FIRST NATIONS FINANCE AUTHORITY

The First Nation Finance Authority and the Evolving Role of First Nations' Institutions in Assisting the Rebuilding of First Nations' Governance: Future Directions and Opportunities for Growth

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Discussion Paper

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Introduction

Societies that are governed well, notwithstanding the particular form or type of governance structure, do better socially and economically than those that are not. First Nations are no exception. Today the form and structure of contemporary First Nation's governance is in a period of transition moving away from "band" governance under the *Indian Act* to more legitimate and appropriate forms of governance based on systems established by First Nations themselves. Governance reform is a central aspect of the reconciliation occurring generally within Canada as First Nation communities and the country come to terms with the difficult process of decolonization. Though the process of governance reform First Nations are moving beyond the limitations of the *Indian Act* and are rebuilding their institutions of good governance. In these efforts to strengthen First Nations' governance significant progress has been made in the past two decades to facilitate the transition along what has been called a "continuum" of governance reform.[1]

At one end of the governance continuum are options that are available to communities governing as legally defined "bands" under the *Indian Act* that strengthen local control and decision-making on-reserve. For example, by exercising by-law making powers or assuming delegated administrative responsibility from Canada to deliver programs and services on behalf of the federal government.[2] Moving along the continuum, there are also now a number of optional "sectoral" governance initiatives that facilitate and support a First Nation in assuming responsibility for a specific area of governance. For example, assuming responsibility for land or financial management. Today under these sectoral governance initiatives approximately a quarter of all *Indian Act* bands have to some degree taken over aspects of self-government and are exercising powers beyond those available under the *Indian Act*.

At the far end of the governance continuum moving away from the *Indian Act* are First Nations that are recognized as "self-governing" in accordance with comprehensive governance arrangements. These are typically negotiated between the Crown and former *Indian Act* bands or groups of bands. These arrangements are set out in self-government agreements; either negotiated as a part of modern treaty-making or as stand-alone agreements with the former *Indian Act* governed communities. The latter is less common.

As reconciliation efforts between the Crown and First Nations are ongoing, the courts also continue to set parameters for the scope and extent of First Nations' governance in the modern era; both with respect to the core institutions of First Nations' governance (e.g. the governing body) as well as the law making powers (jurisdiction) and other powers the institutions of First Nation government can exercise by legal

[1] For a comprehensive account of the work First Nations in BC have been undertaking with respect to governance reform and the "continuum" see the BCAFN *Governance Report,* 2014.

[2] This includes recent amendments in 2014 to the *Indian Act* to make it easier for the governing body of a "band" established under that Act to enact by-laws by removing the Minster's power to disallow a by-law.

right. All paths along the governance continuum, including the guidance provided by the courts, can be viewed as a part of an evolving structure of "cooperative federalism" with "multi-level governance" in Canada as between the federal, provincial and Aboriginal governments.

The evidence suggests, predictably, that First Nations that are further along the governance continuum in moving away from the *Indian Act* are now generally healthier and stronger economically than non-self-governing communities.[3] Despite the benefits, the transition to more appropriate forms of governance for First Nations, whether sectoral or comprehensive, has been difficult for a variety of political and legal reasons.[4] Overcoming barriers to change is always a challenge. It is, therefore, important to try and understand why some governance initiatives have been more successful than others and having done so continue to support and build on those initiatives. It is also important to consider the establishment of new mechanisms, where appropriate, to support the transition from band governance under the *Indian Act* to self-government and ensure coordination with existing initiatives.

While currently there may still only be a limited number of sectoral governance initiatives dealing with a handful of subject matters, a number of the initiatives do stand out as examples of success. One of the most successful of the sectoral governance initiatives is the *First Nations Fiscal Management Act* (FNFMA) and in particular the First Nations Finance Authority (FNFA). The FNFA established under the FNFMA fills a need that all First Nations have, or will have; namely reliable and timely access to affordable public debt financing. Without the ability to raise money on the capital markets as other government in Canada can do, First Nations will always be at a disadvantage and remain reliant on the "retail" loans they can secure through the banks and other private lending institutions. Those First Nations that have yet to be scheduled to the FNFMA and then applied to become a Borrowing Member of the FNFA remain in this situation. The result of this situation is more expensive money, if indeed the money is available at all. This limitation on financing only compounds the reliance by First Nations' governments (whether self-governing or not) on transfers from other governments, which in most cases means the federal government.

This Discussion Paper prepared for the FNFA considers some of the lessons learned during this period of transition from band governance under the *Indian Act* and the

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[3] See the "Evaluation of the Federal Government's Implementation of Self-Government and Self-Government Agreements", Canada, February 2011. This evaluation sets out how the empirical research demonstrates that taking control of selected powers of self-government and capable governance institutions are indispensable tools to successful long-term community development in Aboriginal communities. Quantitatively, the Community Well Being (CWB) analysis conducted by Canada indicates that those Aboriginal communities currently with a self-government arrangement in place score higher on the CWB Index than other Aboriginal communities (for First Nations 9 points higher and for Inuit communities 4 points higher). However, self-governing Aboriginal communities still, on average, remain lower than all Canadian communities (11 points lower), although there are some notable exceptions. Qualitatively, self-governing communities report that a major perceived benefit of self-government is a renewed sense of pride that they now have their own government as well as the right to elect their own governments and to make important decisions affecting their lives.

[4] While beyond the scope of this paper, it is important for policy and lawmakers to understand the political dynamics of "change".

development of sectoral governance initiatives and the negotiation of comprehensive self-government arrangements with a particular focus on the FNFA and its mandate to become the central borrowing agency of choice for First Nations across Canada.[5] This objective is supported by the National Aboriginal Economic Development Board (NAEBD) as set out in the Board's 2012 recommendations that the federal government, "find ways to accelerate the process through which communities can benefit from the financing provided through the First Nations Finance Authority."[6]

The Discussion Paper is in two parts and raises a number of policy questions for consideration in respect of future directions and opportunities for growth along with some recommendations for action. Part One, "Developing an Institutional Framework to Support First Nations' Governance", considers the evolving legal and political relationship between Canada and First Nations and between First Nations and First Nations. In so doing it considers the role of the FNFA as First Nations move along the governance continuum. Of critical importance to First Nations is that as new self-government arrangements are being negotiated, whether as part of modern treaty-making or not, these arrangements must be able to accommodate the model of collective borrowing through the FNFA and the broader institutional framework that supports the borrowing that has been established under the FNFMA. This is to ensure that First Nations can continue to use the FNFA, or if not currently using the FNFA, may choose to use the FNFA in the future, as well as the other tools that support good governance and economic development. In Part Two, "Expanding the Revenue Streams Available for Financing under the FNFA", the Discussion Paper considers the expansion of the revenue streams that can be used by First Nation governments in securing loans through the FNFA. This includes a consideration of using federal transfers to First Nations, Indian Moneys and the First Nations Goods and Services Tax.

Finally, by way of introduction, it should be noted that at the time of writing this Discussion Paper, administrative or "housekeeping" amendments to the FNFMA were actively being developed and which were included in Bill C-59, the *Economic Action Plan 2015 Act, No. 1*. (i.e., the 2015 act to implement the federal budget). None of the proposed amendments to be made at this time are intended to deal with the questions raised or recommendations provided in this Paper. However, there is an expectation that there will be future amendments to the FNFMA and regulation development that will occur within a reasonable timeframe and that these amendments and regulations will address some of the more substantive matters considered in this Paper to facilitate the broader and ongoing relevancy of the institutions to First Nations as they move along the governance continuum and as they look to expand the revenue streams available for securing loans through the FNFA. This is a conversation this Discussion Paper hopes to stimulate.

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[5] Presentation by FNFA CEO Ernie Daniels to the House of Commons Standing Committee on Aboriginal Affairs, March 12, 2015.

[6] February 2012 report titled, "*Financing First Nations Infrastructure*".

PART ONE

Developing an Institutional Framework to Support First Nations' Governance

1.1 The Evolution of Contemporary First Nations' Governance

Governance with respect to Aboriginal peoples is a multifaceted and extremely complex area of public policy, which has been subject to much debate, academic consideration and litigation over the past 40 years.[7]

First Nations approach governance over their lands and peoples living on those lands as a matter of legal right. This is typically referred to as having the "inherent right of self-government". The courts have confirmed that the inherent right of self-government exists at law and is included as an aspect of those Aboriginal rights protected under section 35 of Canada's *Constitution*.[8] The scope and extent of the inherent right is still being determined, both through the common law and reconciliation negotiations that are informed by the decisions of the courts.

Accordingly, policy discussions within the federal government and negotiations between First Nation and the Crown with respect to First Nations' governance are typically no longer as concerned about whether or not Aboriginal peoples have a right to, or need, self-government. This is a now generally accepted as a given, reflecting the evolution in the relationship between First Nations and the Crown and the common understanding that advancing self-government is in everyone's interest. All agree there is a clear objective to remove the application of the *Indian Act* to First Nations within a reasonable time period.[9] Today the policy discussion around self-government is more focused on issues such as: the scope, range and extent of self-government powers, including law-making powers; the relationship between Aboriginal, federal, and/or provincial/territorial laws (e.g., legal questions such as paramountcy, double aspect, inter-jurisdictional immunity, etc.); how self-government is going to be paid for, and; how it will be implemented, including most critically, the transition from existing governance arrangements under the *Indian Act* and how this transition can be best facilitated and supported.

Federal policy with respect to the negotiation of self-government is set out in "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (Inherent Right Policy) and to a lesser

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[7] Of note, this includes the Constitutional conferences held during the 1980s, the Penner Report, the Royal Commission on Aboriginal Peoples, the Charlottetown Accord and more recently the Senior Oversight Committee on Comprehensive Claims and the BC Common Table.

[8] There is judicial support for the view that self-government is an Aboriginal right. See for example, *Campbell v BC*; *Bone v Sioux Valley Indian Band*; *Delgamuukw v BC*; *Tsilhqot'in v BC*.

[9] During an AFN assembly held in Winnipeg on January 25, 2012 former National Chief Shawn Atleo said First Nations needed to get rid of the *Indian Act* within five years. Other First Nation leaders suggested that within five years we needed a plan in place to accomplish this goal within a longer and more realistic timeframe.

degree in the comprehensive claims policies that preceded the Inherent Right Policy. Federal policy with respect to governance of Aboriginal peoples more generally is found in the various policies and directives that guide the different offices within AANDC and across government and that deal with specific subject areas (e.g., lands, education, social programs, emergency response management, wills and estates, etc.). In many cases this policy has little to do with how Canada views self-government and the transition to self-government, but rather with how Canada governs and administer "Indians and lands reserved for the Indians" under the *Indian Act.* It would seem, at times, there has been very little consideration of how the various policy streams coordinate as part of a broader objective of rebuilding First Nation communities, including the development of governance capacity and the transition to self-government.

While there may be a general meeting of the minds on the need for self-government and finding ways to support First Nation communities in comprehensively moving beyond the *Indian Act,* it has been a challenge for both First Nations and Canada to achieve this. As a result of negotiations with Canada (and where applicable provincial or territorial authorities), there are still only 33 Aboriginal communities that are recognized as self-governing either under modern treaty arrangements (most of which are constitutionally protected) or under stand-alone self-government agreements. This despite significant financial and human investment made in trying to achieve the objective.[10]

In addition to initiatives seeking to negotiate comprehensive self-government arrangements, there have also been a number of 'sectoral' governance initiatives that were led by groups of First Nations and that have resulted in federal legislation to remove the application of certain parts of the *Indian Act* to a First Nation and replace them with more appropriate governance arrangements. Typically, while these initiatives have been led by small groups of communities, they are open to any First Nation to opt under once established. These initiatives include: the *First Nations Land Management Act*; the *First Nations Fiscal Management Act*; the *First Nations Oil and Gas and Moneys Management Act;* the *First Nations Commercial and Industrial Development Act*; the *First Nations Education in BC Act,* and; the *First Nations Elections Act).* Some sectoral governance initiatives have been more successful than others in terms of First Nation uptake and certainly compared to the success of the efforts to negotiate comprehensive governance arrangements. This can be attributed, in part, to the specific priorities of First Nations and the leadership shown in developing the initiatives. It is also a reflection of the extreme difficulty in getting to a comprehensive agreement (both in terms of actually creating a negotiating table and then successfully reaching an agreement once the table is established).

In addition to the First Nation supported or led sectoral self-government initiatives, and at the same time as efforts are ongoing to negotiate new comprehensive

[10] For example, trying to amend the Canadian *Constitution* both during the 1980s and 1990s as well as the efforts made by Canada and First Nations to negotiate "community-based self-government" (CBSG) agreements and then agreements under the Inherent Right Policy. Many First Nations viewed CBSG negotiations and now negotiations under the Inherent Right Policy as too limited in scope and problematic because the arrangements reached are not necessarily constitutionally protected nor perceived to be based on 'recognition' of rights.

governance arrangements with First Nations, Canada has enacted other legislation in accordance with its Constitutional powers under section 91(24) with respect to the governance of "Indians and lands reserved for the Indians". The bulk of this legislation is still relatively new so its impact is not fully known. It includes: the *First Nation Financial Transparency Act*; the *Family Homes on Reserves and Matrimonial Interests or Rights Act;* the *Safe Drinking Water for First Nations Act;* and *An Act to Amend the* Indian Act *(publication of by-laws) and to Provide for its Replacement*. Other legislation is also proposed (e.g., the *First Nations Control of First Nations Education Act).* The substantive policy work behind this legislation was principally directed and controlled by AANDC. That is, First Nations did not lead it. While these initiatives are not intended to prejudice comprehensive self-government negotiations or sectoral governance initiatives, they nonetheless impact First Nations' governance today with implications for governance reform moving forward. In some cases the approaches to governance are not consistent. For the most part First Nations have been very critical of federal legislation where it is unilateral and imposed. This criticism is both political and legal. Moreover, it reflects a pragmatic understanding of what is needed to move beyond the *Indian Act* to ensure effective and strong First Nations' governance.

In addition to legislative initiatives, Canada has continued to pursue devolution of administrative responsibility through contractual arrangements with First Nations or with First Nations controlled entities (e.g., in areas such as health, education, lands, etc.). In some cases these initiatives transfer policy control to the First Nations but in most cases administrative devolution is through funding arrangements where the First Nation agrees to deliver a federally designed program or service for a fee and agrees to meet certain standards.

1.2 The Vision of a FNFA

The FNFA is one of a number of national First Nations institutions created to support remerging First Nation governments that has been established pursuant to a First Nation led legislative initiative. All First Nations in Canada, self-governing or not, and all public bodies of First Nations,[11] need access to capital. The driving force behind the vision of the FNFA was an appreciation by a number of First Nation leaders of the simple fact that no single First Nation in Canada, whether under the *Indian Act* or self-governing, is of sufficient size or economic strength to warrant being a regular, if ever, issuer on the capital markets. And, in any case, if they could go to the market individually they would not garner as strong a credit rating and would not be able to borrow as cheaply as a central borrowing agency could.[12] It was recognized by these leaders, that there was a need to create economies of scale through pooling so that any qualifying First Nation would be able to raise the capital they needed when they needed it, and at

[11] For example, schools built by education authorities, hospitals and other facilities built by health authorities, public safety buildings built by police forces and fore departments, linear and other infrastructure built by public utilities, etc.).

[12] Since the concept of the FNFA in Canada was first conceived in the early 90s some Tribes in the United States are now issuers of their own debt given their relative size, the amounts to be raised and their relative economic strength (e.g., the Southern Ute Indian Tribe of Colorado, the Navajo Nation and the Cherokee Nation of Oklahoma). In the case of the Ute Indian tribe they have achieved a AAA rating from Standard & Poor's.

affordable interest rates. This would mean small First Nations as well as larger First Nations, rural or urban, would have access to capital at the same rates and under the same terms. The visionaries behind the FNFA also appreciated that the *Indian Act* was an impediment to pooled borrowing and that if First Nations were going to be able to issue debt and then borrow together there needed to be the appropriate machinery of government and legislative framework to support it. They also understood meeting this objective was not going to be easy. While it was anticipated there would be resistance from some First Nations and no guarantee that the federal government would agree and allocate the necessary human and financial resources to the project, few of the early leaders of the FNFA would have predicted it would take more than 20 years from the time the concept of the FNFA was first conceived of in 1991 to the time the first bond was issued in 2014. It is an example of just how hard it has been to make progress generally with respect to First Nations' governance where something as basic and fundamental as public financing takes a generation to put into place.

Today, thankfully, the FNFA is able to provide long-term fixed-rate financing (with repayment terms up to 30 years) to First Nations that are members of the FNFA (Borrowing Members) by issuing debentures (currently, once a year) into the capital markets and then re-lending the net proceeds to the Borrowing Members participating in the bond issue. The FNFA is also providing short-term (bridge) financing, at below bank prime rates, for its Borrowing Members who require monies in advance of a bond issue. These bridge loans are then rolled into a fixed-rate debenture when there is sufficient size to issue a debenture on the market. In addition to providing financing, the FNFA also provides pooled investment services to its Borrowing and Investing Members as well as other First Nation organizations.

The mechanism to achieve First Nations public financing was the *First Nations Fiscal Management Act,* which provided for the establishment of the FNFA itself, modeled loosely on the Municipal Finance Authority of BC.[13] The Act also established the First Nations Financial Management Board (FMB) that plays a central role in setting financial administration standards that Borrowing Members must adhere to and the First Nations Tax Commission that oversee the raising of certain taxes on-reserve, most notably at this time, property taxes. At the time of writing there are 44 Borrowing Members of the FNFA with 155 bands in total that have been scheduled to the FNFMA and operating under the requirements of the Act, representing 9 of 10 provinces. There are currently another 3 First Nations waiting to be scheduled (please see Appendix A for a full list of First Nation opting into the FNFMA and for what parts of the Act they are using).

Currently all of the Borrowing Members of the FNFA are *Indian Act* bands. In this time of transition as First Nations develop governance under the *Indian Act,* but more importantly move away from governance under the *Indian Act* along a continuum of options, it is critically important that First Nations have access to public financing and continue to have access. In this context it is important to consider the place and authority of National/Regional First Nations institutions in the evolving world of First

[13] The MFABC is a creature of provincial statute and primarily services local (municipal) government. The FNFA is borrowing for purposes beyond municipal purposes and can rely on the more diversified revenue stream available to First Nation governments that are not available to local governments. Further, the FNFA has geographical application Canada-wide.

Nations' governance.

1.3 The FNFMA and the Need for a Sound Regulatory Framework

Considerable policy work went into developing the FNFMA and the regulatory framework established under the Act and there are a number of requirements for good governance and investor safeguards that have been built into the system. To come under the FNFMA, a First Nation must request, through Order-in-Council, to be scheduled under the Act and develop the required laws and management systems. The Act has been described as creating an integrated system of oversight whereby the institutions mutually re-enforce each other's mandates to ensure the integrity of the system as a whole. While it is not the purpose of this Discussion Paper to describe in great detail the operations of the FNFA and the FNFMA it is useful to highlight some of the fundamental elements of the system which illustrates the importance of design and structure of First Nation institutions that transcend the individual First Nation government.[14]

In addition to ensuring stable revenue streams to support borrowing, central to the public financing model is transparency and accountability of First Nation governments. This is demonstrated through the requirement that all Borrowing Members must have made a Financial Administration Law (FAL) and that they are adhering to the strict standards established by the Financial Management Board who certify Borrowing Members accordingly. Similarly, for the FNFA to relend the proceeds of a debenture to its Borrowing Members backed by property tax revenues, a First Nation must have a FNTC approved borrowing law. Structurally, in the event that a First Nation does not meet its payment obligations to the FNFA, the FNFA or FMB may require the Borrowing Member to enter into a co-management arrangement or, in a worse case scenario, third-party management. In this case, however unlikely given the rigor of the systems, the FMB would essentially replace the governing body of the First Nation until such time as the problems requiring the intervention have been resolved.

While a Borrowing Member always remains liable to the borrowing pool for its debts and is subject to institutional oversight, in the event that a Borrowing Member does not meet its debt obligations to the FNFA there are two other important credit enhancement features that protect the borrowing pool and the investor while the issue that lead to any missed payment are sorted out and the pool made whole. Central is the creation of a "debt reserve fund" (DRF) where each Borrowing Member deposits 5% of the total amount they borrow into the fund. This money can be used by the FNFA to make loan payments on behalf of any Borrowing Member if necessary. There is also a statutory requirement in the FNFMA that if the DRF is depleted it must be replenished. While legally not strictly "joint and several" this requirement operates to ensure that if one Borrowing Member cannot pay their annual debt service, the others will on a pro-rata basis. FMB, through intervention, if necessary, will locate the

[14] For a more fulsome description of the regulatory framework under the FNMFA consult the webpages of the respective institutions. Further, a description of the regulatory framework can be found in the BCAFN *Governance Report*.

appropriate amount of funds from the defaulting member to not only cover its share of debt service going forward, but to also reimburse those other Borrowing Members who helped cover the defaulting member's annual debt service. The 5% debt reserve fund with any growth in the fund is returned to each Borrowing Member once its loan commitments for a particular bond issue have been fully repaid.

Additionally to the DRF, there is a facility where the federal government has contributed $10M to a Credit Enhancement Fund (CEF) that acts as a final backstop that can be used to top up the DRF if ever needed. This fund assists the FNFA's ultimate liquidly; something that the rating agencies are concerned about. This fund and liquidity is very important in the initial years of the FNFA and as the FNFA's loan portfolio grows. Liquidity levels must be maintained. Under an agreement with Canada, any monies accessed from the CEF must be fully repaid by the FNFA within 18 months.

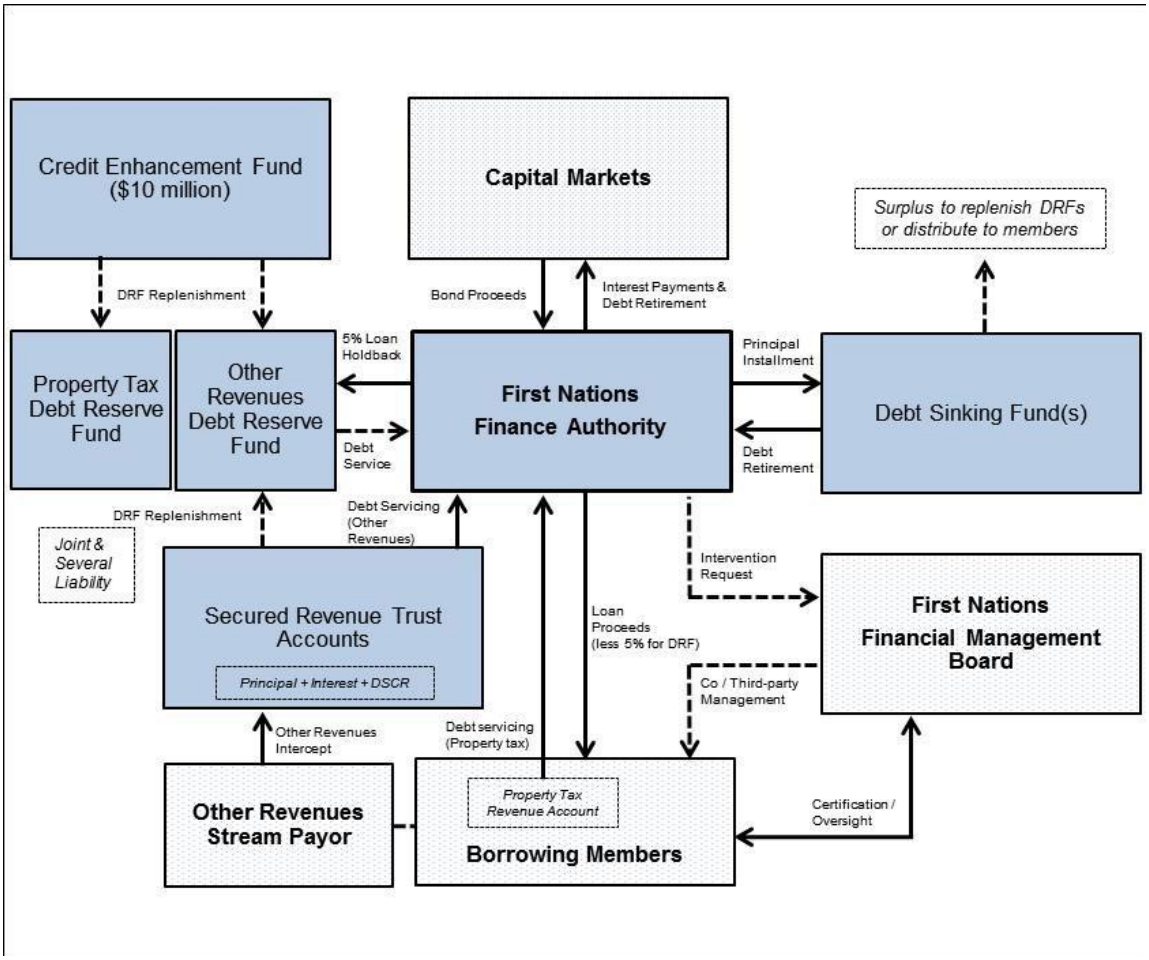

Diagram Setting out the Financing Structure Through the FNFA– *source FNFA, 2014*

One of the central tenants of the integrated system created under the FNFMA is sound financial management. While membership in the FNFA is theoretically available to all First Nations Canada-wide, to actually achieve Borrowing Member status each First Nation applying for membership must be willing to work towards achieving best-practices approach regarding internal governance standards, while maintaining

positive economic and financial ratios. The achievement of these two tests (internal governance controls and financial ratios) provides comfort to investors that their monies will be repaid in full and on time. By adhering to these standards First Nations achieve access to capital and on favourable terms. As the Borrowing Members support one another in the borrowing pool it is critical that each Borrowing Member has confidence that all other Borrowing Members are operating under the same rules and are adhering to those rules. To achieve this and become a Borrowing Member they must agree to relinquish some local control in favour of the collective. While this may be viewed by some as a political cost, it is, nevertheless the cost of achieving greater economic power and access to affordable capital; the whole being greater than the sum of the parts.

Today as sub-national governments within Canada, First Nations working together under the FNFMA umbrella have ensured the FNFA received two investment-grade credit ratings; one from Moody's Investors Service, and one from Standard & Poor's.[15] By implication each of the FNFA's Borrowing Members now enjoy the benefits of this credit rating. The confidence of the capital markets has been achieved and the current group of Borrowing Members and others that join in the future now have access to financing that is available to other levels of governments in Canada.

With respect to aggregation and the need for a sound regulatory framework, it is important to remember that until the FNFA, First Nation governments were the only governments in Canada that relied on retail banking for their public financing needs. And if they could actually get financing, it was typically on terms and at rates not commensurate with their status as government borrowers and underlying low credit risk. While one of the biggest impacts of relying on retail banking loans is typically higher interest rates over shorter terms, the benefit of public financing is more than just competitive rates. Relying on retail loans also means the governing bodies of First Nations are less able to undertake significant long-term planning, as there is no certainty that loan requests to the banks will be accepted. Each loan request to the bank being subject to the lending limits of the bank,[16] and the banks internal policies with respect to First Nations. Accordingly, each loan request is subject to bank scrutiny, fees, and the possibility of the bank saying "no."

FNFA Borrowing Members in contrast, once Borrowing Members and remaining as Borrowing Members, always have access to the capital markets and know up-front what their borrowing capacity is. The borrowing capacity being based upon capital market leverage factors applied to the First Nation's available revenue streams. With this certainty of access to capital and knowledge of its borrowing capacity the

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[15] Standard & Poor's Rating Services, *Rating Direct*, *Research Update: First Nations Finance Authority Assigned "A-' Rating; Outlook Stable*, primary credit analyst, Stephen Ogilivwe, December 18, 2014. Moody's Investor Service, Credit Opinion: First Nations Finance Authority, Issue Rating A3, Outlook Stable, analyst Michael Yak, 2014.

[16] This is a serious issue given the significant public investments that are needed in First Nations and where the banks may be unable or unwilling to meet this need. In some cases their bankers have told individual First Nations with significant borrowing requirements and the means to repay their loans that they would not finance because in doing so the bank's lending limits would be exceeded. There is, in contrast, no shortage of capital available through the markets, which, of course, is why governments with significant financing needs issue debentures.

governing body of a First Nation has the ability to plan and to use all or part of its borrowing capacity based on its own timeframe. With reliable and stable access to financing, long-term planning is easier and more accurate.

Finally, it should be noted that having access to capital markets does not mean there is no role for the banks to play in First Nations' public financing. On the contrary, the banks play a central role though their capital market divisions as part of a "banking syndicate" established to buy and sell the debt issued. As with other government borrowers and as described above, the FNFA uses a banking syndicate consisting of the six primary Canadian chartered banks capital market divisions. The banking syndicate, in fact, purchases FNFA debentures and either holds onto them for their own purposes or sells them on in the secondary market. They are comfortable in taking the full risk of re-selling to subsequent investors. Without the appropriate support of the banks the FNFA model of financing would not work and the inaugural debenture, as described below, would not have been so successful.

1.4 The Inaugural FNFA Debenture & Future Debt Issues

June 26, 2014 with the issuance of the inaugural FNFA bond marked the first time in Canada's history that First Nations, as a group of borrowers, accessed financing directly from the global capital markets (e.g., Bay St and Wall St). The first issue was in the amount of $90 million with a 10-year term, at a fixed lending rate of 3.79%. Today's rate, due to the effects of the oil price "wars" on interest rates, would be 2.85%. The 13 First Nations that participated in the debenture used the proceeds for infrastructure, housing, economic and social development projects.

The inaugural FNFA debenture was re-sold by its banking syndicate within 30 minutes. Life insurance companies, pension plans, and large corporations purchased the debentures. The largest investors were out of New York State, followed by the provincial pension plans in Canada. These institutional investors would have evaluated the risk and rewards of investing their capital in FNFA's debenture versus purchasing the debt issued by other governments or similar issuers. The FNFA structure and investor safeguards made the FNFA debenture very attractive to them, from which we can assume, there will be considerable interest in further FNFA issues going forward. In fact, there is really no shortage of market for FNFA bonds. At any given time fund managers collectively have to invest billions of dollars and are always in the capital markets looking for safe places to invest. In the current market the FNFA could have sold its first issue ten times over or more.

The FNFA plans to continue to fund its lending activities to its Borrowing Members through the issuance of senior unsecured bonds (paralleling provincial and municipal governments) in the approximate amount of $100M once a year over the next few years. As additional First Nations become Borrowing Members and once the borrowing pool is of sufficient size, the FNFA is expecting to issue twice a year. The interim financing revolving credit facility will continue to be used to finance interim loan requests. The current rate for bridge financing to Borrowing Members for approved loans is 2.60%. The existing short-term loans will be rolled into the second

FNFA debenture to be issued in 2015.

Predicting the full potential of the FNFA and the size of its ongoing loan portfolio is hard to quantify and depends on many factors and assumptions. In 2009 at the time the *Financing Secured by Other Revenues Regulations* (SOR/2011-201) were being contemplated the FNFA conservatively estimated a present potential of approximately $3.3 billion of accumulated debt being issued.[17] The amount could conceivably be far greater.

1.5 The Evolving Role of National/Regional First Nation Institutions

The FNFA is now one of a handful of national and regional First Nation institutions that have been established in recent years to support First Nations' governance that transcend the *Indian Act* band. These institutions have been established though sectoral governance initiatives led by First Nations and rely on federal legislation or agreements between First Nations and the Crown for their authority.

Under the FNFMA and in addition to the FNFA, the First Nations Tax Commission and the First Nations Financial Management Board have also been created. Under the Framework Agreement on First Nation Land Management that is brought into effect by the *First Nations Land Management Act* (FNLMA), a Lands Advisory Board and Lands Resource Centre have been established. An education authority under the *First Nations Jurisdiction over Education in British Columbia Act* has also been established. In the future other sectoral governance initiatives might conceivably result in the creation of new institutions to support First Nation governments; for example, as part of other regional initiatives across Canada addressing matters such education, child welfare, health, and so on.

Some of the national/regional First Nation institutions have a regulatory or oversight role. For example, the First Nations Tax Commission can approve First Nation local revenue laws and the Financial Management Board can approve Financial Administration Laws, certify financial administration systems and performance and,

[17] This estimate considered the potential of securing loans through the FNFA using property taxes (local revenues), "other revenues" and AANDC Major Capital funds. With respect to property taxation, the estimate was based on most recent available First Nation Tax Commission reporting of $55M in total revenues, for the 116 First Nations collecting property taxes. Using a 25% borrowing room calculation for maximum debt (municipal finance benchmark) and a factor of 9, resulted in a borrowing capacity of $124M. For other revenues the FNFA relied on the AANDC First Nation Inuit Transfer Payment System data for 2005-2006. Total income for the 484 reporting First Nations in 2005 was $2,097M. The borrowing capacity was based on total revenues of $2,030M, representing the total for the top 300 reporting First Nations with income levels of $1M or more. The FNFA considered that only 15% of this income could be made available for refinancing or new long-term debt service (for comparison, the municipal borrowing room calculations use a factor of 25%). In addition, the total estimated income of all 633 First Nations & Inuit communities and their development corporations in 2009 was estimated to be the range of $4,000M. This range represents $304M in annual cash flow, able to service a debt load of $2,741M (calculated on the basis of a factor of 9 (i.e., the municipal average). Loans financed by AANDC Major Capital water & public building projects was based on the assumption that up to 20% of the current $240M annual budget could be used to service cash flow, for a total borrowing capacity of $432M.

in special circumstances, intervene in the management of a First Nation's government in respect of finances. Other institutions are only advisory in nature. For example the Lands Advisory Board.

In some cases there has been significant uptake in sectoral self-government initiatives (e.g., the FNLMA for land management and for property taxation under the FNFMA) and in other cases there has been limited uptake (e.g. *The First Nations Oil and Gas and Monies Management Act* (FNOGMMA*)* or the *First Nations Commercial and Industrial Relations Act)*. The level of uptake can be attributed, in large part, due to the services and benefits provided through the initiatives to First Nations opting to use them. However, an important part of their success must be attributed to the fact that in those initiatives that have been successful the establishment of First Nation institutions was a priority. The important role these institutions play in supporting good governance among First Nations including capacity development cannot be overstated. However, developing legitimate First Nations institutions beyond the "band" has had its challenges, both legally and politically. There have been ongoing questions regarding the appropriate machinery of government to use and the relationship between these bodies and evolving post-*Indian Act* band government as well as questions regarding how best to implement the inherent right of self-government.

1.6 Developing Appropriate Machinery of Government

When the policy work behind the *First Nations Fiscal and Statistical Management Act* (as it then was) was being undertaken considerable dialogue between the First Nation proponents of the federal legislation and federal government officials took place regarding the appropriate machinery of government to use for each of the four institutions contemplated; the FNTC, the FMB, the FNFA and the now defunct First Nations Statistical Institute. All those involved in this exercise realized that there was no simple answer or neat legal/political fit for what was needed or being contemplated; namely creating the "First Nations institution" using federal authority. To understand what is meant by this statement, and as a starting point to future conversations, it is necessary to have an appreciation of how self-government is developing as a legal and political construct in a post-colonial world.

When moving beyond governance structures under the *Indian Act* there are many issues to consider in implementing the inherent right of self-government. A central question is to determine which Aboriginal polity actually has the inherent right and over what land base. If one follows the direction of the courts then simply stated the right of self-government belongs to the Aboriginal group, however organized, that existed at the time the Crown asserted its sovereignty over the Aboriginal peoples' territory (i.e., Aboriginal title lands). With this in mind, it cannot, therefore, be assumed that the governing body of an *Indian Act* band represents the group that has the inherent right and if it does that it can implement all aspects of the inherent right. This is because an *Indian Act* band is, legally, a creature of federal statute, notwithstanding that it may be the successor, in whole or in part, to an Aboriginal group that prior to the Act existed as a self-governing entity with a defined territory.

This is of particular importance to appreciate in those circumstances where there were no pre-confederation or historical treaties and where a Tribe or Nation was split into bands and its governance institutions and territories interrupted and divided though the imposition of the *Indian Act* created band councils and Indian reserves; for example, in large parts of BC and in Quebec. Transitioning communities out from under the *Indian Act* system to more legitimate and recognized political entities that can legally and effectively govern is the challenge. If Aboriginal title is to be respected it requires rebuilding First Nation governance not only at the band but also at the Tribal or Nation level. But it also, as evidenced from the experience with the FNFA and the creation of other regional and national institutions, needs to take place at a level beyond the "band" and reconstituted Tribes or Nations; namely the establishment of regional or national institutions that transcend bands and/or Nations for legitimate public purposes and as when desired by First Nations. As we know from the FNFA experience, few, if any, First Nations will ever be of such size and power to warrant being able to undertake all of the aspects of government that they might otherwise claim to have a right to exercise. Accordingly, there is a need to politically and legally aggregate with other First Nations (either as a Tribe/Nation, or regionally or nationally).

This, of course, begs the question, assuming First Nations agree to a need for national institutions (which they do), where do the regional or national First Nation institutions derive their power and authority? For First Nation communities to work together though regional or national bodies requires some form of legal framework to support such a system and to ensure the enforcement of the system. Accordingly, it is incumbent for policy makers to take very seriously the question of where the authority for First Nation institutions is, and will in the future, be derived. This is not a matter to be taken lightly as the success or future of Aboriginal governments will depend on how this question is answered and how initiatives like the FNFA will evolve.

Ideally there would be a mechanism for establishing national or regional First Nation institutions emanating from the exercise of First Nations' jurisdiction themselves based on each Nation's inherent right. This would conceivably be achieved through legally binding treaties and agreements between reconstituted (post-*Indian Act*) Tribes or Nations. This, however, is easier said than done, both legally and politically. Some regions have been experimenting with this approach to varying degrees of success.[18] At this point in the evolution of contemporary First Nation government and institution building, no simple mechanism based on an exercise of the inherent right exists that is recognized by First Nations, the Crown or third parties. This includes even the most basic mechanisms for the Crown to recognize and support a Tribe or Nation reconstituting beyond the *Indian Act*.[19] Meanwhile, as this conversation

[18] For example, the Federation of Saskatchewan Indian Nations (FSIN) has created a number of bodies that derive their authority from their member "Nations" which is ostensibly described as being based on an exercise of inherent and treaty rights. For the most part, however, FSIN member "Nations" are *Indian Act* bands. Further not all bands within the FSIN believe they are compelled to respect or follow the direction of the regional bodies.

[19] Through the BCAFN, such a mechanism was proposed, namely Bill S-212, *An Act providing for the*

continues, reserves and *Indian Act* bands still need to be governed and communities have needs.

Assuming the above analysis is correct (and not all commentators would agree), policy makers for First Nations and the Crown have had to consider other options for machinery to use in establishing regional or national First Nation institutions with sufficient legal capacity to act and carry out their intended purposes and to build these bodies using the existing *Indian Act* band as the foundation. Currently national First Nations institutions such as the FNFA typically derive their authority from federal legislation enacted in accordance with Parliament's powers under s.91(24) and/or other federal powers. Using federal legislation was considered the only practical tool available to move beyond the *Indian Act* and to create a regulatory framework that could transcend the "band" and potentially continue after recognition of self-government. Federal legislation creating First Nation institutions is enacted "without prejudice" to the rights of a Tribe or Nation to self-government and typically federal legislation includes non-derogation provisions that speak to this issue.[20] First Nations and the Crown are free to negotiate self-government arrangements based on the inherent right. This has resulted in a new set of issues in ensuring that national institutions created to service *Indian Act* bands can still, in fact, serve First Nations recognized as being self-governing. This is discussed below.

In cases where federal legislation has been used to support First Nation institutions the machinery of government that has been used for the institutions varies. There a number of different types of institutions in Canada that collectively makes up the machinery of government.[21] In the case of the FNFA, the FNFA is a special purpose

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recognition of self-governing First Nations of Canada, which was introduced as a public members Bill.

[20] This is a complicated area of law and there are different approaches and opinions on the use of and effect of non-derogation clauses in federal legislation addressing First Nations' governance. This is an evolving conversation that policy makers need to be alive to and in particular as the courts continue to define the scope and extent of First Nations' governance powers and the relationship between laws (i.e., First Nation, Federal and provincial).

[21] The *Financial Administration Act* (FAA) groups a number of institutional forms of federal organizations under schedules. Institutional forms with their corresponding schedules include:

- Departments—FAA, Schedule I;
- Statutory and other agencies— includes FAA, Schedule I.1 entities and administrative tribunals supported by departments (not listed in FAA schedules);
- Agents of Parliament—FAA, Schedule I.1;
- Departmental corporations—FAA, Schedule II;
- Service agencies—FAA, Schedule II; and
- Parent Crown corporations—FAA, Schedule III (although there are nine additional parent Crown corporations whose governance is primarily dictated by constituent legislation and, to a lesser extent, by the FAA, Part X).

In addition there are two secondary institutional forms that are not listed in the FAA:

- Special operating agencies found within a department or agency; and
- Subsidiaries of Crown corporations.

Finally, there are other types of corporate entities that are not formally part of the federal government, but in which the government has an interest:

- Mixed enterprises;
- Joint enterprises;
- International organizations;

corporation and in the case of the FNTC and FMB, shared governance. The now defunct First Nations Statistical Institute was established as a Crown corporation.

1.7 Machinery of Government used for National/Regional First Nation Institutions

As First Nations may be considering creating additional regional and national First Nation institutions, it is helpful to consider how some of the existing national and regional First Nations institutions have been designed and the machinery of government employed. Below is a brief description of the FNFA, FNTC, FMB, Lands Advisory Board and the BC Education Authority.

FNFA: In the case of the FNFA, the FNFA is established as a non-profit corporation without share capital. The FNFA is not an agent of Her Majesty or a Crown corporation within the meaning of the *Financial Administration Act*, and its officers and employees are not part of the federal public administration. The Act provides that the FNFA is to be managed by a board of directors, consisting of from 5 to 11 directors, including a Chairperson and Deputy Chairperson. Directors are nominated and elected by the representatives of the Borrowing Members who themselves must be a member of the governing body of the Borrowing Members (i.e., on chief and council). The Chairperson or Deputy Chairperson must be a representative of a Borrowing Member, however, other directors can be nominated from among all Members (Investing and Borrowing). This structure is considerably different from that of the FMB and FNTC where the governing bodies are not selected by the governing bodies of First Nations (in this case "bands") but rather by the Crown or other bodies. The FNFA is a legal entity.

FNTC: The FNTC and the FMB are shared governance corporations. Shared governance organizations include corporate entities without share capital for which Canada, either directly or through a Crown corporation, has a right, pursuant to statute, articles of incorporation, letters patent, by-law or any contractual agreement (including funding or contribution agreements) to appoint or nominate one or more voting members to the governing body.

In the case of the FNTC, the Tax Commission operates independently and is only an agent of Her Majesty for the approval of local revenue laws. On the recommendation of the Minister of AANDC, the Governor-in-Council (GIC) appoints a Chief Commissioner and a Deputy Chief Commissioner. These persons hold office during good behavior for a term not exceeding five years, subject to removal by the GIC at any time for cause. On the recommendation of the Minister, the GIC also appoints four commissioners to hold office during good behavior for a term not exceeding five years, subject to removal by the GIC at any time for cause. Further, and again on the recommendation of the Minister, the GIC appoints three additional commissioners, one of whom must be a taxpayer using reserve lands for commercial, one for

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- Shared-governance corporations; and
- Corporations under the terms of the *Bankruptcy and Insolvency Act* (BIA).

residential and one for utility purposes. Again to hold office during good behavior for a term not exceeding five years, subject to removal by the GIC at any time for cause. The Act also provides that the Commission must be composed of men and women from across Canada, including members of First Nations, who are committed to the development of a system of First Nations real property taxation and who have the experience or capacity to enable the Commission to fulfill its mandate. Of note is that there is no person appointed by an independent organization. The Commission and the Commissioners are accountable to the Minister and not strictly speaking the First Nation governments they provide services to and regulate, although at this point in its evolution and as a matter of practice the Commission operates as though it were.

FMB: The FMB is somewhat different than the FNTC with respect to law approval. Like the FNTC the FMB is not an agent of Her Majesty. However, unlike the FNTC where the FMB approves financial administration laws, it is not acting as an agent as the FNTC is with respect to local revenue laws. The Chairperson of the FMB is, like the FNTC, also a GIC appointment made on a recommendation from the Minister of AANDC. In addition to the Chairperson, the GIC, again on the recommendation of the Minister, must appoint a minimum of five, and a maximum of nine, other directors. Unlike the FNTC, there are provisions for up to three additional directors to be appointed by the Aboriginal Financial Officers Association of Canada, or any other body prescribed by federal regulations. In the case of the FMB, the board of directors must also be composed of men and women from across Canada, including members of First Nations. In the case of the FMB by those who are committed to the strengthening of First Nation financial management and who have the experience or capacity to enable the Board to fulfill its mandate.

Lands Advisory Board: The Land Advisory Board (LAB) is a somewhat different model of a First Nation institution than those established under the FNFMA. The LAB does not have any regulatory function with respect to the exercise of a First Nation's law-making powers under the Framework Agreement on First Nation Land Management or the *First Nations Land Management Act*. In fact, the legislation does not even address the legal status and capacity of the Board, or its purposes. Rather these are addressed in the Framework Agreement. It should be noted there is no equivalent of the Framework Agreement in the FNFMA model. In accordance with the Framework Agreement, the LAB consists of at least three members appointed by the Councils of the First Nations that have ratified the Framework Agreement. This ensures accountability of the Board to those whom it serves. The Agreement also states that the Lands Advisory Board will have all necessary powers and capacity to properly perform its functions under the Agreement. The Board also establishes its own rules for selecting its governing body. These rules ensure that each region of Canada is represented on the Board where regions elect a pro rata number of members to the Board reflecting the number of First Nations within that region that have ratified the Framework Agreement.

(BC) First Nations Education Authority Under the *Jurisdiction over Education in British Columbia Act (S.C. 2006, c. 10)* a regional institution, the First Nations Education Authority has been created. This body has regulatory and standard setting authority over elementary and secondary education of those First Nations that

exercise law-making authority under the Act. A board of directors that consists of a minimum of six directors, including a president and a vice-president, governs the Authority. The Authority is not an agent of Her Majesty. Each First Nation that is participating under the Act (i.e., that has made an education law in accordance with the Act) has the right to appoint two directors to the board of directors, at least one of who must be a member of the participating First Nation, for an initial term of two years. Directors may be reappointed for a term fixed by the board for second or subsequent terms.

1.8 Some Lessons Learned and Future Direction in Developing First Nation National/Regional Institutions

In the initial years of the operation of the fiscal institutions it was clear that the appointment process to the governing bodies was proving to be problematic. There were issues in the delay in appointments to the FMB, which threatened the success of the initiative and specifically the future of the FNFA. Without a FMB Board there could be no FMB standards and consequently no certification of FNFA Borrowing Members. The FNFA is entirely dependent on a fully functioning FMB. Eventually a Board was appointed but not without considerable angst that politically the FNFA might not survive the wait. The appointment of the Commission was less of an issue as the FNTC was transitioning from the previously existing Indian Taxation Advisory Board.

The issue of appointments and the perceived lack of urgency in getting the institutions up and running is perhaps, and more significantly, a reflection of a concern raised by some First Nation leaders and other commentators, that the FMB and the FNTC are public bodies where accountability is primarily to the federal government and not to those whom they serve. This notwithstanding the fact that all the institutions do operate in practice with independence from the federal government and certainly, if asked, would not see themselves as doing the government's bidding or as being a part of the federal government. Nevertheless, this remains an issue going forward. First Nations expect that beyond their own self-governance, those whom are responsible for regulating them are accountable to them and will be motivated by that accountability with an urgency of shared purpose. They also expect them to have a stake in the quality and outcome of the decisions they are making. Namely, those with self-interest and who are affected by the outcome of a decision they make are more likely to make more informed, better and timelier decisions.

This experience of the fiscal institutions does beg the question of how appointments to the governing bodies of national First Nation institutions that rely on federal machinery of government should be made. It is, after all, ultimately a political process. Whether in the context of considering changes to existing First Nation federal institutions or when developing new national First Nation institutions, it is appropriate to ask if it is in the interests of good governance to have so many, if any, members of these governing bodies being appointed by the Crown. Certainly there are other shared governance bodies in Canada where the GIC is making the appointments but in other cases the role of the Crown is far less. In cooperation with First Nation partners, different models should be researched further and approaches

considered with potentially new federal policy developed around the process of appointments to First Nation institutions that rely on federal machinery. If the desire were to move away from GIC appointments then logically the next question is, which First Nation body or bodies, or other institutions, would be making the appointments? There would need to be a clear policy rationale for why.[22] This is an issue that requires much more consideration and discussion and will not be an easy one during this period of *Indian Act* transition.

It has also been suggested that policy makers should consider developing new or amended machinery of government within the federal framework to cover First Nation institutions. Such a category could ensure more appropriate control and accountability of First Nation institutions to the First Nation governments they serve with its own legal framework and recognized powers.[23] While it is beyond the scope of this Discussion Paper to suggest what this machinery might look like it is certainly an area that warrants more exploration and discussion.

Finally, and while the financing of national First Nation institutions has not been considered in any detail in this Discussion Paper, there must also be ongoing discussions among policy makers about how national First Nation institutions are resourced. This should include how appropriations are calculated and, where applicable, budget submissions within the federal system are made. While there may be an expectation that some national institutions should have the internal means to generate their own revenues (e.g., by raising taxes, charging fees, conducting business activities etc.) there will still be a need for federal support in most, if not all cases, and at least for the foreseeable future. This is an important issue for the FNFA and other institutions that need to be confident they will have sufficient revenues to meet their respective remits. In the case of the FNFA, this is also something the credit rating agencies are watching closely. If the rating agencies believe the FNFA has insufficient resources this would be viewed as a credit risk and could lead to a downgrading of the credit.

Recommendation

It recommended that First Nations and Canada engage in further research and discussions regarding options for establishing new federal machinery of government specific to national and regional First Nation institutions and to establish the appropriate machinery as required.

1.9 The Need for Coordination Between Sectoral Governance Initiatives and Comprehensive Governance Arrangements

[22] At the time the FNFMA was being developed the AFN was, in fact, considered but not determined to be an appropriate body given its current structure and limited mandate as an advocacy forum for all *Indian Act* bands.

[23] The need for new machinery of government has been conveyed by the AFN to the Crown on different occasions, including at the Crown/First Nations Gathering held in 2012 as well as at the meeting between the Prime Minister and the National Chief and certain members of the AFN executive in January 2013.

Related to the question of appropriate machinery of government is how to address the needs of First Nations when they do eventually become self-governing and move along the governance continuum. Currently the opportunity for a First Nation community to participate in national and regional sectoral governance initiatives is, for the most part, limited to *Indian Act* bands whose core governance is exercised in accordance with the *Indian Act*. This despite the fact in some cases it was expressly contemplated by First Nations and Parliament that national First Nation institutions would be available to support self-governing First Nations.

As discussed above, part of the reason for this problem can be attributed to the inconsistency and different approaches taken by the federal government to "sectoral" governance initiatives and to the negotiation of self-government in accordance with the federal comprehensive claims policies and related directives. There is clearly a need to coordinate federal policy with respect to self-government and the place of regional and national First Nation institutions.[24]

In some cases different federal policy objectives are used to justify approaches in sectoral governance initiatives in order to support good governance and economic development that are not compatible with the overarching policy approach and mandates that guide modern treaty negotiations and how the inherent right is being implemented in those forums. Federal officials sometimes refer to sectoral governance initiatives as "incremental" or "stepping stones" to the resolution of matters of governance under a final (treaty) agreement. While this is true, it is misleading to the extent that sectoral governance initiatives are not transferable to a modern treaty context.

By way of example, in order to reach a final agreement under the current treaty process in BC, a First Nation that is currently governing its lands in accordance with the FNLMA with a ratified land code in place, or collecting property taxes under laws enacted in a accordance with the FNFMA, must agree to provisions in their final (treaty) agreement which remove the application of both the FNLMA and FNFMA in favour of different arrangements. This can have an immediate short-term destabilizing effect with the potential for far greater long-term negative impacts. For example, with respect to land management, bands that were governing under land codes and working with other First Nations across Canada pursuant to the FNLMA and that are using the federally maintained self-government lands registry are transitioned to a provincial land management system and the provincial land registry and all that entails. With respect to property taxation the band is moved out from under the federal FNFMA system as regulated by the FNTC, to a provincial system that is regulated under provincial law. With respect to the FNFA the long-term implications of this approach are significant. This is discussed below in more detail when considering the development of federal regulations under section 141 of the FNFMA.

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[24] The disconnect between policy approaches was discussed at the Senior Oversight Committee on Comprehensive Claims that was established in January, 2012 and reported to the National Chief and the AANDC Minister in December, 2012.

The rationale given to First Nations at the negotiating table by federal officials is that the provincial systems are better. This is simply not true. They are different but not necessarily better for First Nations or for effective or good governance. As such a conclusion can be drawn that one of the objective of the federal government with respect to self-government as part of comprehensive claims (modern treaty-making) is not strictly to ensure good governance for First Nations but rather reflects a deeper policy objective to remove Canada from any significant ongoing role with respect to First Nations. This means to "transition" the First Nation out from under any federal authority, including any First Nation institutions established using federal machinery of government. Whenever possible the policy appears to be to supplant provincial or territorial government institutions to replace federal government institutions. This by default, includes any national/regional First Nations institutions that may have been created under federal statute that support *Indian Act* bands as part of sectoral governance initiatives. Crudely, this could be described as "getting out of the Indian business" in favour of provincial regulation and local First Nation control.

Whether or not this is a deliberate policy on the part of the federal government, if the above analysis is correct, this could have a number of negative long-term consequences for the evolution of Aboriginal government within Canada. It is, respectfully, shortsighted and not an approach shared by national First Nation institutions nor many First Nations that have experience with contemporary governance. Provinces can not always deliver nor are they always willing and there is great benefit from First Nations working collectively nationally or regionally to develop polices that reflect their governance needs. Under the modern treaty approach there is little or no role for First Nation national or regional institutions created under federal statute that would provide oversight and support reconstituted First Nations. Whether this role can, or should, be filled by provincial governments (assuming they would take on this role) and whether every Tribe or Nation would have sufficient capacity and resources to go out on their own, are serious policy questions that must be considered.

As this conversation unfolds, the policy disconnects between modern treaty-making and sectoral governance initiatives should be more systematically identified and addressed. The AFN has recommended how federal policy could be better coordinated if there was in place an overarching reconciliation framework to guide both the reconciliation of section 35 rights through comprehensive treaty-making and also through arrangements other than comprehensive treaties.[25]

Recommendations

It is recommended that AANDC review and amend its policies and directives with respect to comprehensive claims to ensure that advancements in First Nations' governance through sectoral governance initiatives are not negatively impacted by modern land claims (treaty) agreements.

[25] Most recently in a letter from AFN National Chief Perry Bellgarde to the Minister of AANDC, Bernard Vallcourt, February, 2015.

It is recommended that provision should be included in modern land claims (treaty) agreements (both at Agreement in Principle and Final Agreement) to ensure that where First Nations so choose, sectoral governance initiatives continue and that national and regional First Nation institutions can continue to provide services to self-governing First Nations in accordance with their statutory and other powers.

1.10 Developing Regulations with Respect to Self-governing First Nations under the FNFMA

Self-governing First Nations (both under modern treaty or otherwise) or about to become self-governing have indicated that want to use the services of the FNFA. For the same reasons no *Indian Act* band can practically go to the capital markets on their own, holds true for self-governing First Nations; they may be self-governing but they are still too small to be a real player in the global marketplace.

The framers of the FNFMA clearly intended that the First Nation institutions created under the Act would have a role to play post-*Indian Act* governance and the Act provides for this in the regulatory provisions found in section 141.[26] This regulatory power can be used to make adaptations to the FNFMA to facilitate a self-governing First Nation using the services of the institutions created under the FNFMA. Unfortunately there have been issues in developing these regulations. Despite the good intentions, these issues can be attributed to the lack of compatibility of the respective governance frameworks established and the different policy/legal considerations that were taken into account in the design of the respective governance systems under modern treaty making/self-government and the FNFMA.

One of these issues has to do with questions of "paramountcy"; namely which government's law has priority in the event of a conflict assuming multi-level governance (i.e., where governments have shared jurisdiction but where one government's laws are paramount to the other in the event of a conflict of laws). AANDC has advised the institutions that the Department of Justice provided an opinion to them that the constitutionally protected power of a First Nation over its internal financial administration in accordance with final agreements (modern treaties) is paramount to the powers of the FMB under the FNFMA and specifically the statutory power of the FMB to intervene and assume the power of the Chief and Council with respect to the financial administration of the First Nation. As a consequence, a First Nation that moves out from under the *Indian Act* to self-government and in the process is recognized to have local control and constitutionally

[26] S. 141. For the purpose of enabling an aboriginal group that is not a band as defined in subsection 2(1) of the *Indian Act* but is a party to a treaty, land claims agreement or self-government agreement with Canada to benefit from the provisions of this Act or obtain the services of any body established under this Act, the Governor in Council may make any regulations that the Governor in Council considers necessary, including regulations

(*a*) adapting any provision of this Act or of any regulation made under this Act; and

(*b*) restricting the application of any provision of this Act or of any regulation made under this Act.

protected rights, which limit or restricts creditor rights as protected under the FNFMA, might not be able to borrow through the FNFA. There is also no corresponding ability to borrow through a provincial or territorial body (e.g., in BC through the MFABC).

For modern treaty First Nations or those First Nations looking to sign self-government agreements, sorting out this problem is critical. Not only may it potentially preclude the First Nation from accessing the benefits of the FNFA, but if not addressed poses a long-term risk to the future of the FNFA as well. The FNFA is depending on keeping and expanding its pool of Borrowing Members. It was always intended that the FNFA would provide its services to both First Nations that are governing under the *Indian Act* and the FNFMA, as well as those that are, or will be, self-governing. This is very important to the rating agencies and to keeping and improving upon the current credit rating that at this time has the FNFA rating outlook as "stable". The FNFA was established as the primary vehicle in Canada to provide access to the capital markets for First Nations and is expected to remain so.

Notwithstanding the policy disconnect between sectoral self-government and self-government as part of comprehensive claims, the solution for the FNFA with respect to future final agreements (modern treaties) is relatively simple. The fix is to ensure a provision in a final agreement that specifically addresses the paramountcy of the FNFMA where a self-governing First Nation comes under the Act, (i.e., requests and is scheduled under the Act in accordance with the Act and the regulations to be developed under section 141). For First Nations with existing modern treaties where the self-governing powers are already constitutionally protected it is going to be more complicated. They are being advised that they will have to amend their treaties. Whether or not this is actually required remains to be seen as other options are being considered.

<u>Recommendations</u>

It is recommended that Canada issue a policy directive respecting the FNFA and the application of the FNFMA post-treaty including recommended language that can be included in agreements (AIP and Final) respecting the specific creditor rights of the FNFA, the intervention powers of the FMB, and to ensure generally the paramountcy of the FNFMA.

It is recommended that the FNFA and other fiscal institutions reengage with federal officials to develop generic s.141 self-government regulations on the assumption that all future modern land claims (treaty) agreements (AIP and Final) will include the requisite paramountcy provisions respecting the FNFMA.

It is recommended that the FNFA and other fiscal institutions reengage with Federal officials and those First Nations with existing modern land claims (treaty) agreements where there are outstanding issues of paramountcy in order to explore options and solutions and to develop specific section 141 regulations for those First Nations.

PART TWO

Expanding the Revenue Streams Available to Secure Financing through the FNFA

2.1 The Case for Expanded Revenues

In addition to ensuring that all First Nations have the opportunity to use the FNFA regardless of where they are on the governance continuum, there are a number of ways that the FNFA could be made more effective at meeting the needs of First Nations today. The most obvious way is by ensuring that all stable revenue streams that are available to First Nations can be used to secure loans through the FNFA. In addition to helping First Nations, this would increase the business for the FNFA, reduce funding pressures on Canada, and generally help strengthen the credit of the FNFA through diversification. It would also mean that well run First Nations that today might not have any interest in using the FNFA or coming under the FNFMA because they currently do have any revenues that can be used to secure loans, would have an interest in joining the FNFA. This is also good for diversification and the credit rating.

There are already a number of revenue streams available to secure loans through the FNFA. In addition to property taxes collected under the FNFMA there are revenues from many other sources listed in the *Financing Secured by Other Revenues Regulations* (SOR/2011-201) made under the FNFMA (please see Appendix B for a list). In addition to these revenue streams there are other sources of revenue that should be available to secure loans through the FNFA but for a number of reasons are currently not available. Three other important areas for increasing leverageable revenue generation through the FNFA are considered in this Part. These are: 1) Federal Capital Contributions 2) Indian Moneys, and 3) the First Nations Goods and Services Tax.

For each of these sources of revenue a brief description of the source is provided with a discussion of any policy issues or questions that may need to be resolved prior to the funds being made available for securing loans through the FNFA. A number of recommendations for further research and action are made with respect to next steps. For all three sources of revenue, action should be undertaken as a matter of priority to ensure these funds are available to secure loans through the FNFA.

2.2 Federal Capital Contributions

Perhaps, the most obvious source of stable revenue for all First Nations are the federal transfers First Nations receive notwithstanding the fact that they are subject to parliamentary appropriations. Increasingly these are multi-year agreements and could easily be used as security. In fact, currently under the *Financing Secured by*

Other Revenues Regulations, a Borrowing Member is permitted to use federal transfers if the agreement governing the transfer specifically permits such a use and if any other applicable conditions are satisfied. The problem is most federal funding agreements do not permit this use. To permit this use would require changes to federal policy and funding agreements.

The ability to leverage federal funding for capital would allow for the construction of much needed infrastructure today and remove pressure from the existing federal programs that provide funds for capital purposes to First Nations. In fact, it could be a game changer for reserves as is discussed below. Before discussing how leveraging federal capital funds might work it is useful to have an appreciation of the current federal capital programs and the inability of these programs to meet the needs of First Nations.

Today there are a number of federal programs that provide money to First Nations to build infrastructure. The central federal program administered by AANDC is the Capital Facilities and Maintenance Program (CFMP). This program's funding, which totals approximately $1B per year, is invested in four main areas: 1) housing 2) education 3) water and wastewater systems, and 4) other infrastructure such as roads and bridges, fire protection, electrification and community facilities. [27]

The main objectives of the CFMP are to make investments that:

- maximize the life cycle of physical assets;
- mitigate health and safety risks;
- ensure assets meet applicable codes and standards; and
- ensure assets are managed in a cost-effective and efficient manner.

The program has three funding streams; 1) operations and maintenance (O&M) 2) minor capital (for projects under $1.5M), and 3) major capital (for projects over $1.5M).

Major capital projects are subject to AANDC's national priority ranking framework. The framework's priorities are:

- protection of health and safety and assets (assets require upgrading or replacement to meet appropriate standards);
- health and safety improvements (upgrades of existing assets, new construction/acquisition projects to mitigate an identified significant risk to health and safety);
- recapitalization/major maintenance (extend the useful operating life of a facility or asset, or maintain the original service level of the asset); and
- growth (anticipated community growth requiring new housing, roads, schools, community buildings, etc.).

The CFMP's funding is managed through regional five-year capital plans, which list

[27] Protocol for AANDC-Funded Infrastructure (Listing of Statutes, Regulations, Policies, Codes, Directives, Standards, Protocols, Specifications, Guidelines, and Procedures applicable under the Capital Facilities and Maintenance Program) October 10, 2014

specific projects each region plans to undertake, subject to the availability of funding. It is made up of projects identified by First Nations in their capital plans and other specific projects that First Nations identify on an ongoing basis. AANDC has established a National Capital Management Board and a number of Regional Investment Management Boards to oversee CFMP investments.

AANDC prioritizes spending to direct resources where they are deemed needed most. This requires reviewing capital budgets on an ongoing basis to ensure that health and safety concerns are addressed first within available funding levels.

In addition to the CFMP, from time-to-time the federal government announces specific programs to meet capital backlogs. These funds are usually available to all First Nations under a number of programs with different rules for participation.[28] AANDC admits its CFMP program has been under considerable pressure for many years. These pressures are described as:

- rising construction costs, particularly in Western Canada;
- rising fuel costs, driving project costs and operations costs
- increasing operations and maintenance costs, which require a larger share of program funding;
- premature rust-out of assets, often due to a lack of regular maintenance and limited local capacity to operate; and
- infrastructure funding diverted to cover price and volume increases in social and education costs.

This has not been helped by the fact the CFMP has also been capped at 2% annually. Accordingly, there is always a constant over-programming by the regional AANDC offices. Assessing the best way to respond to these pressures, and most effectively allocate limited resources means making difficult decisions and where not all the demand can be met. As a result many important and critical projects are deferred due to the need to fund projects with even greater health and safety impacts. These are, of course, never easy decisions to make. In truth, the CFMP and catch up programs have never been sufficient to meet the infrastructure needs of First Nations. While it is relatively easy to calculate how much money is available to First Nation though federal transfers it is not so easy to calculate with any great precision the demand or

[28] For example, the First Nations Infrastructure Fund in operation between 2007 and 2013 provided $234 million through a single-window approach to access funding for on-reserve infrastructure on-reserve. Starting in 2014-2015, the First Nation Infrastructure Fund is providing $155 million over a further ten years from the New Building Canada Fund and approximately $139 million over five years from the Gas Tax Fund to fund roads and bridges, internet connectivity, solid waste management, energy systems, planning and skills development, and disaster mitigation. Through the federal government's Economic Action Plan 2012, a commitment of $175 million was made over three years for new school projects, renovations and upgrades to existing schools, and in support of innovative and cost-efficient school projects. New funding to build and renovate schools was confirmed in Economic Action Plan 2014 with $500 million over seven years beginning in 2015-16 for a new Education Infrastructure Fund, continuing the investments in school infrastructure announced in the 2012 Economic Action Plan. The Economic Action Plan 2014 continues the First Nations Water and Wastewater Action Plan with an investment of $323.4 million over two years to improve water and waste water infrastructure in First Nation communities.

real need for infrastructure in communities; suffice to say it is significantly higher than the transfers available.

The AFN has tried to calculate the real needs in First Nation infrastructure and quantify the cost of that need in its annual pre-budget submissions to Parliament.[29] In its 2014 pre-budget submission with respect to housing between 2010 and 2034 the AFN estimates there will be a housing shortfall of approximately 130,000 units, which combined with renovations and replacements, will require nearly $1B a year to service. While not all of this housing will be social housing (i.e., private homeownership on-reserve is increasing) there will be a significant cost to government (both First Nation and federal). With respect to water treatment an investment of approximately $4.7B is estimated to be required. The AFN also referenced a study conducted in 2006 by AANDC that identified a $15.2B to $25.6B investment requirement for First Nations major assets typically eligible for AANDC support over the next 5 to 15 years.[30] For the basic needs, according to the AFN, the amount provided has fallen short of these projections by more than $500M annually. Therefore, the AFN recommends that an additional $500M per year, for the next ten years, be provided to First Nation communities to address the backlog in First Nations community infrastructure. It should be noted that these estimates do not include investments in infrastructure geared directly to promoting economic development and growth.

Policy makers need to consider creative ways to get more money for capital purposes into First Nation communities today that will meet the infrastructure backlog as well as stimulate local economies. This needs to happen as quickly as possible. Canada could, of course, simply meet the capital needs by increasing federal transfers, which most First Nations would no doubt argue is the best option for them. Given this is unlikely, Canada should budget what available funds it can and explore ways to make the appropriations go further in order to build more infrastructure today. Policy makers should consider alternatives to the current AANDC practice to provide transfers to First Nations for infrastructure on a "pay-as-you-go" basis. That is, in accordance with federal policy, infrastructure is currently paid for in cash as determined by relative need and other factors as described above.[31] Paying as you go only achieves a limited number of infrastructure projects per year for a handful of First Nations. As each year passes the costs of building the infrastructure that was not built previously increases due to inflation (e.g., labour and materials etc.). Meanwhile the gap continues to grow with the accumulative social and economic impacts on communities.

Generally, other levels of government and in particular local (small) governments will attempt to finance the cost of an infrastructure asset over the course of its useful life.

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[29] 2014 Pre-Budget Submission, Manitoba Regional Chief Bill Traverse, *National Portfolio holder for Housing and Infrastructure.*

[30] Study commissioned by AANDC and released in 2006 and titled *Building Futures: A Review of First Nation Infrastructure Requirements and INAC's Capital Facilities and Maintenance Program.*

[31] While Canada "pays as it goes", in some cases there are still insufficient monies for the capital project being supported. Consequently some First Nations are supplementing the federal funds with their own funds including, to the extent they can, borrowed funds secured using other revenue sources.

First Nations have not had this option until recently. The FNFMA has opened the door for First Nations to obtain long-term financing through the FNFA pooled borrowing program. However, FNFA financing is currently not an immediate option for many First Nations seeking to improve their community's infrastructure, as the FNFA debt must be supported by an existing own source revenue stream that many First Nations may not possess. Using federal transfer is an obvious solution. While Canada does from time-to-time offer programs that require different levels of governments to cost share infrastructure projects (typically one third local government, one third provincial and one third federal) there is currently no program in Canada that would take federal funding allocated to First Nations for capital each year and lever that money to build considerably more infrastructure and close the infrastructure gap.

Perhaps more than any other single action, permitting federal funds allocated for capital to be monetized, could significantly transform life on-reserve. Assuming First Nations are well governed, there would be an obvious and immediate social and economic impact to ensure across the board safe drinking water, homes, schools, as well as infrastructure investments that support economic development. For this to happen would require political commitment from Canada and a need to be creative in developing new financing models and programs that would be designed in partnership with First Nations and First Nation fiscal institutions.

For its part the FNFA has been proposing such a program for a number of years and this work should be built upon.[32] The FNFA believes that an opportunity exists to monetize annual federal funding for on-reserve infrastructure by using the capital-financing regime established by the FNFMA that could result in a multiplier effect approaching 20 times. By developing a new financing program through the FNFA, the federal government could significantly reduce the backlog of First Nations' projects waiting for funding. To give an idea of what monetizing a stream of annual funding could produce, an illustrative example is provided in the table below.

Table 1 - Monetizing annual capital funding using the FNFA's calculator

Program	Funding Source	Annual Amount	Monetized 10 years	Monetized 30 years
Housing component of CFMP	AANDC	$150M	$1,101M	$2,353M
Housing component of CFMP & CMHC	AANDC, CMHC	$300M	$2,202M	$4,706M
Total CFMP budget	AANDC	$1,000M	$7,338M	$15,686M

Source: AANDC, FNFA (see http://www.fnfa.ca/en/calculators/other-revenues-calculator/)

The example takes the approximate amount of three annual federal funding sources

[32] See for example, "A Proposal for Infrastructure Financing Though Monetization of a Portion of AAND's Capital Funds" (FNFA, April 2012) and most recently the presentation made by the FNFA to the House of Commons Standing Committee on Aboriginal Affairs, March 12, 2015.

pertaining to on-reserve infrastructure, and monetizes each of them over 10 years and 30 years using the rates and calculator on the FNFA website.

There are a number of different ways levering the various federal appropriations for First Nation's capital expenditures might work in practice. The options should be explored further and developed. For example, with respect to any small annual grants that are made to bands for capital and that are not proposal based, a simple change to the federal policy could ensure that First Nations can securitize these funds to build projects based on local priorities. This would be done through the existing FNFA structures and as part of the FNFA's current financing process.

For most small First Nations (e.g., 100-1,000 members), it is understood by the author that the annual amounts they receive for minor capital (i.e., not out of the CFMP) are typically less than a hundred thousand dollars (if that) and even for larger communities (e.g., 1,000-5,000) it is not much more. This is simply not enough to actually build any significant project in the year the money is received. However, by simply allowing these funds to be used as security could open up many more opportunities for First Nations. In many cases First Nation may not even require any greater debt service for the project than the federal contribution itself but if it does this additional debt service could, in theory, be met through the use of a First Nation's own source revenues (e.g., property taxes, fees and charges etc.). In order to demonstrate the impact of this proposal and to test the concept further, it would be useful to analyze more closely the minor capital funding received by First Nations each year and determine how many First Nations could have, in fact, built more significant infrastructure had they been able to secure their annual (small) capital payments. For First Nations that are Borrowing Members or scheduled to the FNFMA this amount could be researched quite easily by the FNFA to determine the immediate impacts on borrowing capacity if these funds could be used as security though the FNFA.

In addition to simply allowing the minor capital grants to be used as security, AANDC should also consider developing, in partnership with the FNFA, a more substantial program that securitizes a portion of the capital monies that are conditional and currently allocated based on project proposals and priority. The funds for this project could come from a portion of the CFMP that is currently allocated for major projects on a project priority basis, or from a separate appropriation. Politically, and given the demand, perhaps a new program established with its own specific appropriation over a specified period of time (e.g., 10-15 years) would be the most well received? Certainly it would be less likely to be seen by First Nations as the government shirking its responsibility to provide adequate funds.

Exploring the options and the designing of any new major capital program would require a considerable amount of work and research into best practices and models. Simply stated the concept would be that the FNFA would monetize the annual cash flows appropriated by Canada through a Special Purpose Vehicle (SPV)/FNFA sponsored debenture to create the much larger pool of funds that can be allocated to many more First Nations starting in year one. This larger pool would enable more First Nations to build projects today at today's construction costs, not tomorrow's

inflated costs.

For example, taking a modest $150M in secured capital transfers over ten years through the FNFA would result in $1.1B investment and if over 30 years a $2.4 B investment in infrastructure. Raise that amount of transfer to $1B in funding and the numbers are a staggering $7.3B and $15.7B respectfully. This would close the infrastructure gap significantly by quickly building much needed schools, roads, and water and wastewater systems.

One of the benefits of exploring the option of a separate SPV/FNFA sponsored debenture for a new major capital program would be the ability to create a distinct borrowing program through the FNFA that is separate and apart from the more general financing program that the FNFA is currently running. As a stand-alone product the SPV/FNFA debenture would have its own credit rating and this rating would reflect the risk of the underlying source of the cash flows, namely Canada. Accordingly, the rating for the issue would be higher than the rating for the inaugural FNFA debenture given Canada's stronger credit rating. Having a separate credit rating is important because it would reduce the cost of borrowing even further. Also, in part, it would answer the question why the federal government does not simply appropriate or borrow the needed money for building infrastructure in First Nations itself rather than monetizing appropriations through the FNFA. After all the federal government can borrow at lower rates than the FNFA being an AAA credit and not A-. This is an important policy consideration, notwithstanding the fact that the federal government may simply not want any new debt on its books which monetization through the FNFA would ensure.

It is assumed that First Nations having access to this new capital program would be existing or future Borrowing Members of the FNFA and have met all the requirements to borrow through the FNFA. This is clearly within the FNFMA mandate and is obviously desirable on many fronts. Being a part of the new major capital program would ensure that the participating First Nations are brought into the system of institutional support provided through the FNFMA that provides guidance to establish and maintain a viable financial framework. The application of FMB standards that address capital project management, reporting and tendering etc. would provide for good governance with respect to any capital projects funded under the new program. Further, strengthened internal governance paves the way for better information sharing and improved planning that will assist the governing bodies of First Nations and inform better decision-making and financial performance.

The architects of a new major AANDC capital program that allows funds to be levered through the FNFA will have much to consider and this Paper is intended to simply stimulate discussion. For instance, how would projects for financing be chosen? Would the existing mechanisms in place through AANDC be used and or adapted? Would the same project criteria be followed? Would all First Nations still be eligible to receive full grants under the CFMP when they are a "priority", as well as having access to funds for projects that are financed through the FNFA? Or perhaps the new program would be completely separate from AANDC and managed through another department or perhaps the fiscal institutions? Perhaps the program could be funded

through Infrastructure Canada? How these questions and others are answered will have political as well as economic consequences and any new program should be coordinated and understood in light of all other capital programs that are provided to First Nations or sponsored by Canada.

Finally, it should be noted that interestingly Budget 2015 included a federal commitment to consider developing a similar model of financing to support provinces and local government with respect to public transit.[33] Assuming that this approach is now something being considered for other levels of government in Canada it would make sense to consider it for First Nations where arguably the need is greatest.

Recommendations

It is recommended that AANDC should permit annual contributions for (minor) capital to be secured through the FNFA and to make the necessary changes to policy and amend financial contribution agreements accordingly.

It is recommended that the FNFA and AANDC develop a new major capital program for First Nations where annual federal appropriations are monetized through the FNFA.

2.3 Indian Moneys

The concept of "Indian Moneys" is one of those lingering anachronisms of the *Indian Act* system. The *Indian Act* requires the Crown to collect and administer Indian Moneys because the law and associated policy assumes that Indians are not capable of administering or managing these moneys themselves. The *Indian Act* defines Indian Moneys as, "all moneys collected, received or held by Her Majesty for the use and benefit of Indian or Bands." According to the Public Accounts of Canada there was $833,254,211 of "Indian Money" in the federal Consolidated Revenue Fund (CRF) at March 31, 2014. Of this $635,248,632 was what is referred to as "capital" moneys and $198,005,579 was "revenue" moneys (please see Appendix C for a breakdown).

At the outset, it must be said that the whole concept of Indian Moneys in today's world is, of course, wrong and as soon as the paternalistic classification of Indian

[33] The 2015 federal budget provides that: "Under the new Public Transit Fund, federal support will be allocated based on merit to projects that will be delivered through alternative financing and funding mechanisms involving the private sector that demonstrate value for money for taxpayers, including P3s. The Government will adopt a flexible approach to delivering payments under the proposed new Fund. As appropriate, the Government will consider providing payments over an extended period of time, for example, over the useful life of the public transit assets or over the typical term of provincial or municipal debt issued to finance construction costs. This approach will provide a predictable stream of payments over several years that provinces and municipalities can borrow against, providing greater financial flexibility to raise sufficient funds to move forward with greater infrastructure investments in the short term… This approach allows more federal funding to be available to support more public transit projects." (*Economic Action Plan 2015*, tabled in the House of Commons by the Honourable Joe Oliver, P.C., M.P., Minister of Finance, April 21, 2015 page 189)

Moneys is gone the better. Having said this, in recent times, both in accordance with the *Indian Act* and through sectoral governance initiatives and comprehensive governance arrangements, there are, thankfully, now a number of ways for First Nations to gain control of their own money. Many reports and studies have recommend ways to remove federal control of Indian Moneys and significant steps have already been taken from which we can learn and build. The Courts have also been asked to weigh in as First Nations have challenged the Crown on its management of Indian Moneys.[34]

Generally speaking as First Nations move along the governance continuum they gain increased control of their Indian Moneys. Until they do Canada remains responsible for them. Today, in fact, most First Nations to some degree or other control some of their Indian Moneys. However, the ideal situation would be to remove completely any role for the federal government in their administration and this must remain the ultimate objective of any policy.

Recently, both AANDC and the FNFA have been considering how Indian Moneys that are not already in the control of a First Nation could be used to secure loans through the FNFA.[35] Indian Moneys that are already in the control of First Nations that are Borrowing Members of the FNFA (which at this point is restricted to "revenue" moneys), can, and are already, being secured. Before discussing and considering the options and further work to be undertaken to expand the use of Indian Moneys to secure loans made through the FNFA, it is necessary to have an understanding of how the current mechanisms in place respecting Indian Moneys work.

Pursuant to sections 18(2), 28(2), 35(1), 37(1), 38(1), 39, 61 to 69 and 104 of the *Indian Act* the Minister of AANDC is responsible for Indian Moneys. AANDC policy with respect to this function is set out in the "Manual for the Administration of Band Moneys"[36] (Manual). Section 62 of the *Indian Act* divides Indian Moneys into the two categories, "capital" and "revenue". Capital moneys are derived from the sale of surrendered lands or the sale of the capital assets of a First Nation. These moneys include royalties, bonus payments and other proceeds from the sale of timber, oil, gas, gravel or any other non-renewable resource. Revenue moneys are all Indian moneys that are not capital moneys. They are derived from a variety of sources, including, but not limited to, the interest earned on band capital and revenue moneys, fine moneys, proceeds from the sale of renewable resources (e.g., crops), leasing activities (e.g., for residential development or agricultural purposes) and other commercial ventures. Band capital and revenue moneys are considered public moneys, not appropriated by Parliament, and are held by the Crown within the Consolidated Revenue Fund (CRF)

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[34] See *Ermineskin Indian Band and Nation v.* Canada, 2009 SCC 9, in which the Supreme Court of Canada determined that the Crown had not breeched its fiduciary duties to the Ermineskin and Samson Cree Nations in managing and investing their Indian Moneys and provided some guidance respecting the transfer of Indian Moneys to a First Nation.

[35] "Potential Economic Benefits of Indian Money", AANDC Lands and Economic Development, Policy and Coordination Branch, 2014 (NVR#6998000–v3). FNFA presentation to the Senate Standing Committee on Aboriginal Peoples, March 12, 2015.

[36] Indian Moneys, Estates and Treaty Annuities (IMETA), Estates and Treaty Annuities (IMETA), Individual Affairs Branch, Resolution and Individual Affairs Sector, AANDC, 2012.

on behalf of First Nations.[37]

The CRF is the single fund used to receive all moneys collected by Canada. Capital and revenue moneys are held in separate interest-bearing accounts under the name of the particular band concerned. AANDC generally maintains one capital account and one revenue account per band (approximately 1,400 accounts in total). Band capital and revenue moneys earn a rate of return (interest rate) set by the Governor-in-Council through Order-in-Council.[38] Interest rates are based on Government of Canada bonds having a maturity of ten years or over, using the weekly yields published by the Bank of Canada. Based on the month-end balances in the First Nation's account, interest is calculated quarterly, compounded semi-annually and deposited every six months (April and October) into the First Nation's revenue account. The fund is currently earning approximately 2.5% a year.

Under Section 66 of the *Indian Act*, subject to consent of the band council, revenue moneys may be spent for any purpose that will promote the general progress and welfare of the band or any member of the band (66(1)) or to assist sick, disabled, aged or destitute Indians and for the burial of deceased indigent members of the band (66(2)). Furthermore, revenue moneys may be spent for a number of reasons, without consent of the band council, including the destruction of insects or pests, to address the potential spread of disease, to provide for premise (building) inspections, to prevent overcrowding of housing, to provide sanitary conditions and to construct and maintain boundary fences. However, spending by Canada without band council consent is rarely now, if ever, exercised.

Today it is relatively easy for bands to access their revenue moneys compared to capital moneys and as stated above a number of First Nations are already using these moneys to secure loans through the FNFA. The way most First Nations are currently gaining control over the management and expenditure of their revenue moneys is pursuant to section 69 of the *Indian Act.* Through this method, a band must obtain consent from their membership, which is evidenced through a resolution of council (BCR). The BCR is forwarded to AANDC for review. If all conditions are met and AANDC approves in accordance with its policy, an Order-in-Council is prepared for signature by the Governor General. This is a relatively simple process.

In addition to section 69 of the *Indian Act*, First Nations can gain control of their revenue moneys in three other ways. First, signatories to the Framework Agreement on First Nation Land Management with land codes in effect gain control of their revenue moneys (but not capital moneys) automatically.[39] Second, First Nations that have entered into a self-government agreement (whether as part of a modern treaty

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[37] 62. All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.

[38] The method for determining the interest rate currently payable on Band accounts is pursuant to OIC (P.C. 1981-3/255) dated April 1, 1980.

[39] 12.8 Once a First Nation's land code takes effect, all revenue moneys collected, received or held by Canada for the use and benefit of the First Nation or its members before that date, and from time to time thereafter, shall cease to be Indian moneys under the *Indian Act*, except for the purposes of paragraph 90(1)(a) and shall be transferred by Canada to the First Nation.

or not) gain control (both for revenue and capital moneys) as a matter of course. The third and final way is for a First Nation to opt under the *First Nations Indian Oil and Gas and Moneys Management Act* (FNOGMMA). This option is discussed further below.

Of those First Nations that are scheduled to the FNFMA 126 have access to Indian Moneys (see Appendix A for a breakdown of those First Nations). For the purpose of this Discussion Paper it was not determined how many of the FNFA's Borrowing Members currently have control of their revenue moneys and this should be researched. As a matter of course, the FNFA should be inquiring if First Nations have control of their revenue monies and, if not, strongly encourage it. If there are any Borrowing Members or First Nations currently looking to become Borrowing Members that do not currently have control over their revenue moneys the FNFA and Canada could look to assist them. Finally, with respect to revenue moneys it does not make sense for Canada to spend a lot of time developing new policies that facilitate the use of these revenues to service FNFA debt. Rather it is much better to focus on simply getting the revenue moneys into the control of all First Nations by using section 69 or other existing mechanisms. Having said this, the option to transfer control of all capital moneys to First Nation that are scheduled to the FSMA as set out below would also include the transfer and control of revenue moneys for those First Nations that do not already have control of their revenue moneys.

Gaining control of capital moneys, however, is a different story. Capital moneys are more strictly regulated by Canada and consequently more problematic to transfer. There is no express provision in the *Indian Act* that can give First Nations control over their capital moneys similar to those found in section 69 permitting band control over their revenue moneys. Accordingly, and until the recent policy initiative of AANDC to increase First Nation control of their capital moneys under 64(1)(k) of the *Indian Act* (which is discussed below and should be of interest to the FNFA), the only way a First Nation could gain control of its capital moneys (short of perhaps going to court and winning a rights case) was through entering into a self-government agreement with Canada or coming under the *First Nations Oil and Gas and Moneys Management Act* (FNOGMMA).

FNOGMMA came into force in 2005 and was the result of an initiative led by First Nations with oil and gas interests on their reserve lands. These First Nations were predominately from Alberta. The Act provides that a First Nation can make a code with respect to oil and gas and thereby remove itself from the application of the *Indian Oil and Gas Act*, which is the oil and gas equivalent of the *Indian Act*. FNOGMMA also supports a First Nation in taking control of its Indian moneys, either as a part of an oil and gas regime or independently. It is important to stress this point as some people may be under the impression that the Indian moneys part of the Act is tied to an exercise of jurisdiction under the oil and gas part. This is not the case and a First Nation can take control of its Indian Moneys without exercising jurisdiction over oil and gas.

Under FNOGMMA, in order to have control over Indian Moneys (both revenue and capital), a First Nation must first satisfy AANDC that it has appropriate financial management practices in place. Criteria for transfer of control include the First

Nation developing a financial code that is approved by a vote of the members. Note that this is different from a FAL under the FNFMA and is not a law. The code must set out:

- how the moneys transferred from Canada will be held (i.e., either by deposit in an account with a financial institution or paid into a trust, of which the First Nation is the settlor and sole beneficiary) and prescribing the conditions governing future changes from one mode to the other;
- the way moneys held by the First Nation in the account or received by it from the trust are expended;
- the accountability of council to the members for the expenditure of the moneys transferred;
- the procedures for disclosing and addressing conflicts of interest involving; council members and First Nation employees in the expenditure of moneys transferred; and
- how the code is amended.

A First Nation community must ratify both the financial code and the First Nation's decision to opt into FNOGMMA. As of March 2014, the Kawacatoose First Nation in Saskatchewan became the first and only band to opt into the FNOGMMA program. Part of the reasons for why this initiative has not been all that successful has to do with the complexity of the Act and the process for opting into the regime so created. This is discussed below.

As with revenue moneys the rules for the management of capital moneys are found in the *Indian Act* and associated federal policy set out in the Manual. Permitted expenditures of capital moneys are set out in section 64(1) of the *Indian Act* and include: per capita distributions, construction and maintenance of roads, bridges, water courses and boundary fences; the purchase of additional reserve land or interest in land on behalf of a band member; purchase of livestock and farm equipment; construction and maintenance of permanent improvements and works; providing loans; land and property management expenses; construction and financing of housing; and any other purpose approved by the Minister.[40] Approval of

[40] **64 (1) Expenditure of capital moneys with consent**
With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band
(*a*) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;
(*b*) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;
(*c*) to construct and maintain outer boundary fences on reserves;
(*d*) to purchase land for use by the band as a reserve or as an addition to a reserve;
(*e*) to purchase for the band the interest of a member of the band in lands on a reserve;
(*f*) to purchase livestock and farm implements, farm equipment or machinery for the band;
(*g*) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;
(*h*) to make to members of the band, for the purpose of promoting the welfare of the band, loans not

expenditures under sections 64, 66 and 69 has been largely delegated to the regions, however, capital expenditures under Section 64 (1)(d) and (k) must be approved by the Minister. Section 64(1)(k) is a very broad power that allows the Minister to allocate moneys, "for any other purpose that in the opinion of the Minister is for the benefit of the band." What "for the benefit of the band" means is key in the ongoing discussions around transferring Indian Moneys in whole or in part to a First Nation.

The process to access capital moneys as with revenue moneys requires a First Nation to submit a formal request to AANDC by way of a BCR. This is then followed by an AANDC departmental assessment. An initial review of the BCR examines the benefit to members of the band by looking at: proposed costs, impact on account balance and alternative sources of income; socio-economic impacts such as dependence on existing programs and services such as social assistance; possible environmental impacts; legal and other implications; and the annual operating budget where applicable.

For all capital moneys (and for section 69 revenue expenditures where a First Nation is not in control of its revenue moneys), supporting documentation must be provided for capital expenditures requested by a band to enable federal officials to make an informed decision on the merits of an expenditure request. Requirements vary depending on the specific purpose and nature of the request. For certain types of projects (i.e., the construction of community buildings), moneys may be periodically released from the federal account held for the band according to a cash flow statement and/or a specified work schedule. This is to ensure that predetermined works are completed before any further moneys are released.

For all Indian Moneys controlled by AANDC a cheque is issued pursuant to what has been requested and subsequently approved in the band's BCR. It is usually deposited directly into the band's bank account. For revenue expenditures to bands that do not have section 69 authority, the payment is made by AANDC either directly to the supplier or, to the band if the band has already incurred the expenses and has submitted copies of original negotiated cheques to AANDC for reimbursement.

The AANDC policy Manual sets out a number of "guiding principles" for the management for Indian Moneys that reflect the fact that these moneys are held "in

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exceeding one-half of the total value of

(i) the chattels owned by the borrower, and

(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession, and may charge interest and take security therefor;

(*i*) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

(*j*) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and

(*k*) for any other purpose that in the opinion of the Minister is for the benefit of the band.

(2) Expenditure of capital moneys in accordance with by-laws

The Minister may make expenditures out of the capital moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(*p.3*) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the capital moneys.

common" for all members of the band and should be used for the benefit of all its members. All current members of a band are deemed to have an interest in a band's capital and revenue moneys. Further, AANDC officials, whenever possible are encouraged to give consideration to use or conserve existing moneys in such a way as to benefit not only current members but also future generations. This includes determining whether any given expenditure will be for the general progress and welfare of the band and its members.

In this respect the purposes for which financing through the FNFA is undertaken are consistent with those of the *Indian Act* and the federal policy set out in the Manual regarding Indian Moneys. That is, the FNFA's mandate is to secure financing for its Borrowing Members so they can make investments in community that support the general welfare of the band. For example, the proceeds from FNFA loans are used to build infrastructure (e.g., water systems, roads, bridges, schools etc.) that will be of benefit to existing and future members and improve the quality of life on-reserve. FNFA financing also, of course, supports economic development, the success of which, will also contribute to the overall general welfare of the band. Not surprisingly the types of projects Borrowing Members are using the proceeds of FNFA debentures to build are precisely the types of permitted expenditures described in section 64 of the *Indian Act* and further described in the Manual.[41]

It should be noted that community projects that are built using Indian Moneys are not necessarily funded in total with those moneys. On the contrary, in many cases there are multiple sources of revenue and particularly for large projects. This can also include a financing component. For the purposes of this Discussion Paper, the extent of this practice has not be researched but could be explored further when considering

[41] The Manual describes in Chapter 7 – National Expenditure Request Procedure Guidelines– AADNC's interpretation of permitted capital expenditure's under section 64 of the *Indian Act*: Paragraph 64(1)(b) -Roads, Bridges, Ditches, Water Courses "to construct and maintain roads, bridges, ditches and watercourses on the reserves or on surrendered lands"; Applies to expenditures related to the construction and maintenance of roads, bridges, ditches and water courses located on reserves, or on surrendered lands. May provide for the following types of expenditure: construction: materials, labour, heavy equipment purchase or rental, consulting fees, engineering fees, etc.; and maintenance: minor and major repairs, snow ploughing, bush-cutting, painting, clearing, summer employment to cover removal of roadside garbage, etc. May authorize the purchase of heavy equipment when the equipment will be primarily used to construct or maintain roads, bridges, ditches and watercourses on reserve lands.
Paragraph 64(1)(g) -Permanent Improvements/Works "to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;" Provides for the construction and maintenance of permanent improvements or other works to buildings, central water and sewer systems, churches, lagoons, filtration plants, schools, day care centers, arenas, rural electrification, gasification, where appropriated capital funding is insufficient to cover total project costs. All activities must be on reserve or in connection with a reserve.
Paragraph 64(1)(k)- Any Other Expenditure "for any other purpose that in the opinion of the Minister is for the benefit of the band." Covers other expenditure purposes that benefit Bands. It may encompass the following types of expenditures: the purchase, start-up or operation of a business; loans or contributions made to or by corporations or enterprises owned by Bands; operating costs of a commercial farm (salaries, seed, hay, fertilizer, spraying, maintenance of equipment, insurance, etc.); the purchase of off-reserve lands not to be set aside as a reserve or as an addition to a reserve; legal costs related to some form of litigation which can include support of a specific claim by a Band; other items of a discretionary nature where "benefit" can be established including recreation, daycare and family services; and incurred debts when certain conditions are met.

new policy that might facilitate the use of Indian Moneys to secure FNFA financing or, indeed, any other type of financing.

Further, section 64 of the *Indian Act* does provide for the using of capital moneys for the making of loans to members for business and housing purposes. Section 64(1)(h) deals with loans to members for "promoting the welfare of the band" and 64(1)(j) for housing. Further, and under the broad "any other expenditure" power found in 64(1)(k), the Manual provides that where a band council is experiencing "financial difficulties or indebtedness situations" the band may request the expenditure of its capital moneys to reduce or eliminate their indebtedness.[42] Such expenditure requests require the Minister of AANDC's approval. While this policy may not be directly applicable to the FNFA it is instructive to the conversation about using capital moneys to secure loans through the FNFA. Namely, there is already an approach and policy that supports Indian Moneys being used to service debt and in a number of ways. The question is how to extend its use through to the FNFA in an efficient and acceptable manner. To help this conversation it is useful to look at the recommendations of the internal 2013 AANDC audit of the Indian Moneys program[43] and the policy work that followed.

The audit made a number of important recommendations that look to open up access by First Nations to their Indian Moneys.[44] In 2014 following the audit and presumably guided by the Supreme Court case in Ermineskin[45] and any internal legal opinions,

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[42] Chapter 7, K. 2.0 Band Indebtedness: "The Minister will consider the expenditure of Band capital trust moneys to offset any incurred debt under section 64(1)(k) when satisfied that all of the following conditions are met:

- cause of the debt is explained;
- the expenditure is consistent with any RMP;
- the use of Band moneys is the most appropriate alternative for funding the debt;
- the membership of the Band is made aware of the debt and does not formally oppose to the use of trust funds to pay the debt in full or make payments towards the debt balance.

[43] Final Report, Evaluation of Indian Moneys, Estates and Treaty Annuities, Project Number: 1570-7/11003, April 2013 Evaluation, Performance Measurement, and Review Branch Audit and Evaluation Sector.

[44] *Recommendation #1:* Explore the development of a workable alternative to Band Moneys that would provide First Nations access to funds in the Consolidated Revenue Funds outside the constraints of the *Indian Act* and present proposed alternative to the Strategic Policy Committee.
Recommendation #2: Any changes to Band Moneys and alternatives be designed to increase the transparency of Band Moneys expenditures to members, better support access to capital for economic development and promote greater self-sufficiency.
Recommendation #3: That AANDC revise the Manual for the Administration of Band Moneys to reflect current policy and modern practices.

[45] "While the *Indian Act* provided for the transfer of capital moneys to the bands themselves or to an independent trust, the Court determines that the Crown had to be satisfied that such transfer was in the best interests of the bands. While the Crown was supportive such transfer to the Samson Nation, evidence showed that for various reasons, including the failure by the band to provide adequate financial plans and band support and conflicts within the band council, the Crown was unable to assure itself that such transfer would have been in the band's best interests. In the case of Ermineskin, negotiations took place on such transfer but failed given the Crown's request for a full release of their obligations following a potential transfer. On this aspect, the Court notes that the Crown could not be expected to remain responsible for the funds over which it would no longer have control and, in the absence of such release, the Crown could not be expected to transfer the funds from the CRF to Ermineskin." (case statement by Gowling, Lafleur, Henderson LLP Found at
http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=1840&lang=0&bp=f

AANDC released a draft transfer policy that is intended to facilitate the transfer of capital monies using the discretion afforded the Minister under section 64(1)(k) of the *Indian Act.*[46] This section, as mentioned above, permits capital moneys to be used for any other purpose that in the opinion of the Minister is "for the benefit of the band". This section, as also previously mentioned, has already been used to support the retiring of debt. The new 64(1)(k) transfer policy can be viewed as an alternative to the FNOGMMA route although there are parallel policy approaches being taken in both.

Like FNOGMMA, the 64(1)(k) transfer policy requires that a band must set up a "trust" through a "trust deed" to transfer and receive the capital moneys. Further, like FNOGMMA, the members of the band must approve the transfer through a referendum. Prior to the referendum the band must submit a proposal to AANDC, which AANDC will review against the policy. Central to this policy is the Crown receiving a release from the band for whatever happens with the moneys once transferred. Once the members ratify the deal the band's moneys are transferred from the CRF and deposited into a trust account of the band in a Canadian bank or trust company.

During 2014, Canada underwent a consultation process on its proposed 64(1)(k) policy. The National Aboriginal Economic Development Board (NEADB) responded[47] and suggested that the policy does not go far enough and argued that essentially the Crown should simply relinquish control of these moneys to First Nations with no conditions attached. The NAEDB went on to say that whether to establish a trust or not should be a First Nations own decision. The Board also took issue with the level of community consent required and made comparisons with FNOGMMA and considered some of the reasons for the lack of First Nation uptake with FNOGMMA. While somewhat critical the NAEDB, nevertheless viewed the policy as a "partial solution" and said it "represents a positive but limited step forward".

While the FNFA did not make a submission in respect of the new 64(1)(k) transfer policy, logic would dictate that one mechanism for potentially using capital moneys to support public financing through the FNFA would be to develop appropriate policy also using section 64(1)(k). This policy could provide for the use of the capital itself or conceivably, where the capital is used as a form of credit enhancement or monetized. Alternatively, the income (interest) earned on the funds (whether inside a trust or otherwise) could be used to service debt. It is not clear if this would be a separate option, as presumably the income on the capital funds is already treated as revenue moneys? This needs to be explored further. In any case a number of options could be considered and developed and further research and discussion is warranted.

In terms of having financial management rules in place to receive funds, First Nations that are scheduled under the FSMA already have in place sound financial management

[46] Draft Policy on the Transfer of Capital Moneys though section 64(1)(k) of the *Indian Act,* May 5, 2014.

[47] Letter from Chief Clarence Louie to the Honourable Bernard Valcourt, October 8, 2014.

systems governed by their FAL and managed in accordance with FMB standards.[48] Accordingly, Canada could simply make a policy that a First Nation that is scheduled under the FSMA and has a FAL in place may request control of their capital, and where not already transferred, revenue accounts. The FMB standards and template FAL provides guidelines and structure for administering trust funds as well as ensuring a robust system of financial management that should satisfy Canada that a First Nation has in place adequate financial control before transferring Indian Moneys. This includes the need to protect the assets of the First Nation, to ensure annual budgets with disclosure of those budgets to members, conflict of interest rules ,and the establishment of an audit committee, among other mechanisms. This would, in truth, probably be superior to the policy approach taken in either FNOGMMA or the new 64(1)(k) transfer policy, which does not have the rigor or institutional backing of the FSMA and does not require a First Nation to develop a FAL.

Another policy question that Canada would still need to consider is the question of a community vote before Indian Moneys are transferred. There is no requirement for a community referendum before a First Nation is scheduled under the FSMA. There are pros and cons to having a vote, notwithstanding that the current threshold levels in the FNOGMMA are arguably too high. It is not clear that always requiring a community vote is the best policy and in the best interest of the band when the objective is to ensure access to much needed moneys supported by good governance and sound financial management. What is always required, though, is adequate notice and the ability to protest the transfer for valid reason.

Further, the policy requirement to establish a trust to receive capital moneys may not always make sense, particularly in the post-*Indian Act* world. Using a trust structure where relatively small amounts of money are involved does not make sense given the administration costs. They are hard to justify. More importantly, where a First Nation has sound financial management systems in place as a government any perceived or actual need for a trust to protect and manage assets may have already been mitigated by the operation of the government and in particular through the operation of a FAL. While a First Nation may seek to establish a restricted account or legal trust for its capital moneys (perhaps combined with an existing mechanism that holds other revenues that have been set aside for a pre-determined purpose such as to hold a land claims settlement) the decision should be the First Nations. The key point here is that a First Nations should be determining the best way to hold and manage their assets, whether lands or, in this case, cash, and Canada should satisfy itself that the First Nation has the legal capacity and other tools to do so.

In addition to considering the options of further policy development under 64(1)(k) of the *Indian Act* to facilitate the use of Indian Moneys to secure debt through the FNFA, the options of amending the FNFMA and/or regulations or FNOGMMA should be seriously considered and acted upon. With respect to FNOGMMA, a decision should be made whether or not it is worth trying to fix the Act with respect to Indian Moneys. If the answer is yes, this would probably require amending the sections dealing with

[48] Copies of template laws, the FMB standards and template First Nation policies can be found on the FMB website, http://www.fnfmb.com.

trusts and community approval processes as well as potentially creating greater coordination with financial administration regimes established under other Acts, and specifically the FNFMA. If there remains First Nation support for FNOGMMA with communities seeing themselves specifically wanting to use the moneys part of the Bill (or need to because of wanting to draw down control over oil and gas under this Act), then these amendments should be explored. Otherwise it is probably not worth the effort given there are other better options. An improved Act, nevertheless, would help the FNFA as moneys administered under FNOGMMA are already permitted to be used as security by the FNFA under the FSMA. The problem is First Nations are not using FNOGMMA.

With respect to the FNFMA and regulations made under the Act, presumably there would be agreement that the regulatory framework established can be relied upon by Canada when transferring capital monies. Further, the FNFMA regime should be viewed as creating conditions in which a transfer can be made without requiring that the moneys be placed in a trust because the risk to the Crown is mitigated. Accordingly, when the next round of substantive legislative amendments to the FNFMA and regulations are made, provisions should be included to transfer, at their request, Indian Moneys to a First Nation that has a FAL in place and these monies should be available to secure financing through the FNFA as "other revenues". This option would no doubt garner considerable support from those First Nations that are currently scheduled to the FNFMA or are contemplating doing so. From a risk perspective Canada would need to satisfy itself that it has met its fiduciary responsibilities. The amended Act should make it clear that the Crown is no longer responsible for the funds once transferred, however, as with other governance initiatives, remains responsible for any decision made prior to the transfer. Further, and even without the need for a community vote under the FNFMA, it should also be clear under the Act that the transfer will occur only after proper notice has been given to members of the community with an opportunity to respond.

In addition to the amendments to the Act and/or Regulations, the question of whether or not an agreement with a First Nation respecting the transfer of capital monies is needed may get raised. Such an agreement would typically set out the amount to be transferred, that the Crown is no longer responsible for the moneys transferred and speak to the First Nation being responsible for them moving forward along with any other terms and conditions of the transfer. Such an agreement, however, may not be necessary if the amendments to the FNFMA address these matters. If not required legally having an agreement is not recommended, simply being an extra step. It should be noted that no agreement between a First Nation and the Crown with respect to coming under the FNFMA is presently required. It is assumed that the First Nation by making an informed decision to opt under the Act understands and agrees to the rules. This is evidenced by the BCR requesting scheduling and the subsequent steps involved in developing a FAL and, for
borrowing, becoming a Borrowing Member of the FNFA. This presumably would also be the case with respect to the transfer of Indian Moneys if a transfer is requested.

With respect to the financial potential of using Indian Moneys to secure loans through

the FNFA Canada has already undertaken some initial analysis.[49] This work should be tested and expanded. Based on data from 2006 to 2011 during which time approximately $250M of Indian money was deposited into the CRF annually, Canada calculates that this revenue could be leveraged into $1.7B of capital using the FNFA's pooled borrowing model. This estimate is based on a 30-year loan and First Nation revenues being classified by FNFA as "medium-risk".[50]

Moving forward, to predict what the immediate impact to the FNFA might be if federal policy/law were changed it would be useful to know exactly how much revenue and capital moneys are available to those First Nations that are already scheduled to the FNFMA as well as those that are Borrowing Members of the FNFA. Further, and with respect to individual First Nation accounts, it would be important to know more about the nature of the revenue sources, the predictability of the revenue streams and the amount of the income (interest) generated annually on any capital moneys held. As the moneys are held for the individual bands it is only the band that can request access to their Indian Money accounts. A request to AANDC has been made to begin collecting this information for the FNFA.[51]

In addition to the information supplied by AANDC, the FNFA may also wish to contact its Borrowing Members to confirm or determine that Member's capital moneys. Other than moneys transferred to a First Nation, this information is not discernable from band audits as Indian Moneys are federal moneys and held in the CRF and are not required to be reported on band accounts. At the same time the FNFA could discuss with its Borrowing Members whether they would support the transfer of their capital moneys from Canada to them and under what conditions/terms. This could include a discussion as to how they would hold their Indian Moneys and administer them (i.e., in a trust or otherwise depending on circumstance and preference) and whether they are interested in leveraging these moneys to secure financing through the FNFA.

In summary, with respect to either revenue or capital moneys and consistent with the NEDB approach, it would be best to transfer Indian Moneys to First Nations with limited or no conditions after which time they become an asset of the First Nation to be managed as the First Nation sees fit. In all cases this would improve the financial position and liquidity of the First Nation and in those cases where a First Nation is a Borrowing Member of the FNFA these moneys would help strengthen the credit of the FNFA. It some cases these First Nations might use the funds to build or help pay for projects that are in part financed using other revenues through the FNFA. In other cases, where the principal of the former Indian Moneys is held in trust or an otherwise restricted fund, the income (interest) might be used to service FNFA debt while the capital is kept intact.

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[49] "Potential Economic Benefits of Indian Money", AANDC Lands and Economic Development, Policy and Coordination Branch, 2014 (NVR#6998000 –v3).

[50] Using the FNFA's online calculator, based on medium-risk band revenues, a debt coverage ratio of 2.88 would be needed, resulting in a band being able to borrow approximately $7 for every dollar of revenue used to secure the loan.

[51] Due to privacy rules this information is not available to the author subject to making an access to information inquiry, but may be made available by AANDC to the FNFA in aggregate.

However, Canada may be reluctant to go as far as the NAEDB suggests. Accordingly, and in addition to its s.64(1)(k) transfer policy, Canada at the very least should transfer control of Indian Moneys to any First Nation that requests control and that is scheduled to the FNFMA and has a FAL in place. This would be in the best interest of First Nations and particularly those that are Borrowing Members of the FNFA who would be able to lever these funds. Canada, at the same time, can assure itself that a First Nation has financial controls in place as well as creating an incentive for First Nations to come under the FNFMA. It would also be recognition of the fact that many First Nations are already scheduled are many others are coming along and an unexpected "benefit" of doing so. It would also mean that the institutional framework of the fiscal institutions could be used to support the transfer. This is something that does not exist with FNOGMAA and is very compelling.

Recommendations

It is recommended that Canada develop policy under 64(1)k of the *Indian Act* to permit First Nations to use their Indian Moneys capital account to secure loans made through the FNFA.

It is recommended that Canada amend the FNFMA and regulations made under that Act, so that upon the request of a First Nation that has made a Financial Administration Law their Indian Moneys revenue account (if not already) and Indian Moneys capital account will be transferred to them and that these funds are "other revenues" for the purpose of securing loans though the FNFA.

2.4 First Nations Goods and Services Tax

All taxes collected by Canada on behalf of a First Nation should be available for financing through the FNFA. In this case we consider the First Nations Goods and Services Tax and its precursor the First Nations Tax. Currently both taxes are not available as "other revenues" under the *Financing Secured by Other Revenues Regulations*.

The Federal *Budget Implementation Act 2000* (S.C. 2000, c. 14) established for the first time tax room for First Nations to collect a point-of-sale consumption tax referred to as the First Nation Tax (FNT) equivalent to the GST on fuel, alcohol and tobacco products sold on-reserve (Part 4, s. 91–97). With the exception of those First Nations that still remain scheduled under the *Budget Implementation Act 2000* this initiative has now been superseded by the *First Nations Goods and Services Tax Act* (S.C. 2003, c. 15). This legislation extends the FNT, now referred to as the First Nations Goods and Services Tax (FNGST), over all products and services and provides a different formula for calculating a First Nation's share of the available tax room (i.e., it is not based solely on "point-of-sale" but rather on an estimate of overall consumption). As with the FNT, the federal government agrees to vacate tax room and give up GST revenues in favour of the First Nation; however, in the case of the FNGST, the tax administration agreements include provisions to control the amount of GST tax room that Canada will vacate, specifically where non-residents make up a large proportion of the First

Nation government's tax base.

As with the FNT, participating First Nations apply the FNGST or the provincial equivalent tax through their own tax law, as authorized by the federal *First Nations Goods and Services Tax Act,* and through a tax administration agreement with the government of Canada through the Minister of National Revenue. Like the FNT the CRA collects, administers and enforces the FNGST. First Nations can expend FNT or FNGST revenues on programs and services of their choosing. The FNGST is also available to self-governing First Nations, as well as to Indian "bands" that continue to operate primarily under the *Indian Act*. FNGST is fully harmonized with the federal GST, and it effectively replaces the GST. This means the FNGST has to apply at the same rate as the GST and to the same range of goods and services and is administered in exactly the same way as the GST. Goods and services that are not subject to the GST (such as basic groceries and residential rents) are not subject to FNGST.

There are two formulas that are used to determine the FNGST amount, a "simple" and a "detailed" method. The exact formulas are complicated and take into account the size of the First Nation, its geographical location, the estimated consumption of its members and the size of the non-member population. It is by no means an exact science. The choice of which formula to use is decided by Canada and the First Nation. For First Nations that are primarily located in rural areas, the federal government prefers to apply what is called the "simplified revenue estimation method."[52] Approximately 85% of First Nations that are collecting FNGST fall under the simplified revenue estimation method. For First Nations that are located in more urban centers and would thus be more likely have more non–First Nation consumers of goods and services, it is more common that the "detailed revenue estimation method" is used. The detailed method is far more complicate and the result is a more accurate estimate of final consumption.[53]

When the FNGST gets to be the equivalent of between two and eight times the estimated GST per each Canadian (multiply the estimated GST per each Canadian by the number of residents on the First Nation's lands) Canada will let the First Nation keep 50% of the amount of FNGST that is over and above two times the estimated GST attributed to the residents living on the First Nation's lands. However, when the FNGST gets to be over eight times the estimated GST, then Canada retains 95% of the amount that is over and above eight times the estimated GST. Notwithstanding these

[52] This method involves taking the net GST amount for a province, multiplying this by the fraction of people, aged 15 years and older, living on First Nations lands relative to the population of the province. From this amount is deducted the net amount of GST that is paid back to low-income Canadians.

[53] This formula starts by calculating the simplified revenue estimation amount for that First Nation. This total is then split into three different bases: consumer expenditure base (accounts for approximately 70% of tax collected); exempt supplies (e.g., tax on items purchased by doctors' and dentists' offices, as it is not associated with final consumption by consumers; accounts for approximately 17% of tax collected); and new housing construction (accounts for approximately 13% of tax collected). Under the consumer expenditure base, items consumed "in the home" account for 40%, while items consumed immediately at the place of supply (e.g., restaurant, casino, spa, hotel, golf course, hair salon) account for 30%. This immediate consumption amount is then removed from the formula and replaced with a number collected from the actual business data on First Nations land. This number is calculated by Statistics Canada based on the final amount of tax associated with immediate consumption at the place of supply for each industry.

limitation, the FNGST is now generating significant revenues for some First Nations in the multi-millions of dollars. However, and while many current Borrowing Members collect this tax, this money cannot be used to secure financing though the FNFA.

When the *Financing Secured by Other Revenues Regulations* made under the FNFMA was being developed, federal officials advised the FNFA that Canada was not prepared to include monies raised under the *Budget Implementation Act* or the *First Nations Goods and Services Tax Act*. The reason for this decision was not made explicit. The assumption by the FNFA was that there may have been a concern in the federal system that should Canada ever decide to change the rules respecting the FNGST or indeed if Canada reduced or even got rid of the GST (however unlikely) that a First Nation may not be ale to meet its commitments to the FNFA. Perhaps Canada was worried it might be called upon to make up the difference to a First Nation that had used its FNGST revenues to secure debt? Alternately, it could have simply been a case of not having the time to coordinate the policy work between AANDC (responsible for the *Financing Secured by Other Revenues Regulations)* and the Department of Finance, (responsible for the FNT/FNGST) before the regulations were drafted. Notwithstanding the reason why this important and growing source of revenue to First Nations was left out of other revenues, this should be rectified. This would require a simple amendment to the *Financing Secured by Other Revenues Regulations*.

Recommendation

It is recommended that the *Financing Secured by Other Revenues Regulations* should be amended so that the First Nations Tax raised under the *Budget Implementation Act, 2000* and the First Nations Goods and Services Tax raised under the *First Nations Goods and Services Tax Act*, are listed as prescribed revenues that can be used to secure loans through the FNFA.

Conclusion

First Nations are in a period of governance transition. The decisions that are made today with respect to governance reform and institutional design moving beyond the *Indian Act* will be determinative of the future prospects for First Nations with long term impacts for generations to come. It must be done right.

The FNFA is a positive example of the progress that is being made. Until the FNFA, First Nation governments were the only governments in Canada that could not practically access the capital markets and obtain their own government backed financing. Moving forward, the vision of the FNFA is that within a generation a majority of First Nations should be meeting their public financing needs through the FNFA. As set out in this Discussion Paper there are a number of steps that can be taken by AANDC and the FNFA to make this happen faster, including increasing the sources of revenue that can be used to secure loans through the FNFA.

In moving forward, as the Discussion Paper also sets out, there is much that can be learned about the success and benefits of certain governance models and the structure of how First Nations institutions, including the FNFA, can support evolving First Nation governments. The experience of the FNFA demonstrates that while progress is being made which supports good governance for First Nations and thus increases chances for social and economic success, there is an increasing need for and an understanding of what is working and why. As this Discussion Paper warns significant opportunities could be lost if there is not better coordination between governance related initiatives and federal policy. Specifically, there is need for greater policy coordination between self-government initiatives, whether sectoral or comprehensive, reflecting a common public policy and understanding of the role of national First Nation institutions. There is also a need to think more critically about the machinery of government that is used for these bodies.

Appendix A: First Nations Participating in the *First Nations Fiscal Management Act* *(source AANDC, Policy and Coordination Branch, April 2015)*

	AB	BC	MB	NB	NS	ON	SK	QC	NWT	Total
Taxing	1	65	1	1	1	3	6	0	0	**78**
Certified (FMB)	1	38	3	0	2	4	3	1	0	**52**
FNFA Borrowing Member	1	29	2	0	1	3	0	1	0	**37**
Access to Indian Money	2	73	13	5	4	11	15	3	0	**126**
Total FNFMA FNs	3	86	14	7	5	18	17	4	1	**155**

Alberta (2)(2*)

Beaver Lake Cree Nation*
Siksika Nation (b,c,t)*
Tsuu Tina

British Columbia(85)(73*)

?Akisq'nuk First Nation (t)*
Adams Lake Indian Band (t)*
Aitchelitz First Nation (t)
Beecher Bay (t)*
Campbell River Indian Band (t)*
Cayoose Creek Indian Band (t)*
Chawathil First Nation (t)*
Cheam (t)*
Coldwater Indian Band (t)*
Cowichan Tribes First Nation (b,c,t)*
Douglas (b,c)*
Ehattesaht*
Gitga'at First Nation*
Gitsegukla First Nation (t)*
Gitwangak First Nation (t)*
Halalt First Nation*
Heiltsuk (b,c)*
K'ómoks First Nation (c,t)*
Kanaka Bar (b,c,t)*
Kitselas First Nation (b,c,t)*
Kwadacha (b,c)
Kwantlen First Nation (t)*
Kwaw-Kwaw-Apilt First Nation (t)
Lax Kw'alaams (b,c)*
Leq'á:mel First Nation (t)*
Lheidli T'enneh (t)*
Lower Kootenay Indian Band (b,c,t)*
Lower Nicola Indian Band (t)*
Lower Similkameen Band
Malahat First Nation (b,c)*
Matsqui First Nation (t)*
Metlakatla First Nation (b,c,t)*
Moricetown Indian Band (b,c,t)*
Mount Currie (b,c,t)*
Nadleh Whut'en Band (b,c,t)*
Nak'azdli*
Nanoose First Nation*
Neskonlith Indian Band (t)*
Osoyoos Indian Band (b,c,t)*
Penticton Indian Band (b,c,t)*
Peters*
Popkum First Nation (t)*
Saik'uz First Nation*
Saulteau First Nations*
Scowlitz (t)*
Seabird Island Band (c,t)*
Semiahmoo First Nation*
Seton Lake*
Shackan First Nation (t)*
Shuswap First Nation (t)*
Shxw'ow'hamel First Nation (t)
Shxwhá:y Village First Nation (b,c,t)
Simpcw First Nation (t)*
Skawahlook First Nation (t)*
Skeetchestn Indian Band (b,c,t)*
Skidegate First Nation (t)*
Skowkale First Nation (t)
Skwah (t)*
Sliammon First Nation (b,c,t)*
Songhees First Nation (b,c,t)*
Soowahlie (t)*
Splatsin First Nation (b,c,t)*
Squamish Nation (t)*
Squiala First Nation (b,c,t)
Stellat'en First Nation*
Sts'ailes (b,c,t)*
Stz'uminus First Nation (t)*
St. Mary's First Nation (b,c,t)
Sumas First Nation (t)*

T'Sou-ke First Nation (t)*
Taku River Tlingit First Nation (b,c)
T'it'q'et
Tk'emlúps te Secwépemc (b,c,t)*
Tla-o-qui-aht First Nations (t)*
Tobacco Plains Indian Band (t)*
Tsartlip First Nation (t)*
Tsawout First Nation (b,c,t)*
Tseycum First Nation*
Ts'kw'aylaxw First Nation (t)*
Tsleil-Waututh Nation (b,c,t)*
Tzeachten First Nation (b,c,t)
Upper Nicola Indian Band (c)*
We Wai Kai Nation (b,c,t)
Wet'suwet'en First Nation (b,c)*
Whispering Pines/Clinton Indian Band (t)*
Williams Lake (b,c,t)*
Yakweakwioose First Nation

Manitoba(15)(13*)
Berens River*
Black River First Nation*
Brokenhead Ojibway Nation*
Buffalo Point First Nation (t)*
Cross Lake First Nation
Ebb and Flow*
Fisher River (b,c)*
Gamblers
Long Plain First Nation*
Misipawistik Cree Nation*
Norway House Cree Nation*
Pauingassi First Nation
Peguis*
Red Sucker Lake First Nation*
Rolling River First Nation*
St. Theresa Point (b,c)*

New Brunswick(7) (5*)
Buctouche Mic Mac Band
Elsipogtog First Nation*
Indian Island First Nation
Madawaska Maliseet First Nation*
Metepenagiag Mi'kmaq Nation (t)*
Oromocto *
Tobique First Nation*

Nova Scotia(4)(4*)
Bear River First Nation*
Membertou First Nation (b,c)*
Glooscap
Millbrook Band (c,t)*
Pictou Landing First Nation*

Ontario(13)(11*)
Atikameksheng Anishnawbek
Bingwi Neyaashi Anishinaabek
Chippewas of Georgina Island First Nation (t)*
Chippewas of Kettle & Stony Point First Nation*
Chippewas of the Thames First Nation (c)*
Kingfisher
M'Chigeeng First Nation*
Mohawks of Akwesasne*
Mohawks of the Bay of Quinte (b,c)*
Munsee-Delaware First Nation*
Nipissing First Nation (b,c,t)*
Obashkaandagaang
Pic Mobert
Saugeen*
Serpent River First Nation (t)*
Wahgoshig
Wasauksing First Nation (b,c)*
Wunnumin

Quebec(4)(3*)
Bande des Innus de Pessamit*
Conseil de la Première Nation Abitibiwinni* Conseil des Montagnais du Lac Saint-Jean (b,c)
Timiskaming First Nation*

Saskatchewan (16)(15*) George
Gordon First Nation* Kahkewistahaw
First Nation*
Lac La Ronge
Mistawasis*
Mosquito, Grizzly Bear's Head, Lean Man*
Muskowekwan First Nations*
Muskeg Lake Cree Nation (t)*
Muskoday First Nation* Ochapowace*
Onion Lake Cree Nation* Peepeekisis
Cree Nation No. 81* Peter Ballantyne
Cree Nation Saulteaux First Nation*
Thunderchild First Nation*
White Bear First Nation (t)*
Whitecap Dakota First Nation (t)* Yellow
Quill Band (c,t)*

North West Territories (1)(0*)
Behdzi Ahda" First Nation

***** - has access to Indian Money **c** - certified member **b** - borrowing member **t** - taxing member

Appendix B
Revenues Permitted to be Used Under the FNFMA and Regulations to Secure Public Financing Though the FNFA

1. "Local revenues" collected under the *First Nations Fiscal Management Act*:
   - property tax
   - business activities tax
   - development cost charges.

[Note: not property taxes collected under section 83 of the *Indian Act*]

2. Tax revenues (e.g., income and consumption taxes) and fees imposed by a First Nation but not tax revenues administered by Canada on behalf of the First Nation.

[Note: Consumption taxes collected under the *Budget Implementation Act, 2000* and the *First Nations Goods and Services Tax Act* are excluded because these taxes are administered by Canada on behalf of the First Nation].

3. Royalties payable to a First Nation under the *First Nations Land Management Act* or the *First Nations Oil and Gas and Moneys Management Act*;
4. Royalties payable to Her Majesty in right of Canada under the *Indian Act* or the *Indian Oil and Gas Act* on behalf of a First Nation that has assumed control of its moneys under the *First Nations Oil and Gas and Moneys Management Act*;
5. Revenues that are from leases, permits or other instruments authorizing the use of reserve land issued under the *Indian Act* and that a First Nation has assumed control of under the *First Nations Oil and Gas and Moneys Management Act*;
6. Revenues from leases, permits or other instruments authorizing the use of reserve land issued under the *First Nations Land Management Act*;
7. Revenues otherwise payable to a First Nation under any contract with a person other than Her Majesty in right of Canada, other than revenues collected by Her Majesty in right of Canada on the First Nation's behalf;
8. Revenues, other than local revenues, received by a First Nation from businesses wholly or partly owned by it, including dividends from shares owned by it;
9. Transfers from a provincial, regional, municipal or local government to a First Nation;
10. Transfers from Her Majesty in right of Canada if the agreement governing the transfer specifically permits such a use and if any other applicable conditions are satisfied.

[Note: Current federal policy and therefore most transfer agreements do not allow for use of transfers as security.]

11. Interest earned by a First Nation on deposits, investments or loans, other than interest held by Her Majesty in right of Canada on the First Nation's behalf.

[Note: This excludes interest earned on Indian Moneys held by Canada]

Appendix C: Public Accounts of Canada, 2013-2014- Indian Band Funds

Indian band funds

This account was established to record funds belonging to Indian bands throughout Canada pursuant to sections 61 to 69 of the *Indian Act*.

Table 6.31
Indian band funds — Capital Accounts

	2013-2014	2012 2013
	$	$
Opening balance	646,155,029	648,356,131
Receipts and other credits —		
Oil royalties	98,251,463	93,165,836
Gas royalties	30,322,025	25,840,423
Sundries	15,397,838	27,262,313
	143,971,326	146,268,572
	790,126,355	794,624,703
Payments and other charges —		
Per capita cash distribution	14,000,400	15,964,167
Transfer pursuant to section 64 of the *Indian Act*	137,530,278	132,067,941
Sundries	3,347,045	437,566
	154,877,723	148,469,674
Closing balance	635,248,632	646,155,029

Table 6.32
Indian band funds —Revenue Accounts

	2013-2014	2012 2013
	$	$
Opening balance	213,751,063	233,746,880
Receipts and other credits —		
Government interest	24,261,903	21,541,176
Court awards and settlements		4,465,107
Land and other claim settlements	654,240	35,000
Sundries	40,655,718	51,874,348
	65,571,861	77,915,631
	279,322,924	311,662,511
Payments and other charges —		
Per capita cash distribution	1,019,815	3,017,747
Transfer pursuant to section *64) of the Indian Act*	71,534,558	92,012,792
Sundries	8,762,972	2,820,909
	81,317,345	97,911,448
Closing balance	198,005,579	213,751,063

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