership	Advocate for changes to laws, regulations, policies and budgets.	Representative organizations, anti-poverty or other coalitions, lobby groups, industry lobbyists, etc.
Educators and Advisors	Training, professionalization, thought leadership, creating forums for practitioners	Enhance capabilities and capacities of individuals, governments, businesses and institutions.	Professional Associations, Post-Secondary Institutions, Trade Associations, Skills Development Organizations, Apprenticeship/Certification Organizations, etc.
Economic Enablers	Market stimulus, market creation, market liquidity, financing, insuring, investing and banking	Create market conditions and mechanisms that promote public and private sector development and trade	Markets/Exchanges, Finance Authorities, Trade Development Corporations, Business Development Corporations, Development Banks, Commercial Banks, Investors, Survey Insurance, Mortgage Insurance, Pension Funds, etc.

Some important questions that will need to be considered by the Government of Canada in the design of its institution building programming follow.

1. What institutional functions do First Nations think are needed and which of these are most important to them?

2. **Is there a need for a permanent forum or council to advance thinking about First Nations institutions? Alternatively, should institutional development be entirely organic and grass-roots?** Is a pan-First Nations council necessary to study, review and advise on needs and priorities for Indigenous institutional development in Canada? If so, does such an organization require a legislative base and permanent funding? Further, what would be the roles, functions, mechanisms and expectations for such an entity? If there is no desire to promote and fund such an institution, how will the Government of Canada receive and react to proposals for Indigenous institutional development?

3. **What Indigenous-led institutional roles and functions is the Government of Canada willing and able to support?** It is important to pin-point which institutional roles and functions the Government of Canada is intending to support and/or promote. When speaking about possible functions for Indigenous-led and Indigenous-focused institutions, it is important to understand the broad varieties of institutional roles and functions (see table above which lists examples of institutional roles and functions).

4. **Are there some institutional functions that the Government of Canada is not prepared to support or fund now?** For policy, financial or other reasons, are there institutional functions that the Government of Canada is not yet prepared to fund and support?

5. **What principles should guide federal funding decisions for pan-First Nation institutions?**

As a simplistic example, the following are offered as notional principles:

- ▶ institutional functions must be pan-First Nation (i.e. be national, regional or nation-group focused);
- ▶ Indigenous designed and led wherever practicable;
- ▶ backed by Indigenous governments and representative organizations;
- ▶ led by capable and proven leaders;
- ▶ interoperable with the broader system of First Nations institutions and safeguards;
- ▶ interoperable with the Canadian legal system, and where appropriate, parliamentary system;
- ▶ subject to appropriate governance and accountability requirements;
- ▶ be designed to evolve as the needs and circumstances of First Nations change;
- ▶ support the complex forms of legal and political organization of First Nations;
- ▶ protected by oversight mechanisms and accountability regimes built into the broader system;
- ▶ include longer-term revenue generation strategies to enhance self-sufficiency; and

- ▶ include pathways to higher level institutions (e.g. certification that includes pathway to Bachelor program, linkages to Canadian parliament and political institutions, means to escalate through Canadian tribunals and courts, etc.).
6. **How should the Government of Canada fund Indigenous Institutions?** Institutions can be funded directly, indirectly or through a hybrid approach (e.g. provide the Aboriginal Financial Officers Association (AFOA) with a stable funding base for its core governance, membership and certification activities, but fund its programming indirectly by funding Indigenous governments to take professional training courses and participate in professional conferences).
 7. **Are institutional surrogates or incubators necessary as interim measures?** As an example, AFOA offers Human Resources and Leadership training/certification because no other organization is presently providing them. Another example might be an existing Canadian institution, such as the Auditor General of Canada, being given a mandate to perform evaluations and audits of Indigenous-led institutions.

Annex E - Overview of the Miawpukek First Nation Grant Agreement

This Annex provides a brief overview of the Miawpukek First Nation (MFN) including its history and how it came to receive a grant, the results of the recent evaluation, and flexibilities and efforts and costs associated with the Grant Agreement.

MFN, located at Conne River, Newfoundland, is an example of a First Nation that has been able to employ its unique funding situation to create opportunities for its community. It has an on-reserve population of 833 people, and an off-reserve population of 2,198.¹³⁰ It boasts economic success above neighbouring communities, and full employment. MFN's federal funding is unique among First Nations that operate under the Indian Act because it receives much of its funding through a flexible grant, with a much smaller proportion being funded through contribution agreements. MFN has leveraged its grant funding to support community projects, contributing to a community that is thriving compared with neighbouring non-Indigenous communities.

History of Miawpukek and its Move to Grants

When Newfoundland joined confederation in 1949, there was a Mi'kmaq settlement at Conne River dating back to the late 1800s. While historical Indigenous communities existed prior to 1949, Newfoundland Premier Joey Smallwood did not include recognition of Indigenous people in the province. Rather than applying the Indian Act to settlements in Newfoundland, cost-sharing arrangements were made with many communities, but the community at Conne River was not included in these arrangements.¹³¹ In the 1970s the Indigenous inhabitants at Conne River began to assert themselves and demand rights, leading to access to funds from the federal government in 1974. These funds flowed through Newfoundland's provincial government, with the province withholding a fee for managing funds. The provincial government disputed Conne River's expenditures in 1982, which led to a freeze of funding and a conflict over accountability. The dispute escalated, with community members taking over government offices in St. John's, and a hunger strike by Conne River's Chief Mi'sel.¹³²

Fundamental changes in the relationship between the First Nations people living at Conne River and the Canadian government resulted from the activism. In 1985, Miawpukek was recognized as a band and began negotiations with the Canadian government for a grant. These negotiations led to the signature of the first Grant Agreement between the Miawpukek First Nation and Canada in 1986. The following year, Samiajij Miawpukek Indian Reserve was established on the site of the community at Conne River.¹³³

In the 1990s, MFN began to discuss working toward self-government. In 2004, the MFN Self-Government Agreement was accepted for negotiation, and the self-government Framework Agreement was signed in 2005.¹³⁴ MFN created a Self-Government Steering Committee to allow for community input, and made a great deal of progress in negotiations while ensuring that they respect community input.¹³⁵ In November 2014, MFN and Government of Canada signed a Self-Government Agreement-in-Principle. This is essentially a “rough draft” of a Final Agreement, while the details of a final agreement have yet to be finalized.¹³⁶ In early 2016 Miawpukek withdrew from its 12-year self-government negotiations and it is unclear whether and why their grant funding relationship was more attractive to them than seeking increased jurisdiction through self-government.

MFN is the only grant recipient community among Canadian First Nations that is not self-governing. Since the recognition of Miawpukek First Nation as a band, there have been six consecutive Grant Agreements.

Results of Evaluations

As a condition of the Grant Agreement, evaluations are undertaken prior to the end of each Grant Agreement. These evaluations provide accountability in ensuring that grant funding is the right arrangement moving forward. The evaluations are conducted by independent evaluation firms with an aim to determine whether the objectives of the funding agreement have been met. Eighteen months prior to the end of the funding contract the evaluation process begins, which includes delegating a team composed of MFN council members and representatives of Canada drawing up the Terms of Reference of the evaluation, and recommending the person or firm who will carry out the evaluation.¹³⁷

Evaluations have been conducted prior to the end of each of the Grant Agreements. The most recent evaluation was conducted in 2011. The report concluded that MFN is performing very well, with a comparatively high score in the Community Wellbeing Index and strong internal processes (planning, programming, administration).¹³⁸ The grant allows for increased efficiency for both INAC and the community, and has helped to bring economic prosperity to the community. The evaluation highlights the need to continue the Grant agreement for MFN. Recommendations in the report include the need to further consolidate funding, with more funding flowing through the grant agreement and less through contribution approaches, and to expand the use of grant funding to other First Nations.¹³⁹

Flexibilities that the Grant Offers Miawpukek

Grant funding allows MFN to enjoy a number of benefits that are not available to First Nations with contribution agreements.

Funding Allocation Flexibility

MFN has a strong planning process and consults with the community to ensure that community priorities are met. As long as INAC standards are met, MFN can design its own programs and allocate funds in alignment with their community plans.¹⁴⁰ The grant funding allows them to focus funds in areas that might not be covered by a contribution agreement such as job creation, justice and policing, natural resources and recreation and culture.¹⁴¹

MFN is “committed to the principle”¹⁴² of full employment, with everyone living on reserve guaranteed a job once they turn nineteen. Once they are employed by the council for 14 weeks per year, they are eligible to accept Employment Insurance (EI) for the remainder of the year.¹⁴³ In addition to the employment offered by the Council, there are several businesses on the reserve that offer employment to community members.¹⁴⁴

Housing on reserve is ample and well maintained. There are 300 houses available for approximately 900 people, and improvements are made annually.¹⁴⁵ The on-reserve population is growing, so the investment in housing is important to the community.

Leveraging Additional Funds

MFN can use the grant funding to help secure additional funding from federal and provincial governments where an equity contribution is required. The grant is not subject to regulations against program stacking (which prohibit the use of funds received under one federal program as an equity contribution when applying for another program). MFN secured \$18.3 million in external funding from April 2005 to December 2010.¹⁴⁶

Accountability

MFN is accountable to the community for service delivery and quality of governance and administration.¹⁴⁷ An annual report demonstrating how minimum program requirements were met is presented to members, including audited financial statements. The audited financial statements are also provided to INAC.¹⁴⁸ MFN’s accountability regime includes the following specific elements:

- ▶ policy on transparency and disclosure;
- ▶ termination of agreement (Self-Government Agreement or off-ramp);
- ▶ Policy on Redress for Citizens;
- ▶ fair, open accessible, equitable regimes for political, management, and financial accountability;
- ▶ evaluation to inform future discussions (18 months prior: joint Terms of Reference for evaluation and select team);

- ▶ deficit can't be greater than 8% of revenue;
- ▶ default: branch agreement, health, safety, wealth compromised; and
- ▶ default remedy: remedial management plan, Co-management, Third Party Management.¹⁴⁹

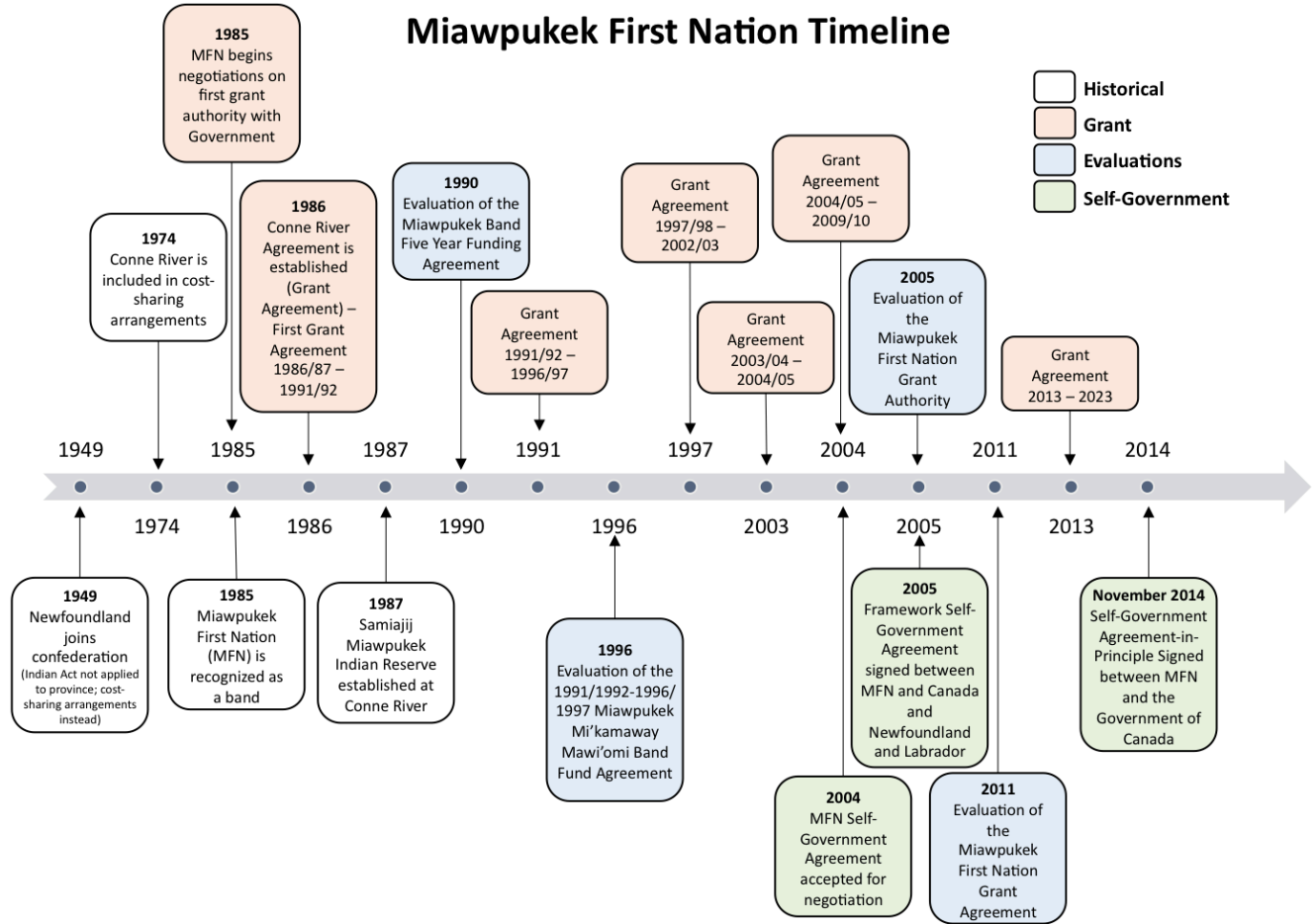
Data Collection Instruments (DCIs) are used to collect data for program funding under INAC's contribution agreements. Because MFN only submits audited financial statements to INAC, INAC does not have access to MFN's program data. In the rare circumstance when INAC requires program information, MFN has provided this data to the Department.¹⁵⁰

Efforts and Costs Associated with the Grant Agreement

The Grant Agreement leads to different efforts and costs than a Comprehensive Funding Agreement for both the recipient and INAC. Under the Grant Agreement's in-depth evaluation, a large burden is placed on the First Nation. In the 2011 evaluation, MFN worked with the INAC evaluation team by taking part in interviews, leading a community survey, and supporting focus group sessions. The evaluation also comes at a large financial cost to INAC, who outsources the evaluation to an evaluation firm.¹⁵¹

The administration of MFN Grant Agreement uses fewer INAC resources for ongoing administration than most funding agreements. The 2011 Evaluation done by Goss Gilroy estimated that 40 days are required annually by a Funding Services Officer to administer a Comprehensive Funding Arrangement, and only four days are required to administer the MFN's Grant Agreement.¹⁵²

Miawpukek First Nation Timeline



Annex F – Enhancing Federal Programs and Supports for First Nations Governance, Administration, Capacity Development and Nation-Rebuilding

All First Nations governments need stable governance and administration funding and many require targeted capacity supports. Every federal department has different approaches to subsidizing and directly funding these costs, with some allocating administrative costs to all program funding (e.g. 10% of project funding eligible to cover project administration costs). Outlined below are some opportunities for enhancing horizontality and effectiveness in the funding of core governance and administration costs.

1. Enhance Funding for First Nations Governance and Administration, including a delinking of funding for governance and administration. The delinking of governance and administration funding would recognize the complex and varied forms of organization, both politically and administratively, among First Nations. Existing programs, formulas and approaches for funding First Nations governance and administration costs would need to be completely overhauled to ensure that sufficient, predictable and stable funding is provided, including:
 - 1.1. A new Nation Governance Allotment that provides First Nations governments with a base funding level and additional incremental funding based on total band membership. First Nations governments could choose to allocate some or all of their governance allotments to a nation group or another designated representative.
 - 1.2. New Approach for Administration Allotments could be devised through a simple formula that considers the level of programming controlled by the First Nations government (e.g. 15% to 20% of a First Nations total federal program funding, with a minimum threshold to ensure that smaller First Nations are adequately supported). This funding should have no reporting obligations outside of the Annual Audited Financial Statements. It would naturally escalate for remoteness, growth and other escalators accounted for in program funding levels. To recognize and promote the importance of aggregation in program delivery, where program funding is paid to a program delivery organization other than a First Nations band council, a portion of the administration funding could be paid to the First Nations Band Council and the remaining to the program delivery organization (i.e. recognizing that band councils incur costs to oversee the activities of service delivery organizations).
 - 1.3. A Comprehensive Review of Funding Requirements for First Nations Governance and Band Administration, including broad studies and engagement with Indigenous nations and stakeholders could be performed to adjust the governance and

administration funding regimes at a pre-defined future date (e.g. 2-3 years into the future).

- 1.4. New Capacity Development Program Terms and Conditions could be created, or embedded into every set of Indigenous Program Terms and Conditions, to enable targeted investments, including funding for:
 - a) Governance improvement initiatives;
 - b) Nation rebuilding activities and rights and historical research;
 - c) Community engagement, community visioning and goal setting, and community planning;
 - d) Financial management capacity development supports;
 - e) Human resources development, training and learning supports for band executives and administrators;
 - f) Capacity development supports for leadership development for political leadership;
 - g) Data governance, performance measurement, information management and information technology capacity supports;
 - h) Community reporting capacity supports; and
 - i) Program complaint and dispute resolution processes.
2. Adequate program funding for all First Nations programs, including rethinking program evaluation approaches and adjusting funding levels on a program-by-program basis through program reform initiatives. Ongoing review mechanisms for evaluating program effectiveness and relevance and funding sufficiency should be developed, flowing from discussions with First Nations on the new fiscal relationship.
3. New policies, approaches and mechanisms for responding to First Nations governments and communities in distress situations, moving away from default and intervention focused approaches, including:
 - 3.1. An integrated multilateral approach to engaging with and working with First Nations that are facing an actual, imminent or potential distress situation. Such an approach necessitates an integrated approach by external stakeholders (i.e. federal, provincial, municipal, key service providers, other support agencies, etc.) and an integrated approach within the First Nation (i.e. political leaders, band executives, program executives, community service providers, nation group representatives, first responders, other community leaders, community partners, etc.).

3.2. Update Policies, Approaches and Supports for strengthening financial health, financial management capacity and access to capital.

Annex G – Joint Evaluations of First Nations Programming

In 2011, INAC funded a joint-evaluation of the Miawpukek First Nation (MFN) Grant Funding Agreement, spanning the period from April 2005 – December 2010. The evaluation is a condition of the Grant Agreement that outlines that an evaluation must occur 18 months prior to the end of the multi-year agreement. The evaluation was undertaken jointly by INAC and MFN through a co-development process that involved creation of an evaluation working group composed of both INAC and MFN representatives.¹⁵³ The Working Group co-developed an evaluation methodology report and the evaluation Terms of Reference to ensure that the needs of both parties would be met.¹⁵⁴

Looking to the international context, the United Nations has set guidelines for itself in order to ensure Indigenous participation in all aspects of programming, including evaluation. The United Nations Guidelines on Indigenous Peoples' Issues calls for "sound monitoring and evaluation that is participatory and adapted to capture Indigenous perceptions through their own analytical perspective".¹⁵⁵ This is based on the principle that, because Indigenous peoples have the right to define their own development priorities, they inherently have the right to participate in the "evaluation of plans and programmes for national and regional development that may affect them".¹⁵⁶

Joint-evaluations are becoming common in the international development realm. An example is the joint review of the official development assistance for disaster relief provided by Japan to the Philippines. An evaluation team was created that comprised members of both the Embassy of Japan in the Philippines, and the National Economic and Development Authority¹⁵⁷ (NEDA), which is an agency of the Philippine government.¹⁵⁸ The evaluation team was also supplemented with the inclusion of an independent consultant. While the evaluation was guided by the Evaluation Guidelines of the Ministry of Foreign Affairs of Japan (MOFA), the framework for the evaluation was jointly developed by MOFA and NEDA.¹⁵⁹

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