

# First Nation–Crown Relationship

First Nation Crown Gathering

First Nation–Crown Agreement

First Ministers–First Nation Leaders Meeting

# Pursuing First Nation Self-Determination:

## Realizing our rights and responsibilities

Living Draft  
12.07.11

# First Nations Self-Determination

## Implementation of First Nation Governments

Community planning

Accountability mechanisms

Capacity building and institutions

New fiscal mechanisms

Joint analysis of existing practices

Common principles

## New Fiscal Relationships

Organizational change to support nation building

Legal review and assessment

Affirm First Nation jurisdiction

## Structural Change

## Current Supportive Activities

AFN Planning & Dialogue Forums

AFN National Treaty Strategy

Canada-First Nations Joint Action Plan

1763 Royal Proclamation

Treaty Making

1969

First Nations Rejection of White Paper

1983

Penner Report

1982

Patriation of Canadian Constitution

1989

Meech Lake Accord

1992

Referendum on Charlottetown Accord

1996

Royal Commission on Aboriginal Peoples

2004

Canada-Aboriginal Peoples Roundtable

2005

Recognition and Implementation of First Nation Governments Initiative and Accord

2008

Government of Canada Apology to Survivors of Residential Schools

2010

Canadian Endorsement of United Nations Declaration on the Rights of Indigenous Peoples





# PURSUING FIRST NATION SELF- DETERMINATION:

REALIZING OUR RIGHTS AND RESPONSIBILITIES

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ANNUAL GENERAL ASSEMBLY  
2011

Draft for Full Discussion

## INTRODUCTION

The role of the Assembly of First Nations (AFN) is to advocate for First Nations governments. This work involves facilitating conversation among First Nations, promoting solidarity and fostering the conditions by which First Nations can realize their goals. AFN advocates for the tools and supports required by First Nations and advances a framework that respects our rights and advances our jurisdiction within Canada.

At the 2010 Annual General Assembly, National Chief Atleo presented a Vision paper, remarking that the “time has come for First Nations to drive the change; not for a patch work of arrangements but a methodical and clear plan to move away from the *Indian Act*.”

This direction is a reflection and culmination of what Chiefs and First Nation citizens have been consistently expressing to the Assembly of First Nations, through resolutions and various meetings and forums. These directions have also been supported and confirmed through extensive research, studies and task forces, including through processes such as the:

- 1983 Report of the Special Joint Committee on Indian Self-Government (Penner Report),
- the 1996 Final Report of the Royal Commission on Aboriginal Peoples (RCAP); and
- the AFN Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nation Governments (RIFNG).

In the past year, the AFN has directly engaged with and invited representations from a wide range of First Nation leaders who are driving change within their Nations through a series of special Planning & Dialogue Forums (“Forums”). These Forums have been organized independent of Government funding, enabling the approach and content to be exclusively driven by First Nations.

The purpose of these Forums has been to share information, generate discussion, and identify areas of common approach to highlight success stories and progress. To date, these forums have taken place in Saskatoon (March 2010), Montreal (November 2010) and Vancouver (March 2011).

Based on these Forums, along with the above reports and a broad set of Resolutions passed by the Chiefs-in-Assembly, the essential features of the plan have come into clear focus. These features relate to:

- New approaches and processes to affirm the First Nation-Crown relationship;
- Moving forward with the affirmation and recognition of First Nation treaties, inherent rights and governments;
- New fiscal relationships to ensure sustainability and fairness;
- Capacity and institution building to support First Nation governments, law-making and accountability; and
- Changes in Canada's machinery of government to correspond with these developments, as well First Nation organizational structures to correspond with a nation re-building agenda.

This document reflects the research and conversations to date and culminates in a high level plan to advance fundamental and meaningful change.

## PREVIOUS RESEARCH & RECOMMENDATIONS

While it is undisputable that First Nations are the best sources and experts in our realities and how to move forward, it is useful to reflect upon extensive studies and recommendations which have been undertaken on this matter in the past.

The Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nation Governments reviewed such studies and provided a synthesis of findings and recommendations in its March 2005 Report.

A brief synopsis is contained here:

Many independent studies have been undertaken over the past thirty years on the requirements for respecting and implementing First Nations Government rights. These studies have been undertaken by a broad range of independent observers from Parliamentary Committees to Royal Commissions and respected research bodies such as the Harvard Project on American Indian Economic Development.

The right of self-determination is a principle recognized in these reports and there is considerable consistency in their findings such as:

- **The need to recognize and advance First Nations jurisdiction or self-determination as a central feature of successful, legitimate and accountable governance.**
- **The importance of direct engagement by citizens in any change.**

- **The importance of First Nations jurisdiction and the nation-to-nation relationship as part of the requirements to ensure successful development.**
- **The need for engagement and consent of First Nations governments to any federal legislative initiative affecting First Nations government particularly the exercise of federal s. 91(24) jurisdiction.**

These reports contain a diverse range of ideas and recommendations on new institutions and on machinery of government reforms on the federal side.

However, all point to ultimately replacing or phasing out the Department of Indian Affairs and establishing new contact points that properly reflect the nation-to-nation relationship and financing arrangements appropriate to a nation-to-nation relationship and reflective of the Crown's fiduciary duties to support the implementation of First Nations Governments.

There is considerable consensus on the need to establish independent monitoring bodies for claims and self-government issues including the oversight of negotiation and implementation processes.

## FIRST NATION CONCERNS

Through this research and various activities, First Nations have also expressed fear and apprehension about moving forward. Specific concerns have been raised which reflect uncertainty and insecurity within many First Nations.

Indeed many First Nations communities, families and individuals experience great vulnerabilities on a daily basis. Challenges of addressing immediate socio-economic needs can restrict or nearly eliminate the opportunities to merely discuss broader change and opportunity.

In addition, the *Indian Act* continues to have powerful symbolic importance in the absence of respect and reconciliation. This is a point that has been misunderstood and misidentified by others as an inability or reluctance on our part to advance change.

While we have consistently rejected the *Indian Act* as evidenced through the First Nation leadership testimony before the Joint Senate and House of Commons Committee studying Indian Policy in 1946, we have also clearly stated that our rights and our realities must be recognized and affirmed. This sentiment is perhaps best captured in the now defining statements made by the late eminent First Nation leader and scholar, Harold Cardinal in response to the 1969 White paper:

*We do not want the Indian Act retained because it is a good piece of legislation. It isn't. It is discriminatory from start to finish. ...but we would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights. Any time the government wants to honour its obligations to us we are more than ready to devise new Indian legislation. (Harold Cardinal, The Unjust Society, the tragedy of Canada's Indians. (Edmonton. Hurtig, 1969).*

This statement sets out the First Nation perspective, prior to 1982. With the Constitution Act and the inclusion of section 35, with the many decisions of the Supreme Court, the Apology to Survivors of Residential Schools in 2008 and the endorsement of the United Nations Declaration on the Rights of Indigenous Peoples in 2010, a new context and the possibility for a new perspective may be on the horizon.

Referencing an emerging new context is, in no way, meant to diminish the validity of concerns being expressed. In fact, it is very important that these concerns are fully recognized and directly influence and direct the pace of change that is pursued by each respective First Nation in accordance with their own experience and vision of the future.

As in the RIFNG discussions in 2005, First Nations continue to emphasize the importance of full community engagement and dialogue and for each Nation to undertake such work supported by improved communication and support at the regional and national levels. In addition, First Nations have expressed the importance of unity in effectively moving forward. As noted in 2005, First Nation leaders encouraged one another to work together in unity and warned that we must "*do the hard work of moving together now and undertake a collaborative effort as it will only get more difficult in the future.*"

## FIRST NATION GOVERNMENT ADVANCEMENTS

Indeed, through the recent past, many First Nations have made tremendous progress building core institutions of governance, re-claiming and re-establishing their jurisdictions and their economies.

Across the country, there are First Nations advancing their own strategies and approaches. While every journey is unique and must be driven by its citizens, there is much to learn from one another. The effort at the National level and by the Assembly of First Nations is to create the space (political and legal) for the desired change supporting each Nation's journey. The following paper advances reflections from key meetings over 2010-2011 and sets four elements and possible paths guiding AFN is in the fulfillment of this role.

## AFN PLANNING & DIALOGUE FORUMS: WHAT WAS SAID...

### **MARCH 2010 FORUM**

The March 2010 Forum focused on priorities that would be advanced based on the AFN's national strategic plan with four pillars as follows:

#### **SUPPORTING FIRST NATION FAMILIES AND COMMUNITIES**

- National Call to Action on First Nation Education – advancing the principle of First Nations control of First Nation education
- Advancing governance structures in health reflecting First Nation jurisdiction

#### **EXERCISING AND IMPLEMENTING OUR RIGHTS**

- UN Declaration of the Rights of Indigenous peoples (UNDRIP) advocacy and advancement
- Development of a National Strategy on Treaties
- Land rights including Comprehensive Claims Policy reform and reform of the Additions to Reserve policy

#### **ADVANCING ECONOMIC AND ENVIRONMENTAL INTERESTS**

- Supporting positive partnerships and relationships that respect rights and balance interests including the environment
- Focus on infrastructure and housing – need for innovation and increased advocacy to address basic community safety interests

#### **SUPPORTING FIRST NATION GOVERNMENTS AND CAPACITY**

- Citizenship – AFN called upon to support new broad dialogue and provide tools and supports
- Urban strategy – linking citizens

These pillars provided the foundation for a broad-based discussion that helped to set the agenda for all of the AFN's work moving forward, and led to a more focused set of issues for discussion at the next Forum in November.

# NOVEMBER 2010 FORUM

The November 2010 Forum heard from First Nations on their experiences and reflections on how First Nation governments could be supported in exercising jurisdiction in four key areas of government as itemized below:

## LAW MAKING AND INSTITUTION BUILDING

As Grand Chief Mike Mitchell from Akwesasne said in the opening plenary: *“Each First Nation will have to carve out what they see will suit their purpose, and this has to reflect the culture, history and tradition of your nation. For us that’s a tall order.”* This work is not easy and all First Nations – regardless of their current situation and where they want to go – require tools and supports to get there.

Too often, First Nations do not have the institutional supports to implement laws as they might have envisioned. As a consequence, we are forced to rely on institutions that continue to promote Euro-Western models of decision-making. This is seen time and again where First Nations have attempted to move beyond the Indian Act framework to develop processes that reflect their own decision making – such as an Elections Code – only to have disputes resolved in the courts.

In the area of justice, mainstream courts apply Canadian law to First Nation citizens – with devastating consequences. The Criminal Justice System’s focus on punishment and incarceration, as was highlighted by Don Worme, is often inconsistent with a First Nations’ focus on restitution, rehabilitation and reintegration. Chief Peter Johnson spoke about the Teslin Tlingit Administration of Justice Agreement – an agreement that establishes a traditional justice system based on Tlingit values and customs with a Peacemaker Court.

*“AT THE END OF THE DAY, IT IS NOT ABOUT SHAME AND BLAME, BUT EMPOWERING THEM TO MAKE CHANGE, AND ALLOWING THE PEOPLE TO SEE THE GOOD SIDE OF WHO WE ARE AS PEOPLE AND AS TLINGIT. IT IS NOT ONLY OUR CHALLENGE, IT IS OUR RESPONSIBILITY.” CHIEF PETER JOHNSON, TESLIN TLINGIT*

The Treaty Four Governance Model has as one of its principles that *“dispute resolution is a key component to all governance developments”*, focusing on settling disputes in a respectful way that incorporates traditional principles and practices to improve the quality of life for Treaty Four citizens. Similarly, Peepeekisis First Nation follows a



custom decision-making model where family heads and elders exercise consensus decision making.

What participants expressed firmly – across the forum – is that, while independence is necessary to resolving disputes, interdependence and the trust of the community is critical to its success.

## LAND AND RESOURCE MANAGEMENT

Lands and resources are essential to First Nation sustainability and this goes for not just reserve lands but also for off reserve First Nation traditional territories. First Nations must have a role in management and share in benefits from both.

First Nations land tenure and property rights issues are an important element of self-determination and economic development strategies for First Nations across Canada. The respective roles of collective landholding and individual property regimes, and views on the relationship between “certainty” of tenure and the ability to maximize economic development opportunities within domestic and global economies, are a focus of some current debates.

Strong support was expressed for collective title and exercising clear decision making over territories and resources, including the importance of securing resource revenue sharing. Presenter Arthur Manuel underlined the importance of asserting economic interests in our traditional lands “... *we don’t want to go to the Department of Indian Affairs to talk about this. We don’t want to go to the provincial government to talk about this. We want to go to the economic sources that the Canadians and the [provincial] governments depend on. Push them on this issue. If you don’t do it at that level, you’re not going to address the economic consequences of land rights.*”

As Chief Austin Bear from the Muskoday First Nation said: ... when the Elders spoke of the Framework Agreement and the consideration of the Muskoday land code, these were their words: “*It’s about time that the Muskoday First Nation reclaimed jurisdiction and control over our lands and resources and removed the Minister of Indian Affairs as Indian agent and his decision making authority over us*”.

## PUBLIC ADMINISTRATION AND ACCOUNTABILITY

A competent and well-functioning public administration is crucial to exercising jurisdiction – as this is the mechanism through which political direction is carried out through the development of policies and guidelines. Public administration is often the everyday face of a government in communities and is the primary interface with citizens. As such, transparency, openness, consistency and fairness are critical to an effective public administration.

These principles are achieved through human resource development, and the development and application of standards for ensuring that administration staff function as competent and independent professionals. As presenter Christa Williams from the BC First Nations Public Service noted: “First Nations are exercising their decision-making rights and responsibilities through governments and administrations that strive for excellence in community service.”

The Forum heard from organizations currently involved in sharing, training, or setting standards for First Nations Public Administration, such as the Institute for Public Administration and the Aboriginal Financial Officers Association., and there was a clear call for support for First Nation governments in terms of outlining roles and responsibilities and providing tools to deliver excellence in public administration. There was also an admission that the Indian Act framework and funding within which most governments operate remains a hindrance to innovation and growth of public service standards.

*“MOST IMPORTANTLY, CREATING A SYSTEM OF ACCOUNTABILITY, TRANSPARENCY, REPRESENTATION AND RESPONSIBILITY TO THE COMMUNITY WAS THE MOST CRITICAL STEP WE TOOK IN MOVING OUR NATION FORWARD”. CHIEF PAUL ESHKAKOGAN*

## INTERGOVERNMENTAL RELATIONSHIPS

Governments require capacity to interact with other governments – to discuss principles of trade and commerce, interaction of laws, movement of people between jurisdictions, among other matters. The Treaty relationship and the experience of Treaty making provides the principles of partnership, sharing and fair-dealings. This is not however how the relationship with Canada and Canadians has proceeded over time.

Chairman of the Cree-Naskapi Commission, Richard Saunders, spoke about their experiences in ensuring negotiated terms were maintained, and challenges in working with other governments – including the high turnover of public servants and lack of corporate memory. He asserted that: *“First Nations need to be “unrelenting” in their pursuit of adherence and respect for Aboriginal and Treaty rights – both historic and modern.”*

As Chief Robert Louie, Westbank First Nation reiterated: *“The government wanted us to get out of 91(24), but the bottom line was that we need to keep the government on the hook, and have the best of both worlds. You make laws, and the federal government is obligated to follow. That is what I encourage: keep them on the hook.”*

# MARCH 2011 FORUM

A clear theme emerged at the March 2011 Forum. Resoundingly, presenters and participants agreed that the critical and most important step for First Nation governments' success was to be able to move beyond current constraints and assume full responsibility for decision-making.

## FREEDOM FROM THE INDIAN ACT

Stephen Cornell, co-founder of the Harvard Project on American Indian Economic Development and Director of the Udall Centre on Public Policy at the University of Arizona, provided international examples of Nation building, where American Tribes were able to radically transform their socio-economic status and re-build their nations. The key in all cases was establishing and maintaining good governing mechanisms.

*"NATIONS THAT GOVERN WELL DO BETTER THAN THOSE THAT DO NOT. RESOURCES ARE NOT ALWAYS NECESSARY. IT'S ABOUT WHAT YOU DO WITH THE RESOURCES YOU HAVE —YOU NEED TO MAKE GOOD RULES AND LIVE BY THEM."*

Dr. Cornell further reflected on what he saw governance as: *"the definition of governance is how you translate the will of the Nation into sustained, organized action. You need to decide what do you want for the future ... and governance is how that happens."*

Chief Kim Baird of Tsawwassen First Nation provided examples of their experience in translating the will of the people to new governing structures and relationship with other governments: "Ultimately purging the Indian Act is the best chance at success we have. The most important resource for Nation Building was the strength and belief of our own people. It was absolutely critical for the Tsawwassen people to agree with the vision and to lead the work to make it possible. Moving forward takes pragmatism, and not letting the 'perfect' get in the way of the 'good'. Waiting for the perfect in Tsawwassen would have meant opting for the status quo, and failing another generation of our people – totally unacceptable."

All participants were specifically asked to reflect on their experiences with the Indian Act and to outline the benefits and risks of moving beyond it. The benefits were many:

- Ability to determine our own destiny
- Empower our traditional knowledge

- Development what we need to be successful
- More involvement of community – peoples’ input will matter more
- Fully responsible for our decisions, our actions and our people
- Can develop our lands and resources as our people determine – not as the Indian Act defines
- Full accountability to our own people – not another government
- Exercise own law-making authority
- Improved leadership selection processes that promote harmony rather than foster conflict
- Overcome divisions the Indian Act has imposed on us and welcome back all of our people

There was a common sense of the risks – mainly overcoming mistrust and the fear of change – and importantly ensuring that the proper conditions for success are in place.

### CLEAR FIRST NATION JURISDICTION AND ADMINISTRATION OVER CITIZENSHIP

One of the critical elements of Nationhood is determining who does – and does not – belong to the Nation. This element has been consistently undermined by the Indian Act, and First Nations are seized with the importance of ensuring the Nation can define and support their people. A number of presenters shared different approaches at the Forum.

Jeanette Corbiere Lavell, President of the Native Women’s Association of Canada and Citizenship Commissioner for the Anishinabek Nation in Ontario, shared the principles the Anishinabek used to develop its Citizenship Law:

- Only traditional governments have the right to determine citizenship
- Reject the Indian Act attempts to define who is a First Nation citizen
- Reject the concept of Indian "status"
- At the core is language, culture and spirituality

Dan Bellegarde, from Treaty Four and the Federation of Saskatchewan Indian Nations (FSIN), shared ideas about being careful about how we discuss such matters, focusing on citizenship, and not being drawn into a discussion of membership: “There are entitlements that accrue to a citizen because of the Treaty relationship with the Crown. ... Citizenship is associated with social, economic, and political participation in the life of a community. The FSIN is actively working on addressing citizenship as outlined in the Treaties, but continues to be challenged by reconciling Treaty obligations of the Crown, its ongoing fiscal responsibilities and lack of resources to support First Nations.”

Kahnawake has been grappling with these same issues for a long time – with some controversy both internal and external to the Nation. Chief Lloyd Phillips spoke about Kahnawake’s citizenship code, which operates outside of the Indian Act: “If we cannot determine who we are without interference from Canada, how can we call ourselves a nation? We stand by the fact that we are not Canadians, we are Mohawk. Canada's laws do not apply to us. We are citizens of nations that were here before the Europeans were here. When it comes down to status Indians, Canada holds the cards. We have accepted people who Canada does not accept and they will not fund; but if we reject people who Canada has accepted, then it's front page news.”

All participants agreed that First Nation citizenship requires concerted attention and further discussion. Specifically participants asked for additional gatherings focused on this topic. The AFN is facilitating a national engagement on First Nation citizenship with virtual dialogue sessions throughout 2011 and a National First Nation Citizenship Forum in November 2011 to provide opportunity for discussion and planning.

## **STRONG AND SUSTAINABLE ECONOMIES TO SUPPORT FIRST NATION CITIZENS**

A discussion of First Nation citizenship naturally leads to an examination of fiscal relationships and economic sustainability for our Nations. Ontario Regional Chief Angus Toulouse said: *“As Indigenous peoples we were never meant to be poor in our homelands. We need to discuss how to change that and refocus by looking at the long term and at sustainable resources.”*

Presenters and participants referenced the importance of resource revenue sharing arrangements consistent with inherent rights and Treaty relationships. In addition, the need for First Nations to be proactive, to not wait for an invitation to work with governments or industries was clearly made. This theme contributed directly to the planning and organizing of the recent International Indigenous Energy and Mining Summit in Niagara Falls, June 27-29, 2011.

*Claire Marshall, First Nations Energy and Mining Council, expressed the idea that: “...there’s nothing precluding us from talking, planning and strategizing amongst ourselves on a national basis to influence these policies that affect us.”*

Chief Joe Miskokomon of the Chippewas of the Thames shared how his Nation was creating a public pension for their citizens using funds from a recent settlement. He noted that: *“it’s not right for First Nations to become wealthy through compensation payments while the people stay poor. We are redistributing the wealth in the community.”*

There was also significant call to develop a national strategy to reform fiscal transfers to First Nation communities with observations on how current arrangements not only do not fulfill Canada's fiduciary obligations or equitably transfer funds reflective of citizens, but also distorts the relationship between First Nations and the Crown.

Also of issue is the ability to implement First Nation laws. Jaime Battiste, Eskasoni First Nation, said: "We know we have the jurisdiction to create our Mi'kmaq laws but we have trouble ensuring they are going to be enforced ... capacity is an issue."

## SUPPORTIVE INSTITUTIONS & CLEAR ACCOUNTABILITY

Critical to supporting the success of First Nation governments are strong and sustainable institutions at all levels – local, nation, Treaty, regional and national. These institutions have very different roles and mandates – such as ensuring the supply of independent data, research or analysis to make informed decisions or sharing information or providing training or facilitating networking among decision-makers.

One youth representative observed how such Forums were a powerful opportunity for sharing: *"My recommendation is to continue supporting and involving the youth through various measures. I want to sincerely thank the staff and chiefs for including our youth. This is how we learn - modeling, discussion, active participation. It is important to communicate, because this is how we become informed."*

The role of the AFN was discussed in depth at the Forum, and participants were supportive of moving towards financial independence. There was strong consensus around AFN's role to share ideas, educate on First Nation issues, and advocate on behalf of First Nations – always being respectful of the diverse cultures, histories and aspirations of different Nations.

Participants challenged the AFN to ensure it remained relevant to Chiefs and First Nation citizens, noting that Chiefs were often too busy to engage in issues or an organization if they did not see benefit for their people. Participants also encouraged AFN to emphasize ongoing mechanisms for dialogue and engagement, as well as clear and frequent follow-up and communication regarding mandates and resolutions.

As one participant observed: *"AFN has to be proactive, we have to define our agenda. ... We have to identify what we want and how to do it. We'll see lots of changes then. We'll see our people working and our communities changing. We have to take our rightful place in this country."* There was also support for a coordinating function of the AFN – such as coordinating interventions in Supreme Court cases, and support for negotiating tables.

The Forum also focused on accountability exercised by First Nation governments, and explored successes along with the limits of current arrangements.

*“IF YOU ARE LOOKING FOR EFFECTIVE GOVERNING TOOLS, DOES THE INDIAN ACT PROVIDE THOSE TOOLS? TWO THINGS ABOUT THAT ACT: ONE - IT REPRESENTS SOMEONE ELSE’S IDEA ON HOW YOU SHOULD GOVERN; TWO - IT TOTALLY SCREWS UP ACCOUNTABILITY – SO YOU ABSORB THE CONSEQUENCES OF THEIR DECISIONS. AS LONG AS CANADA IS MAKING YOUR DECISIONS, THINGS WILL NOT IMPROVE. THE INDIAN ACT IS A CRUMMY PIECE OF GOVERNANCE MACHINERY. YOU DESERVE, AND NEED, BETTER.” DR. STEPHEN CORNELL*

National Chief Atleo called for a reframing of the accountability relationship between Canada and First Nations, through tools such as a First Nation Auditor General, while Chief Darcy Bear provided examples of how his Nation had achieved economic success precisely by ensuring strong accountability measures to their citizens.

Participants reflected that accountability was not just about reports or agreements, but was about communication, relationships and truly reflecting and moving forward with the will of the people. National Chief Atleo also noted that: *“The key to accountability is to connect responsibility with consequences. We need to bring the focus back to our people, not give more power to the Indian Act and the Minister of Indian Affairs”*.

As Elder Cliff Atleo, Sr. shared: *“A few thousand years of experience has to be worth something. The values are still there. Our challenge and task is to bring those values and teachings back.”*

These meetings are part of a broader discussion that has been ongoing with First Nation leaders and citizens at all levels. The plan presented here has been developed based on the discussions that have taken place to date, and to help guide action and discussion moving forward.

# PURSUING FIRST NATION SELF-DETERMINATION:

## REALIZING OUR RIGHTS AND RESPONSIBILITIES

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

- Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples

### PURPOSE

This paper aims to give full expression to the First Nation pursuit of self-determination. Building on the strong foundation set through Treaty making, constitutional processes, the Apology and to the endorsement of the United Nations Declaration, this paper is provided to offer a systematic way to begin to organize the ideas and work at the national level. First Nations themselves through individual and regional dialogue, respectful of their local and regional circumstances must have the full opportunity to consider options, to design and ultimately to build self-determination reflective of their own vision, rights and responsibilities. At the same, time, through organizing this work, we can clarify the ways in which we can and must work together in support of one another's efforts.

It is hoped that the paper will provide the basis for a dialogue among First Nation leadership across Canada and further guide the work of the Assembly of First Nations at the national level. Ultimately, the purpose of the paper is support all First Nations pursuing and giving full expression to their right to self-determination charting a clear path for freedom from the *Indian Act* and towards the implementation of treaties, inherent rights, aboriginal title and jurisdiction.

This work arises from decades of research, legal challenges and advocacy by First Nation leadership. A Joint Committee of Chiefs and Advisors was mandated by the Annual General Assembly in July 2004 to develop a broad strategy and process on issues relating to the recognition and implementation of First Nation Governments.

The Committee focused on key reports, such as the 1983 Report of the Special Joint Committee on Indian Self-Government (Penner Report) and the 1996 Final Report of the Royal Commission on Aboriginal Peoples (RCAP), and held regional sessions across the country to develop recommendations for a broad framework to advance the recognition and implementation of First Nation governments.



The Joint Committee developed such recommendations in a 2005 report: ***Our Nations, Our Governments: Choosing our own Path.***

Chiefs-in-Assembly affirmed the principles and action for moving forward in Resolution 6/2007: Recognition and Implementation of First Nation Governments - the framework for moving forward. These are summarized as:

- **Reconciliation and Recognition of First Nation Governments** affirming Treaty and Aboriginal rights, consistent with section 35, Constitution Act, 1982
- **Sustainability and Structural Change by Implementing First Nation governments** including:
  - substantial reform of the fiscal relationship between the Federal Crown and First Nations to end fiscal discrimination in favour of sustainable transfers based on real rates of growth; and;
  - support for nation-building through capacity building and institutional development measures developed jointly with First Nations; and,
  - federal policy renewal and machinery of government changes in the form of elimination of the Indian Act and the Department of Indian Affairs.

Moreover, Chiefs in Assembly in 2007 directed that this summary provides a framework for advancing all policy and advocacy activities of the AFN; and that the principles and processes elaborated therein be affirmed as the means of working jointly with the Federal Crown to promote meaningful relations, policies and processes for reconciliation and implementation of section 35 rights to achieve an improved quality of life for First Nations peoples; and finally concluded by affirming the fundamental requirement for unity and coordinated action among First Nations in the achievement of the recognition and implementation of First Nation governments.

In addition to important decisions of the Supreme Court of Canada, Canada's Statement of Apology to Survivor's of Residential School in 2008 as well as Canada's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, indicate that First Nations interests have continued to make steady progress.

This paper intends to reflect these priorities and delineate possible paths and strategies to move forward. This is supportive and complementary to other related efforts, including the National Treaties Strategy and the June 2011 Canada-First Nations Joint Action Plan.

**Affirming the path forward is an ongoing process. This paper is intended for discussion and further consideration at AFN's 2011 Annual General Assembly. Ongoing work and implementation will be coordinated by a new Committee of Chiefs and Advisors as mandated by the Chiefs-in-Assembly to fulfill this plan.**

## VISION

The vision put forward by Chiefs-in-Assembly for a Broad Framework on Advancing the Recognition and Implementation of First Nation Governments in Resolution 24/2004 is: *To enable the political, social and cultural development of First Nations peoples to exist, continue and prosper, consistent with Treaties and Inherent Rights.*

The pursuit of First Nation self-determination includes four key elements and related possible paths to support First Nation governments in implementing this vision.

## ELEMENTS

1. *First Nation-Crown Relationship*
2. *New Fiscal Relationships*
3. *Implementation of First Nation governments*
4. *Transition and Support*

### 1. FIRST NATION-CROWN RELATIONSHIP

*States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.*

- Article 27 of the United Nations Declaration on the Rights of Indigenous Peoples

As stated in its Preamble, the United Nations Declaration on the Rights of Indigenous Peoples sets out a standard of achievement to be pursued in a spirit of partnership and mutual respect.

While Treaties embodied a nation-to-nation relationship, this has not been upheld by the Crown, and First Nations have been denied their right of self-determination. In order to give full effect to this right, a new relationship must be forged, that respects the spirit and intent of Treaties, and new mechanisms and processes put in place to affirm the relationship.

**Past Recommendations:**

The Penner Report recommended that a First Nations Recognition Act be developed jointly with First Nations; that Canada adopt legislation authorizing it to enter into agreements with First Nations on power sharing and to define respective jurisdictions; and, legislation under the authority of s. 91(24) of the Constitution Act, 1867 designed to occupy all areas of competence necessary to permit First Nations to govern themselves effectively.

In 2006, RCAP recommended that Parliament enact an Aboriginal Nations Recognition and Government Act as well as establishing continuing and bilateral processes to renew the Crown's relationship with First Nations.

Changing the relationship through such mechanisms would create tangible steps towards reconciliation as has been called for by the Supreme Court of Canada and promised through the 2008 Indian Residential School Apology by the Prime Minister. The 2011 Canada-First Nations Action reflects the need to build on the apology as well as the endorsement of the UNDRIP.

**Possible Paths:**

- a. Plan for an initial First Nation - Crown Gathering, grounded in ceremony to reflect original relations of peace, friendship and mutual benefit. Such gatherings should be held periodically to establish and measure progress on shared objectives, such as improving education and health outcomes.
- b. Convene a Joint First Ministers-First Nation Leaders Meeting focusing on Supporting First Nation Governments and appropriate Inter-governmental mechanisms to ensure the well-being of all First Nation citizens.
- c. Begin examining options for a broad First Nation – Crown Agreement on advancing / recognizing First Nation Crown relationship through potentially a Parliamentary Proclamation / Order in Council to achieve significant advancements in recognizing and implementing First Nation governments.

## 2. NEW FISCAL RELATIONSHIPS

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

- Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples

Historic and current underfunding of First Nations through all aspects of their programming and government services has been extremely well documented.

First Nations citizens do not enjoy services comparable to those provided to Canadians. While Canadians receive services from all levels of government, through direct federal transfers to provinces and territories, and at an average annual growth rate of 6.6% per year, Finance Canada has maintained an arbitrary 2% cap on spending increases on core services for First Nations since 1996. Yet, First Nation Governments provide a huge range of programs and services to their citizens - in other cases provided through a combination of three levels of government with associated institutional support.

First Nation governments are not treated as legal entities by Canada, but instead, follow the same funding arrangements as organizations, are primarily funded through multiple annual, discretionary Contribution Agreements.

### **Past Recommendations:**

The Auditor General concluded in the June 2011 Status Report:

*The use of contribution agreements to fund services for First Nations communities has also led to uncertainty about funding levels. Statutory programs such as land claim agreements must be fully funded, but this is not the case for services provided through contribution agreements. Accordingly, it is not certain whether funding levels provided to First Nations in one year will be available the following year. This situation creates a level of uncertainty for First Nations and makes long-term planning difficult. In contrast, legislation may commit the federal government to provide statutory funding to meet defined levels of service. A legislative base including statutory funding could remove the uncertainty that results when funding for services depends on the availability of resources*

First Nation Governments need new fiscal transfer arrangements based on a stable allocation reflecting demographics, need and inflation, as well as the spirit and intent of treaties and the principles contained in the United Nations Declaration on the Rights of Indigenous Peoples.

### **Possible Paths:**

- a. Under the authority of the Joint Committee of Chiefs and Advisors establish a sub-committee to:
  - Establish common principles of fairness and equity among all jurisdictions for core services.
  - Conduct a joint analysis that evaluates existing practices in fiscal transfers (using FPT models, resource revenue sharing, international examples) and identify options for new fiscal mechanisms.
  - Examine effective reporting and accountability practices and processes for support, standards and accreditation.

### **3. IMPLEMENTATION OF FIRST NATION GOVERNMENTS**

*Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*

- Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples

First Nation Governments in Canada have faced relentless challenges to their capacity to govern their own affairs and interact with other governments – to discuss principles of trade and commerce, interaction of laws, movement of people between jurisdictions, among other matters. The Treaty relationship and the experience of Treaty making provides the principles of partnership, sharing and fair-dealings. This is not however how the relationship with Canada and First Nations has proceeded over time.

Implementing and strengthening First Nation governments, while inter-related to the other priorities in this paper, requires special focus on the core capacity of First Nation governments and their ability to move forward on strategic and comprehensive community planning. Also, focus is required in the following areas as consistently mandated through resolution and affirmed in the UNDRIP:

#### First Nation citizenship

First Nation governments have never ceded authority to determine who is - and is not - a citizen of their Nation. Article 9 and Article 33 of the UNDRIP reinforce this right of all Indigenous peoples yet Canada has systemically undermined this authority and in the process, disenfranchised individuals and created family and community divisions.

Chiefs-in-Assembly have consistently asserted their jurisdiction and intention to provide for all of their citizens, regardless of Indian Act imposed definitions and divisions.

#### Elections and leadership selection

Current provisions for 2-year elections under the Indian Act do not respect traditional decision-making structures, nor provide adequate time for capacity building and strategic and long-term planning. Nations that have implementing “custom” processes remain at risk of being ordered to comply with the Indian Act upon the Minister's prerogative based on powers outlined s. 74.

#### Institutions for Public administration & Dispute Resolution

Strong functioning First Nation governments will rely on a cadre of professional public servants, to carry out political direction in fair and accountable processes. As Article 34 of the UNDRIP affirms: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Moving forward, transitional mechanisms will need to be put in place to support Nations to re-build structures and capacity, while ensuring accountability to citizens and the adequate provision of needed services.

#### **Possible Paths:**

- a. Ensure First Nations are provided support for comprehensive community planning, so that all Nations can move forward on their own priorities as identified by their citizens, at the rate and pace of their own choosing.
- b. Support the examination and restoration of First Nation elective systems - including adequate provisions for appeals and dispute resolution - revoking ss. 74 - 80 of the Indian Act and removing any powers of the Minister of Aboriginal Affairs over elections.
- c. Support the development of regional-driven tools and supports for First Nation governments respectful of regional realities and regional approaches.
- d. Support and enable First Nation government capacity and institution building as directed by and directly serving First Nation governments.
- e. Develop recommendations for the recognition of First Nation jurisdiction over citizenship and appropriate resources to administer this.

- f. Mandate the Joint Committee of Chiefs and Advisors to articulate areas of transitional concern which require further study to ensure consistent and unthreatened service delivery and portability of rights.

## 4. STRUCTURAL CHANGE

### **Past Recommendations:**

The June 2011 Status Report of the Auditor General reflected on 10 years of recommendations to improve the living conditions of First Nations, and concluded that there had been little measurable improvement. Ultimately, the Auditor General concluded that structural impediments prevented improvements for First Nations and that these must change if any meaningful change is to occur.

The Royal Commission on Aboriginal Peoples had recommended fundamental restructuring within Government to better reflect the Nation-to-Nation relationship and to move beyond entrenched impediments. Recommendations included abolishing the Department of Indian Affairs and Northern Development and replacing it with two new departments: a Department of Aboriginal Relations and a Department of Indian and Inuit Services. RCAP also recommended a continuing bilateral process to implement and renew the Crown's relationship with and obligations to the treaty nations under the historical treaties, in accordance with the treaties' spirit and intent, along with the establishment of a Crown-Treaty office within the Department of Aboriginal Relations.

Such structural changes would support the other elements identified , better ensure that funding identified to support First Nation governments is used for these purposes, as opposed to supporting increased bureaucratic presence.

### **Possible Paths:**

- a. First and foremost, affirmation of First Nation control over First Nation interests is required
- b. Careful legal review is required to assess impact and implications of transition options related to any structural change to ensure that provisions that are required in accordance with inherent and Treaty rights are maintained
- c. Conduct a review of current federal structures tasked with providing services to First Nations for relevancy and efficiency and create recommendations for new federal machinery with clear performance measures for First Nations.

- d. Replace AANDC with new entities to:
  - Focus on First Nation-Crown relationship
  - Focus on fair service provision
- e. Consider strategies for structural change to support First Nation building and re-building and ensuring organizational alignment and consistency
  - organizations to advance and support nation re-building as key to advancing institutional development supporting effective First Nation governance
  - local, regional and national effort required to affirm, support and enable good governance practices including through specific tools and resources advanced at the regional and sub-regional level
  - reflection among all organizations as to their role and relationship in support of First Nation government re-building and advancement of governing regimes to ensure effectiveness, efficiency and excellence in service provided to First Nation citizens
- f. Advance effective intergovernmental arrangements that ensure harmony of services between First Nation governments and reconciliation with relevant provincial or federal laws.