1.1

A BRIEF HISTORY OF EVOLVING FIRST NATIONS GOVERNANCE WITHIN CANADA

INTRODUCTION

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

Inherent Right to Govern

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

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

DIFFERING LEGAL TRADITIONS

Indigenous Legal Traditions

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

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

Indigenous Legal Traditions, Law Commission of Canada, 2007

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

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

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

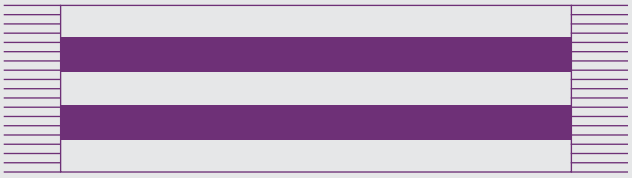
The Impact of Western Legal Traditions

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

The Two-Row Wampum

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

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



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

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

THE COLONIAL LEGACY

The *Indian Act*: A Tool for Assimilation

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

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

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

Getting Beyond the *Indian Act*

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

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

Douglas Treaties

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

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

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

SELF-GOVERNMENT IN MODERN TIMES

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

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

Final Report of the Royal Commission on Aboriginal Peoples

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

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

Constitution Act, 1982 and Section 35

Rights of the Aboriginal Peoples of Canada

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

Constitution Act, 1982

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

The Harvard Project on American Indian Economic Development

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

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

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

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

Community-Based Self-Government Negotiations

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

Treaty 8

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

The Charlottetown Accord

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

Canada's Inherent Right Policy

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

Judicial Recognition

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

Recognition through Commissions of Inquiry and Other Studies and Reports

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

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

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

International Recognition

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

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

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

United Nations Declaration on the Rights of Indigenous Peoples

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

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

Article 3: UN Declaration

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

Article 4: UN Declaration

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

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

Article 6 deals with indigenous government and governance institutions:

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

Attempts at Federal Legislative Reform

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

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

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

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

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

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

Article 37: UN Declaration

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

Sectoral Governance Initiatives

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

BC Treaty Negotiations

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

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

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

Self-Government Agreements

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

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

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

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

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

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

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

***Indian Act* Governance**

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

Exercising Self-Government in the Absence of Agreement or Recognition

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

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

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

Governance Over Aboriginal Title Lands

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

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

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

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

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

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

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

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

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

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

Indigenous Legal Traditions within Confederation

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

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

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

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

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

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

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

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

ORGANIZING FOR CHANGE

BC First Nations Taking the Lead

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

Establishment of Regional Political Bodies

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

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

DEVELOPING NEW MECHANISMS TO SUPPORT GOVERNANCE REFORM

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

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

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

Appropriate Federal and Provincial Reconciliation Frameworks

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

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

Federal Self-Government Recognition Legislation

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

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

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

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

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

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

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

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

Future Constitutional Reform

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

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

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

THE GOVERNANCE CONTINUUM

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

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

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

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