

# Overlapping Consensus, Legislative Reform and the *Indian Act*

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*Calls to abolish the Indian Act and to reset the relationship between Aboriginal people and the Crown dominate the academic discourse. The author proposes something different. He suggests that the Government of Canada and First Nations work within the framework of the Indian Act to find areas of agreement. In doing so, the author draws on Rawls' theory of "overlapping consensus": the idea that two parties with opposing viewpoints, or "comprehensive starting positions", can find areas of agreement without abandoning their respective starting positions. Despite the Crown's and First Nations' very different conceptions of the nature of their relationship, if overlapping consensus can be found on both the changes to be made to the Act and the principles that underlie those changes, progress can be made without asking either party to compromise on its foundational beliefs.*

*The author identifies financial accountability, membership integration and financial integration in First Nation communities as areas ripe for overlapping consensus on necessary reforms. He proposes that members of a First Nation community should be entitled to have their income tax payments directed to their community. This would mean that First Nation communities would finally have the incentive to admit non-status Indians as new members because the communities would receive increased funding for each member through his or her income taxes. The tax redirection plan would further combine accountability and integration, and it would represent a reform that could begin to set the Indian Act on a better path.*

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# Introduction

[T]he *Indian Act* [should be] retained [*not*] because it is a good piece of legislation. It isn't. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretensions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable *Indian Act* than surrender our sacred rights.

—Harold Cardinal<sup>1</sup>

In 1969, when Harold Cardinal penned these words, the federal government had just tabled a White Paper on Indian policy in Canada.<sup>2</sup> The White Paper proposed the elimination of the *Indian Act (Act)*,<sup>3</sup> the abolition of treaties, and the assimilation of Indigenous people into the broader Canadian society, such that Indigenous people would be reduced to the status of every other ethnic minority. Cardinal opposed this abrogation of the Crown's constitutional responsibility to respect treaties and to deal with Indigenous people as a founding people. In this paper, I too argue against calls to abolish the *Indian Act*. Like Cardinal, I believe that the *Indian Act* exists in part to set out the terms of the relationship between First Nations and the Government of Canada (the Crown), and that the current *Indian Act* is neither reflective of the Crown's historic

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1. Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: MG Hurtig, 1969) at 140.

2. Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (Ottawa: Indian Affairs and Northern Development, 1969).

3. RSC 1985, c I-5.

commitments to Indigenous people nor adequate to sustain contemporary First Nation communities.

My concern is with both the substance and the process of reform to the *Indian Act*. I believe that legislation can and must set out a rightful relationship between First Nations and the “settler”<sup>4</sup> people—though I do not here propose a full vision of that relationship.<sup>5</sup> Instead, drawing on the work of John Rawls, I propose a process through which First Nations and the Crown can find consensus on *Indian Act* reform despite very different understandings of the relationship between them. The process builds on Rawls’ concept of “overlapping consensus” by asking First Nations and the Crown to seek consensus on the things they are likely to agree on, and more importantly, on the principles that underlie those areas of agreement. In other words, we must not only identify areas where there happens to be agreement, but also the crucial subject of those areas where the agreement comes about because the parties agree *on the underlying principles*. Such an agreement on principles forms the basis of overlapping consensus, and, I will argue, is what permits productive discussion about reform to take place. In specific terms, I believe there is already a consensus on certain critically important areas of government responsibility: accountability for one, and also the economic and political integration of (and within) First Nation communities.

I do not here advocate the abolition of the *Indian Act*, or its replacement with a sweeping new legislative regime, though in time this too may be possible and advisable. Instead, I argue for change within the existing framework of the *Act* in areas that are capable of generating political consensus among First Nations, Canadians generally and Parliament in particular. I do not take this position because I believe that incremental

4. Throughout this article I will use the term “settler” to mean non-Indigenous. I do so because I wish to establish a useful contrast between settler and Indigenous people. By settler, I mean non-Indigenous persons and governments, historical and present day.

5. The meaning of a “right relationship” is beyond the scope of this article for several reasons. First and foremost, the particulars of a right relationship will change over time, and the appropriate relationship must therefore be specified by political representation and negotiation. Second, and connected to the first, the right relationship is not something that is discovered as a matter of truth by the academy; rather, it is an artifact of interacting cultures and peoples—it is something built with the effort of both sides. That said, the underlying principles of a right relationship, from now to the foreseeable future, are set out in Douglas Sanderson, “Redressing the Right Wrong: The Argument from Corrective Justice” (2012) 62:1 UTLJ 93 [Sanderson, “Argument from Corrective Justice”].

change is best, but because there is at present little chance of agreement between settler and Indigenous people on the fundamental issue of how to define the relationship between First Nations and the Crown. Indeed, we have been seeking that consensus since the arrival of the settler people and we are no closer to a broad-based agreement about how we are to live side by side. Instead, for the past seven generations the Crown has imposed its vision of the proper relationship between itself and First Nations through the *Indian Act*.<sup>6</sup> Given this history, we may not be able to come any time soon to a grand bargain where everything is on the table and a new relationship is sealed, but we can advance toward that end by taking principled steps every time First Nations and the Crown meet to negotiate some aspect of their relationship. This paper is concerned with a rightful relationship, reciprocity of opportunity and the need to finance our communities with the human resources available to us.

The elders tell us that things take time, that actions have consequences, and that we must think through these consequences not only for this generation and the next, but for seven generations down the line. This paper is my argument for a better *Indian Act*, and for a process to get us there. In Part I, I will make my argument for the existence of some form of *Indian Act*. In Part II, I will outline Rawls' theory of "overlapping consensus". In Part III, I will identify the areas of reform in which I believe an overlapping consensus can be achieved: accountability and integration. By accountability, I refer to the common sense meaning of the word as appropriate transparency in financial decision making.<sup>7</sup> By

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6. See John Borrows, "Seven Generations, Seven Teachings: Ending the Indian Act" *National Centre for First Nations Governance* (2008), online: Centre for First Nations Governance <<http://fngovernance.org>> [Borrows, "Seven Generations"]. I am particularly indebted to Professor Borrows, both for his many years of mentorship, and for the seeds of some of the ideas found in this paper.

7. Shin Imai's definition of accountability includes accountability in the sense that I am using the term, but also in the sense of "some form of community participation in the making of laws" and "a policy that distinguishes routine decisions, which do not require consultation, from important decisions should involve the whole community". Shin Imai, "The Structure of the Indian Act: Accountability in Governance" (Paper delivered at the National Centre for First Nations Governance, 30 July 2007), online: Centre for First Nations Governance <<http://www.fngovernance.org>> at 2. Imai demonstrates that the accountability and transparency regimes in First Nation communities are imposed by the structure and legal framework of the *Indian Act*. Alcantara, Spicer and Leone further demonstrate that First Nation communities *not* constrained by the *Indian Act* can readily

integration, I mean the right of First Nation communities to choose to enter into the broader Canadian economy, and the right to encourage the adoption of non-status Indians as citizens of those communities. Finally, I will put the idea of overlapping consensus into practice by proposing an income tax reform that builds on the shared interests of First Nation and settler people.

## I. An Argument for Some Form of the *Indian Act*

The *Indian Act*, for all its trappings of colonial thinking and clear paternalistic intent, does important work. Among many other things, the *Act* sets out the powers of Indigenous governments,<sup>8</sup> creates a system of land holdings and property interests,<sup>9</sup> provides for the education of Indigenous children (because provincial legislation does not extend to Indian reservations),<sup>10</sup> establishes programs for financial assistance,<sup>11</sup> provides for the legal authority to issue warrants in Indigenous communities to maintain peace and order,<sup>12</sup> determines who is and is not legally an Indian person and sets out the electoral process in Indigenous community elections.<sup>13</sup>

Of course, the *Indian Act* does all of these things badly. The powers of Indigenous governments under the *Act* are few and of little consequence if the goal is to govern modern communities. The system of education enabled by the *Indian Act* is today set out in the very same language that established the residential school system and its well-documented horrors. Maintenance of peace and order is impossible because there are not enough resources to fund police services or attend court hearings. The criteria for

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create successful regimes of accountability and transparency. Christopher Alcantara, Zachary Spicer & Roberto Leone, “Institutional Design and the Accountability Paradox” (2012) 55:1 Canadian Pub Ad 69.

8. *Supra* note 3, ss 81–86.

9. *Ibid*, ss 20–30.

10. *Ibid*, ss 114–122.

11. *Ibid*, s 70 (providing that the Minister of Finance may authorize loans to Indian bands).

12. *Ibid*, ss 103(4), 105.

13. *Ibid*, ss 5–17.

who is an “Indian” are anachronistic at best and racist at worst.<sup>14</sup> The system of property rights in Indigenous communities serves to stymie rather than promote economic development. The statutory framework governing the electoral process in Indigenous communities imposes what is, in effect, a foreign system of governance on an unwilling people. And so, the *Indian Act* is in many ways a terrible piece of legislation: racist, backwards, inefficient and colonial in both scope and intent. It is no wonder so many cry out for its abolition.<sup>15</sup>

All that said, the *Indian Act* is *necessary*, because some piece of legislation must govern the settler-Indigenous relationship.<sup>16</sup> If the *Indian Act* were abolished today, some other piece of legislation would simply spring up to take its place.<sup>17</sup> Nevertheless, in its present form, the *Indian*

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14. See Pamela D Palmater, “An Empty Shell of a Treaty Promise: *R v Marshall* and the Rights of Non-Status Indians” (2000) 23:1 Dal LJ 102; Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2011) [Palmater, *Beyond Blood*].

15. See e.g. Shawn A-in-chut Atleo, “Breaking free of tattered Indian Act” *Toronto Star* (18 November 2010), online: *Toronto Star* <<http://www.thestar.com>>; Phil Ambroziak, “Rob Clarke in Hot Water Over Indian Act” *Northern Pride* (14 February 2012), online: *Northern Pride* <<http://northernprideml.com/2012/02/14/rob-clarke-in-hot-water-over-indian-act>>; Phil Ambroziak, “Indian Act to be modernized: PM” *Northern Pride* (31 January 2012), online: *Northern Pride* <<http://northernprideml.com/2012/01/31/indian-act-to-be-modernized-pm>>; Peter O’Neil, “‘An aboriginal uprising is inevitable’ if Harper doesn’t listen, chief threatens” *National Post* (23 January 2012), online: *National Post* <<http://www.nationalpost.com>>; Herb George Satsan, “Aboriginal crises are symptoms of a deep-rooted problem” *Toronto Star* (25 January 2012), online: *Toronto Star* <<http://www.thestar.com>>; Lorne Gunter, “The Indian Act sustains the problems on our reserves” *National Post* (6 December 2011), online: *National Post* <<http://www.nationalpost.com>>; Tom Flanagan, “First nations property rights: Going beyond the Indian Act” *The Globe and Mail* (22 March 2010), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>; Matthew Pearson, “Abolish Indian Act, Elijah Harper says; Legislation treats First Nations people like ‘children’, says man who killed Meech Lake Accord” *The Ottawa Citizen* (27 January 2012), online: *Ottawa Citizen* <<http://www.ottawacitizen.com>>.

16. In the words of my research assistant Avery Au, “We need a productive debate on what the *Indian Act* should contain; not a futile debate about whether settler and Indigenous people together could live without an *Indian Act*.”

17. Even the call for a return to the treaty relationship is, tacitly, a call for a legislative relationship. International treaties between nations (i.e., bodies in a nation-to-nation relationship) provide no cause of action to Canadian citizens (i.e., they cannot sue the Crown) unless those treaties are implemented through domestic legislation. So, to call for a

*Act* is not a piece of legislation that any of us wants to live under. Surely we can do better.<sup>18</sup>

It is helpful to contrast the approach I am advocating with the current proposed alternatives. On one hand, Indigenous peoples tend to advocate for the wholesale replacement of the *Indian Act* with a different statutory or government-to-government relationship based on historical and contemporary treaties. The *Report of the Royal Commission on Aboriginal Peoples (RCAP)* represents the most comprehensive of these proposals.<sup>19</sup> More recently, Bill S-212 (a private member's Senate bill) has

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nation-to-nation relationship or a return to the treaty relationship is necessarily to call for a relationship that is set out in legislation.

18. On the subject of improving the *Indian Act*, there is a paucity of literature. Save for a few targeted reforms around the taxation and membership provisions, almost no articles exist on the constructive reformation of the *Indian Act*. Even the *Report of the Royal Commission on Aboriginal Peoples*, which charts out an extensive history of the *Act*, has virtually nothing to say about its reform. Its recommendations with respect to the *Act* begin with its wholesale abolition and replacement with an Aboriginal parliament. *Report of the Royal Commission on Aboriginal Peoples: Renewal—A Twenty-Year Commitment*, vol 5 (Ottawa: Supply and Services Canada, 1996) at 172–73, recommendations 2.3.45, 2.3.51 [RCAP]. With regards to the present government's stance on *Indian Act* reform, Prime Minister Stephen Harper has said the following:

To be sure, our Government has no grand scheme to repeal or to unilaterally re-write the Indian Act: After 136 years, that tree has deep roots, blowing up the stump would just leave a big hole. However, there are ways, creative ways, collaborative ways, ways [involving consultation], . . . ways that provide options within the Act, or outside of it, for practical, incremental and real change.

So that will be our approach, to replace elements of the Indian Act with more modern legislation and procedures, in partnership with provinces and First Nations.

Stephen Harper, "Statement by the Prime Minister of Canada at the Crown-First Nations Gathering" (Statement delivered in Ottawa, 24 January 2012), online: Prime Minister of Canada <<http://www.pm.gc.ca/eng>>. While I agree that we cannot simply repeal the *Indian Act*, it is clear that the current federal government has not developed any creative or collaborative proposals for amendments to the *Act*. Reforms by previous governments are few and far between, as are the introduction of legislative instruments dealing with Indigenous-Crown relations. One notable exception is the *First Nations Land Management Act*. This legislation makes it possible for First Nation reserve communities who develop and approve land use management plans to bypass the need for federal approval to lease reserve lands. SC 1999, c 24 [*Land Management Act*].

19. See discussion of the *RCAP*, *supra* note 18.

proposed moving First Nations out of the *Act* by transforming *Indian Act* communities into self-governing nations, replete with constitutions, law-making powers, jurisdiction over lands and resources and powers of taxation over lands and citizens.<sup>20</sup> On the other hand, the federal Crown has proposed a variety of legislative changes to various aspects of its relationship with First Nation people, including changes to the *Indian Act*, virtually all of which are vociferously opposed by First Nations' political leadership. These proposed reforms have either demanded too many concessions on issues of fundamental disagreement between First Nations and the Crown, or the proposals have been too narrow and poorly developed such that there is little to no agreement about how or whether to proceed.

I should note that reforming the *Indian Act* involves a special kind of political process because the *Act* sets out the terms of the relationship between First Nation people, the Government of Canada and its settler citizens. Reforming the *Act* involves more than the sorts of policy considerations that affect all Canadians in the way that, say, reforming the *Criminal Code* or the process of conducting environmental assessments affects all Canadians. Reforming the *Indian Act* has consequences that fall primarily on one group of people: Indians, as defined by the *Act*. Thus, proposals for reform must be attentive to the special relationship between First Nations and the Crown and to the fact that First Nations are likely the only people who will bear the consequence of those reforms (or lack thereof). One way to be attentive to that special relationship, and to create the space for principled and fair agreements, is by identifying an overlapping consensus.

## II. Rawls and the Overlapping Consensus

John Rawls was concerned with how a diversity of communities and individuals could come to consensus on political questions central to the governance of a state. Rawls accepted as given that citizens come to the political process with a range of comprehensive (though not necessarily fully formed or considered) doctrines that by their very nature generate different answers to political questions about the organization of the

20. *An Act providing for the recognition of self-governing First Nations of Canada*, 1st Sess, 41st Parl, 2012 (first reading 1 November 2012).

state and its relationship to citizens. In light of this disagreement on fundamental questions (and even disagreement on the facts of our current situation—which he termed the “burdens of judgment”<sup>21</sup>), Rawls sought a process by which persons with starkly different (though necessarily reasonable) comprehensive doctrines could still agree on political questions.<sup>22</sup> One means to that end, and the one that I will draw on in this paper, is the idea of an “overlapping consensus”—a set of ideas that can garner consensus among reasonable persons on a particular topic, despite the parties’ differing comprehensive doctrines.<sup>23</sup> Rawls wrote, “[T]here can, in fact, be considerable differences in citizens’ conceptions of justice provided that these conceptions lead to similar political judgments. And this is possible, since different premises can yield the same conclusion. In this case there exists what we may refer to as overlapping rather than strict consensus.”<sup>24</sup>

In the context that I am using Rawls’ ideas and terminology, I mean not so much a comprehensive moral doctrine as a comprehensive view about the nature of the appropriate relationship between First Nations, the Crown and the settler citizens of Canada. It is the vast divergence between these comprehensive starting positions, with respect to the appropriate relationship between First Nations and the Crown, that can make negotiation to a principled middle ground impossible.<sup>25</sup> In this

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21. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 54.

22. Rawls imagines that citizens actually have two views: one political and one comprehensive. Where persons argue from their comprehensive doctrines, consensus is difficult or impossible. Instead, Rawls asks us to argue from our political views by referring back to our comprehensive doctrines and tempering these views with principles such as public reason, justice, political and civil liberty, and other fundamental concepts. These comprehensive views, suitably tempered, enable a discussion of and consensus around political questions. *Ibid* at 133–40, 143–44.

23. A similar approach to constitutionalism is presented by James Tully. See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995). Tully’s account is directed to the ideals of constitutionalism in socially, politically, culturally and economically diverse societies. He argues for a constitutionalism based on conventions of mutual recognition, consent and continuity.

24. John Rawls, *A Theory of Justice*, revised ed (Cambridge, Mass: Belknap Press, 1999) at 340.

25. For further critique, see Jeremy Webber, “The Meanings of Consent” in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010).

paper, I want to use the idea of an overlapping consensus to facilitate both the process and the substance of reform. To the extent that First Nations and the Crown each have a comprehensive starting position on the appropriate nature of their relationship, my proposal does not ask that parties abandon their principled and reasonable positions. Rather, my strategy is to ask that parties approach negotiation on questions of reform by aligning their comprehensive starting positions with the more narrow questions of legislative reform. Let me provide two examples of how this might be done.

First, imagine that the federal government has proposed a bill to modernize water safety and sewage standards for First Nation communities. The bill would create new standards and regulations, transfer authority for water and waste systems to First Nation governments and absolve the Crown of any future liabilities arising from this arrangement. First Nation representatives agree on the fundamentals of water safety, and gaining jurisdictional authority over water in their communities is consistent with their views on self-determination. This is a form of overlapping consensus: both parties can agree on certain issues without compromising their comprehensive starting positions. But, the First Nations may reasonably ask, “Given that the water and sewage systems are in decay, how can we be expected to modernize them without new resources to ensure that the work is done properly and that safety standards can be met in the years and decades to come?” Raising these concerns does not ask the Crown to move from its position of wanting to modernize water systems, or even from its position of wanting to absolve itself of future liabilities. It only asks the Crown to continue to work with First Nations on marshalling the resources to achieve what both parties agree are principled and necessary reforms.

Second, imagine that First Nation and government representatives come together to discuss land reforms under the *Indian Act*. But the First Nation refuses to discuss reforms to land tenure, instead asserting that a discussion about self-determination is more appropriate. The Crown could then reasonably ask, “Given your desire to talk about self-determination, what would the land regime look like under your proposed

vision of self-governance?”<sup>26</sup> This approach has the potential to move the First Nation toward discussing land reforms that are consistent with its comprehensive doctrine, and does not require the Crown to abandon its own comprehensive starting position. The fact that parties have principled starting positions is not a barrier to achieving overlapping consensus of this sort, because no one is asked to give up on their principles.<sup>27</sup>

Consider an example of a proposed reform which lacked overlapping consensus to show how and why failure to reform the *Indian Act* is inevitable if parties are unable to align reforms with their comprehensive starting positions. The *First Nations Governance Act (FNGA)* of 2002

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26. I am grateful to the members of Western University’s Kawaskimhon Moot team (Maeve Mungovan, Devin Fulop and Michelle Manning), who provided me with this example. Although the context in which this question was raised was not in a hypothetical discussion between the Crown and a First Nation, the nature of the question has been extremely valuable to me in thinking through the idea of overlapping consensus with respect to relations between First Nations and the Crown.

27. An example of this kind of commitment is set out in the *Kunst’aa Guu-kunst’aayah Reconciliation Protocol*, signed by the Haida Nation and the Province of British Columbia on December 11, 2009. *The New Relationship with First Nations and Aboriginal People, Kunst’aa guu – Kunst’aayah Reconciliation Protocol (2009)*, online: [The New Relationship with First Nations and Aboriginal People <http://www.newrelationship.gov.bc.ca>](http://www.newrelationship.gov.bc.ca), as referred to in *Haida Gwaii Reconciliation Act*, SBC 2010, c 17. The Protocol begins:

The Parties hold differing views with regard to sovereignty, title, ownership and jurisdiction over Haida Gwaii, as set out below.

The Haida Nation asserts that:

Haida Gwaii is Haida lands, including the waters and resources, subject to the rights, sovereignty, ownership, jurisdiction and collective Title of the Haida Nation who will manage Haida Gwaii in accordance with its laws, policies, customs and traditions.

British Columbia asserts that:

Haida Gwaii is Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia.

Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, the Parties seek a more productive relationship and hereby choose a more respectful approach to coexistence by way of land and natural resource management on Haida Gwaii through shared decision-making and ultimately, a Reconciliation Agreement.

*Ibid.*

sought to overhaul several sections of the *Indian Act* dealing with electoral codes, band administration and financial management.<sup>28</sup> The motivation for these revisions is tidily summarized in the preamble to the Act, which stated, “Whereas representative democracy, including regular elections by secret ballot, and transparency and accountability are broadly held Canadian values . . . .”<sup>29</sup> First Nations rejected the *FNGA* in part because the proposed legislation was developed through a flawed consultative process. More importantly, the proposed legislation failed to recognize that while First Nations value transparent financial information and accountable governments, they have a different understanding of where and how those values should apply in their own communities. Reform of the *Indian Act* requires us to focus on the things on which we do agree, and on finding common ground about those shared values. These are difficult topics, reconciling as they must the wide range of political and economic structures of more than six hundred First Nations with those of the dominant settler state. But we need not find a precise alignment of the relevant values and principles. In that vein, our goal in amending the *Indian Act* should never be to impose “broadly held Canadian values” on Indigenous peoples. Rather, we should seek to identify policies and principles that can form the core of an overlapping consensus between First Nations and the Crown, thereby identifying subjects capable of consensual legislative reform.

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28. Bill C-7, *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts*, 2nd Sess, 37th Parl, 2003 [*First Nations Governance Act*]. For commentary on the *FNGA*, see John Borrows, “Stewardship and the First Nations Governance Act” (2003) 29:1 Queen’s LJ 103; John Provart, “Reforming the *Indian Act*: First Nations Governance and Aboriginal Policy in Canada” (2003) 2:1 Indigenous LJ 117.

29. *First Nations Governance Act*, *supra* note 28, preamble.

Some readers may object to the use of liberal political philosophy as a methodology for guiding agreements on legislative reform of the *Indian Act*.<sup>30</sup> I do not here take issues with these objections; my point in this paper is not to argue against the legitimacy of the Canadian state's assertions of sovereignty over Indigenous people, or to spell out what a rightful relationship looks like from the vantage point of legal or political theory. My goal is more modest: to acknowledge that whatever the legitimacy or otherwise of the current relationship between Indigenous people and the Canadian state, the two are indeed in a relationship, and that fact requires us to work together to improve the lives of Indigenous people. This is true whether we are talking about the need for safe water, adequate funding for schools, fixing the broken child welfare system or any number of real world issues that First Nation people themselves want addressed in their communities. To make principled progress on these issues, First Nation and settler government representatives must come to principled agreements, and to do that they must hash out their differences through negotiations. This is not to say that we Indigenous people should give up and accept colonization, or forget about the importance of self-determination, or abandon the wisdom of our elders in negotiating the historic treaties; it is simply to say that we can, and must, negotiate principled agreements on a wide range of topics while maintaining fidelity to our principles and beliefs.

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30. Some argue that liberalism is incapable of incorporating uniquely Indigenous views of community. See Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2:1 *Indigenous LJ* 67. Others argue more broadly that the paradigm of liberal philosophy sets out the terms of the debate such that Indigenous political philosophies or rights to self-determination are subsumed at the outset. See e.g. Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006); Robert Nichols, "Indigeneity and the Settler Contract Today" (2013) 39:2 *Philosophy & Social Criticism* 165. A different tack is taken by Jean Leclair, who argues that the "constitutionalization of aboriginal rights has led to an unfortunate and unsatisfactory reification of aboriginal identity by *all* concerned, natives and non-natives alike". Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31:2 *Queen's LJ* 521 at 522 [emphasis in original]. Leclair asserts that the better way of conceptualizing the relationship is to recognize Aboriginal people as "federal actors" who should be able to assert their claims of nationalism within the existing federal constitutional order. *Ibid* at 532. I am not certain that this approach is in any way at odds with the methodology that I set out in this paper for negotiating such an order.

### III. Some Essential Background

Later in this paper, I will focus on two key areas for reform—accountability and integration—each of which is, I think, capable of being the object of overlapping consensus between First Nations and the Crown. But I will first set out some brief background on the socio-economic context in which First Nation communities find themselves and on how these communities are funded. This background is necessary to understand the perspective of First Nation communities on matters such as accountability and integration.

First Nation people face poorer outcomes in terms of health, education, wealth and social status when compared to their settler counterparts.<sup>31</sup> More specifically, First Nation communities are statistically more prone to teen suicide,<sup>32</sup> experience higher rates of crime,<sup>33</sup> suffer an endemic lack

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31. See Brian Postl, Catherine Cook & Michael Moffatt, "Aboriginal Child Health and the Social Determinants: Why Are These Children So Disadvantaged?" (2010) 14:1 *Healthcare Quarterly* 42; Janet Smylie & Paul Adomako, "Indigenous Children's Health Report: Health Assessment" *Keenan Research Centre* (2009), online: St. Michael's Hospital <<http://www.stmichaelshospital.com>>; J Reading, "The Crisis of Chronic Disease Among Aboriginal Peoples: A Challenge for Public Health, Population Health and Social Policy Centre for Aboriginal Health Research" *Centre for Aboriginal Health Research* (2009), online: Centre for Aboriginal Health Research <<http://www.cahr.uvic.ca>>; Malcolm King, Alexandra Smith & Michael Gracey, "Indigenous Health Part 2: The Underlying Causes of the Health Gap" (2009) 374:9683 *The Lancet* 76; Chantelle AM Richmond & Nancy A Ross, "Social Support, Material Circumstance and Health Behaviour: Influences on Health in First Nation and Inuit Communities of Canada" (2008) 67:9 *Social Science & Medicine* 1423.

32. In general, Aboriginal rates of teen suicide are five to six times higher than for non-Aboriginal Canadians. The rates vary between large and small, northern and southern communities such that small northern communities suffer more than others. See Laurence J Kirmayer et al, "Suicide Among Aboriginal People in Canada" *Aboriginal Healing Foundation* (2007), online: Aboriginal Healing Foundation <<http://www.ahf.ca/downloads/suicide.pdf>> at 22.

33. A 2006 report found that Aboriginal people are three times more likely than non-Aboriginals to experience violent victimization. On-reserve crime rates are three times higher than off-reserve crime rates and violent on-reserve crime rates are eight times higher. See Jodi-Anne Brzozowski, Andrea Taylor-Butts & Sara Johnson, "Victimization and Offending Among the Aboriginal Population in Canada" *Statistics Canada* (2006), online: Statistics Canada <<http://www.statcan.gc.ca>> at 1.

of housing<sup>34</sup> and clean water,<sup>35</sup> and have little access to education beyond

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34. Aboriginal Affairs and Northern Development Canada's (AANDC) predecessor, Indian and Northern Affairs Canada (INAC), estimated the *current* backlog of housing needs for the on-reserve Aboriginal population as follows: 20,000 to 35,000 new housing units, 16,900 existing units in need of major repair, and 5,200 existing units in need of replacement. Aboriginal Affairs and Northern Development Canada, *Evaluation of INAC's On-Reserve Housing Support* (February 2011), online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca>>. The authors of this report note that the *growing* backlog is especially troubling for two reasons: the Aboriginal demographic is exploding and, over the last five years INAC has only built 1,500 new units and serviced 6,000 existing units. *Ibid.*

35. As early as 1995, Health Canada determined that twenty-five percent of on-reserve water systems posed health and safety risks. Between 1995 and 2001, \$1.9 billion was spent to improve these systems. However, in 2001, INAC found that seventy-five percent of on-reserve water systems posed a safety risk. In 2003, \$600 million over five years was budgeted for further improvements. Office of the Auditor General of Canada, *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons: Chapter 5—Drinking Water in First Nations* (2005), online: Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca>> at 6. Consider these statements from an INAC expert panel in 2006:

[T]he federal government has never provided enough funding to First Nations to ensure that the quantity and quality of their water systems was comparable to that of off-reserve communities.

For example, in the five-year capital plan covering 2002–07, INAC officials acknowledge that the federal government's initial estimates of the capital needed to invest in First Nations water and wastewater systems turned out to be *one-third to one-half* of what was actually needed. The estimates were *not based* on detailed engineering analysis. As well, they did not take into account increases in construction . . . and the impact of increasing water-quality standards.

Harry Swain, Stan Louttit & Steve Hrudey, "Report of the Expert Panel on Safe Drinking Water for First Nations" *Indian and Northern Affairs Canada* (2006), online: Safe Drinking Water Foundation <<http://www.safewater.org>> at 22 [emphasis added].

the primary years.<sup>36</sup> First Nation people are overrepresented in prisons<sup>37</sup> and underrepresented in the economy.<sup>38</sup>

### A. *The Current System of Funding*

It is not possible to summarize the precise manner in which First Nation communities are funded. To start with, there is no legislative basis for existing funding formulae.<sup>39</sup> The formula applied to any given First Nation community is based not on legislation, but is instead based on the policies of the department of Aboriginal Affairs and Northern

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36. In 2006, educational attainment among First Nation persons aged 25 to 64 was composed of: 38% having less than high school, 20% having no more than high school and 42% having more than high school. Only 8% of the Aboriginal population had university degrees, compared with 23% of the non-Aboriginal population. See Statistics Canada, *Educational Portrait of Canada: 2006 Census* (2006), online: Statistics Canada <<http://www.statcan.gc.ca>> at 21.

37. In 2008, Aboriginal adults composed 22% of the prison and temporary custody populations while representing only 3% of the Canadian population. See Samuel Perreault, "The Incarceration of Aboriginal People in Adult Correctional Services" *Statistics Canada* (2009), online: Statistics Canada <<http://www.statcan.gc.ca>> at 5. To help with the technicalities of this document, see Statistics Canada, *Definitions* (2009), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2009003/definitions-eng.htm>> .

38. See Indian and Northern Affairs Canada, *Comparison of Socio-economic Conditions, 1996 and 2001: Registered Indians, Registered Indians Living on Reserve and the Total Population of Canada* (2005), online: Library and Archives Canada <<http://www.collectionscanada.gc.ca>> .

39. The source of AANDC's mandate is vague. It stems from the Constitution, the *Indian Act* and modern legislation, none of which sets out the basis of any principled funding relationship. AANDC explains that its mandate is essentially to maintain continuity with the current structures and to respond to judicial decisions when necessary:

[Besides legislation, the] Department's mandate is also derived from policy decisions and program practices that have been developed over the years; it is framed by judicial decisions with direct policy implications for the Department; and it is structured by funding arrangements or formal agreements with First Nations and/or provincial or territorial governments.

Treasury Board of Canada Secretariat, *2012-13 Part III: Reports on Plans and Priorities (RPP)* (2012), online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca>> at 4.

Development Canada (AANDC).<sup>40</sup> Small communities are funded according to different formulae than large ones, and more northern and remote communities according to different formulae than urban ones. Internal AANDC policy documents go so far as to state that there is no coherence to the funding formulae, and even the department itself does not know the long-term goals of these labyrinthine arrangements.<sup>41</sup>

The current system of transfer payments to First Nation communities is not directly tied to the number of members in a community. Additionally, increases to social programs and band administration spending for the communities has been capped by AANDC at 2% growth per year since 1998, even when inflation has exceeded that rate.<sup>42</sup> Thus, as

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40. See Emmanuel Brunet-Jailly, "The Governance and Fiscal Environment of First Nations' Fiscal Intergovernmental Relations in Comparative Perspectives" *National Centre for First Nations Governance* (2008), online: Centre for First Nations Governance <<http://www.fngovernance.org>> .

41. For example, a report entitled "Special Study on INAC's Funding Arrangements" states:

Funding arrangements are the primary instrument through which INAC implements its policies and programs. . . . Despite the centrality of funding arrangements to the Department and their importance in terms of INAC's relationship with First Nations . . . [i]t is not clear what the overall objective is in terms of funding arrangements, there is a lack of coherence among programs and funding authorities that make up the arrangements, and there is no clear leadership at Headquarters to coordinate the management and implementation of funding arrangements.

Responsibility for the design, negotiation, and monitoring of funding arrangements is split between INAC HQ and the regions, and across Finance, Programs and Regional Operations. There is no centre of expertise on grants and contributions . . . and no single point of contact for coordination with other federal departments . . . . Policy and program officials are often not familiar with the details of funding arrangements and funding authorities, and program terms and conditions can conflict with broader policy objectives or be inconsistent with each other.

Aboriginal Affairs and Northern Development Canada, *Special Study on INAC's Funding Arrangements* (2008), online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca>> at 30–31 [*Special Study*].

42. Inflation was only 2.3% during this period, effectively freezing funding for more than a decade. For the response of AANDC ministry officials, see House of Commons Standing Committee on Aboriginal Affairs and Northern Development, 40th Parl, 2nd sess, No 006 (26 February 2009). Neil Yeates, the Associate Deputy Minister of AANDC,

more members are born into a community (First Nations are the fastest growing demographic in Canada<sup>43</sup>) and as inflation negates the 2% per annum increase in funding, First Nation communities face increasing

noted: “[T]he 2% cap . . . has been in place for a long time. It has placed a significant amount of pressure on the whole array of programming. It’s not just education; it is social programming, and so on, more broadly . . . I would say, however, that the government has made investments [elsewhere constituting funding] above and beyond the 2% cap.” *Ibid.* The 2% cap applies to what AANDC calls the “core funding envelope” comprising fifteen programs including post-secondary education and band support; the latter aiming to “provide a stable funding base to facilitate effective community governance”. The 2% cap is not applied to each community, but rather to each of AANDC’s regional offices. This funding arrangement is explained and criticized in two internal audits. The first stated:

Since 1998/99, a global funding methodology has been employed that allocates core budget funds to [INAC regional offices] annually, with no breakdown of the core funds by program. National budget increases (currently 2% annually) are allocated to each [regional office] in proportion to their existing budgets . . . Internal Audit is of the view that the allocation methodologies currently in place do not ensure that eligible students across the country have equitable access to post-secondary education.

Indian and Northern Affairs Canada, *Audit of the Post-Secondary Education Program* (2009), online: Aboriginal Affairs and Northern Development Canada <<http://www.aandc-aandc.gc.ca>> at 11–12. The second stated:

The [regional offices] determine how the core funding is to be allocated within the fifteen programs based on the greatest needs of their [recipient communities]. . . . [Though t]he core funding envelope increases 2% each year . . . where the total year-over-year increase in [band support] commitments is greater than 2%, regions are forced to re-allocate funds from other areas of their core funding envelope to meet [band support] commitments.

Indian and Northern Affairs Canada, *Audit of the Band Support Funding Program* (2009), online: Aboriginal Affairs and Northern Development Canada <<http://www.aandc-aandc.gc.ca>> at 11, 16.

43. The present Indigenous population in Canada is 1.2 million and, by 2026, will number 1.5 million. The Indigenous population is growing at an average annual rate almost double that of the general Canadian population. Indian and Northern Affairs Canada, *Aboriginal Demography: Population, Household and Family Projections* (2011), 2001–2026, online: Aboriginal Affairs and Northern Development Canada <<http://www.aandc-aandc.gc.ca>> at 5. The Indigenous population is also much younger than that of the general Canadian population, with a median age of 27, as compared to Canada’s median of 40. Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census* (2006), online: Statistics Canada <<http://www12.statcan.ca/census-recensement/2006/as-sa/97-558/pdf/97-558-XIE2006001.pd>> at 14.

financial constraints even as the challenges and populations of their communities grow.

The *Indian Act* provides little in the way of meaningful powers of taxation.<sup>44</sup> Moreover, with little ability to raise money, a community's decisions about its fiscal and capital priorities are subject to the spending authority of the Minister of Aboriginal Affairs and the policy directives of AANDC. The existing taxation powers of an Indian band are very limited and do not provide First Nation communities with significant revenues, certainly insufficient compared to other levels of government. Section 83 of the *Indian Act* prescribes the bylaw-making authority of First Nation governments.<sup>45</sup> Section 83(1)(f) is so vague that it might authorize income taxes, but this has never been tested in court.<sup>46</sup> The *First Nations Goods and Services Tax Act* provides definitive authority to collect sales tax on reserve,<sup>47</sup> but the national unemployment rate of status Indians living on reserve is almost 25% and the median household income has remained unchanged for over ten years at an astonishingly low \$26,000 per year.<sup>48</sup> Under these circumstances, sales taxes and income taxes, even if fully deployed, simply cannot yield significant revenue.

## IV. Financial Accountability

Funds that flow from the federal government to First Nation communities are supposed to be spent for the benefit of the community

44. I should note here that communities that negotiate their own self-government agreements are free to negotiate for themselves new or augmented powers to tax. Further, communities opting into the *First Nations Fiscal Management Act*, *First Nations Goods and Services Tax Act*, and *First Nations Land Management Act* have augmented powers of taxation such as sales tax and real property tax. *First Nations Fiscal Management Act*, RSC 2005, c 9 [*Fiscal Management Act*]; *First Nations Goods and Services Tax Act*, SC 2003, c 15, s 67; *Land Management Act*, *supra* note 18. The otherwise limited powers of taxation under the *Indian Act* are enumerated in section 83. *Supra* note 3, s 83.

45. *Ibid.*

46. *Ibid.*, s 83(1)(f). It should be noted that section 83(1)(f) is so vague it seems to authorize "almost any means of taxation of band members, including income taxes". Jack Woodward, *Native Law*, loose leaf (Toronto: Carswell, 1989) at 12:350. To my knowledge, 83(1)(f) has never been utilized by a First Nation to impose personal income taxes on its members.

47. *Supra* note 44, s 3(1).

48. See *supra* note 38 at 15. In comparison, during this period the median Canadian household income grew from \$44,000 to \$47,000. See *ibid.*

and its members, and proof that funds are spent in this way is typically what is meant by “accountability”. There has been no shortage of calls for accountability of this kind. Politicians and the press regularly seek to make First Nation communities more accountable, and to that end the *First Nations Financial Transparency Act* was passed in March 2013.<sup>49</sup> This Act is just thirteen sections long, and purports to “strengthen first nations governance by increasing accountability and transparency, *giving first nations community members the information they need to make informed choices about their leadership*”.<sup>50</sup> The Act requires the preparation and public disclosure of annual consolidated financial statements and statements of remuneration paid to the chief and councillors. It also requires that those documents be provided to any community members who request them.

No one will argue with accountability in the abstract, and First Nation people share with the settler people a desire for their governments to be accountable to them as citizens. Similarly, the federal Crown has the right to ensure that funds transferred for a specific purpose are spent accordingly. But it is important to understand the context in which this statute was introduced. Even before the *First Nations Financial Transparency Act* was passed, First Nation communities were (and are still) required to file more than 150 reports each year on their spending,<sup>51</sup> and the *Indian Act* already

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49. SC 2013, c 7 (Royal Assent received 27 March 2013). For further analysis of the bill, see Tonina Simeone & Shauna Troniak, “Legislative Summary of Bill C-27: An Act to enhance the financial accountability and transparency of First Nations” *Library of Parliament Research Publications* (2013), online: Parliamentary Information and Research Service <<http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c27-e.pdf>>.

50. See *House of Commons Debates*, 41st Parl, 1st Sess, No 184 (23 November 2012) at 34 (Michelle Rempel) [emphasis added] [House of Commons Debates].

51. The Auditor General in 2011 reported as follows:

In 2002 . . . [w]e estimated that [the] four [principal] federal organizations together required about 168 reports annually from each First Nations reserve. We found that many of the reports were unnecessary and were not in fact used by the federal organizations. . . . In our 2006 follow-up audit . . . INAC’s officials told us that the Department obtained more than 60,000 reports a year from over 600 First Nation communities.

. . .

[In 2008 the] Treasury Board of Canada Secretariat . . . [issued the] Government of Canada Action Plan to Reform the Administration of Grant and Contribution Programs . . . commit[ing] the government to reduc[e] recipients’ administrative and reporting burden . . . [A]t the time of our audit, INAC had yet to finalize a

requires the Minister of Aboriginal Affairs to approve such spending and ensure that expenditures are to be “only for the benefit of the Indians or bands”.<sup>52</sup> Thus the federal government already has all of the information that it could possibly need regarding First Nation spending.<sup>53</sup>

The main problem with the *First Nations Financial Transparency Act* is that it goes beyond its stated purpose of giving First Nation members the “information they need to make informed choices”.<sup>54</sup> The Act specifies that the venue for disclosure is the band’s website, and so the information is available to many more people than simply First Nation community members.<sup>55</sup> The requirement that consolidated financial statements be published means that some aspects of confidential agreements made between First Nations and resource companies working on the First Nations’ traditional lands are now publicly available. This undermines

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process . . . to determine the level of reporting requirements most appropriate to each First Nation.

. . .

Despite many initiatives, we have not seen a significant reduction in the reporting burden. We were able to track the number of reports [filed in the electronic transfer payment system used regularly by 228 of 700 First Nations]. The number of . . . reports increased from 30,000 in the 2007–08 fiscal year to 32,000 in 2009–10 . . . [Many] First Nations officials . . . indicated that the reporting burden has increased in recent years.

Many initiatives with the potential to streamline reporting have been started but have not resulted in meaningful improvement.

Office of the Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons: Chapter 4—Programs for First Nations on Reserves* (2011), online: Office of the Auditor General of Canada <[http://www.oag-bvg.gc.ca/internet/docs/parl\\_oag\\_201106\\_04\\_e.pdf](http://www.oag-bvg.gc.ca/internet/docs/parl_oag_201106_04_e.pdf)> at 31–34 [“Auditor General’s Status Report”].

52. *Indian Act*, *supra* note 3, s 61.

53. In 2011, the Auditor General of Canada characterized the government efforts to streamline reporting requirements over the last ten years as “unsatisfactory” and having “not resulted in meaningful improvement”. Reporting requirements have since increased. “Auditor General’s Status Report”, *supra* note 51. See also the Assembly of First Nations’ own report on this issue, Assembly of First Nations, *First Nations Accountability Fact Sheet: June 2011* (2011), online: Assembly of First Nations <[http://www.afn.ca/uploads/files/accountability/11-05-31\\_fs-accountability\\_fe.pdf](http://www.afn.ca/uploads/files/accountability/11-05-31_fs-accountability_fe.pdf)>.

54. House of Commons Debates, *supra* note 50.

55. *First Nations Financial Transparency Act*, *supra* note 49, s 8. The *First Nations Governance Act* also contained public disclosure requirements for audited statements. *Supra* note 28, s 9(3).

the negotiating power of First Nations, because everyone in the resource sector now has access to the details of previous agreements. For these reasons, the *First Nations Financial Transparency Act* failed to gain the support of First Nations.

That said, I believe the issue of financial accountability in First Nation communities is capable of becoming an object of overlapping consensus: First Nation people want their governments to be accountable to them, and the federal government as funding agent wants to know that monies transferred to First Nation communities are being spent for their intended purposes. But coming to agreement on a suitable statutory framework for such accountability will only be possible if we can agree on who is to be accountable to whom. First Nation governments already have detailed requirements designed to ensure financial transparency to their members.<sup>56</sup> In that light, the trumpet calls for accountability appear not to be for the benefit of First Nation members, but rather to open the communities' books to a political base of skeptical non-Indian citizens who do not believe that "you are spending *our* money wisely".<sup>57</sup>

It may well be that First Nations would agree to legislation that embodied the department of AANDC's existing policy requirements,

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56. Currently, AANDC's Year-End Financial Reporting Handbook requires every First Nation receiving federal funds to disclose in its financial statements the salaries, honoraria, travel expenses and other remuneration paid to or received by elected officials (and some employees). These statements must include funds from all sources from which the First Nation receives funding. Aboriginal Affairs and Northern Development Canada, *Year End Reporting Handbook: Funding Agreements covering 2012-2013* (2013), online: Aboriginal Affairs and Northern Development Canada <[www.aadnc-aandc.gc.ca](http://www.aadnc-aandc.gc.ca)>. According to AANDC's Funding Agreement Model for 2013 and 2014, First Nations must also provide within sixty days a copy of the report to any band member who asks for one, and the band must complete the financial report within 120 days of its fiscal year end. The provisions specify that members can request, and must be provided, financial statements from all previous years, and that the band may not charge more than a modest fee to cover the cost of copying the documents. Aboriginal Affairs and Northern Development Canada, *First Nations and Tribal Councils National Funding Agreement Model For 2013-2014* (2014), online: <<http://www.aadnc-aandc.gc.ca>> at ss 4.4, 6.3.

57. It pains me to point out that First Nation people pay taxes. If Indians live off-reserve, they have no tax breaks, and pay income, property and sales taxes at the same rates as every other Canadian. To those persons who believe that the filing of 150 financial reports and ministerial oversight are insufficient, I would argue that the ambit of their concern should be directed to reforming the already existing and extensive financial reporting rather than demanding new and unnecessary levels of transparency and accountability.

namely, the requirement to disclose detailed financial information to AANDC and to band members. When partisan political concerns such as those reflected in the *First Nations Financial Transparency Act* trump just and principled reforms, the ambit of overlapping consensus shrinks and the good will necessary to support a process of reform disappears.

I will return to the issue of financial accountability later in this paper, and I hold open the possibility that new regulations or new legislation may be desirable for both First Nations and the Crown. However, if accountability is to become an area of overlapping consensus, reforms must be truly aimed at making First Nation governments accountable to their members rather than merely being window dressing reforms aimed at responding to the unfounded skepticism of non-Indigenous Canadians.

## V. Integration

Integration is a word with a dark history in the context of First Nations-settler relations, tied as the term is to assimilation and the residential school system. I do not mean integration in this way. By integration I mean that First Nation communities should be able to choose the degree to which they will participate in the modern global economy. This includes the manner in which First Nation communities might wish to use their lands and resources: for commercial exploitation, for leasing, for security against loans or for preservation in pristine natural form. But I also use the word integration in a second way: to mean the incorporation of non-status Indians into First Nation communities, which should be encouraged to the extent that it is desired by, and beneficial to, communities and non-status Indians.<sup>58</sup> Below, I will propose how and under what circumstances First Nation communities might consider opening their membership doors more widely to non-status Indians, Métis and even non-Aboriginal people.

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58. See also John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 155–64 [Borrows, *Indigenous Constitution*]; John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 202–03.

## A. Bars to Economic Integration

Let me begin with integration in the first of the two senses: economic integration. First Nation people and communities must be able to choose for themselves the extent to which they wish to participate in the broader Canadian and global economy. I believe that there is a general consensus among the settler people that First Nation people should be able to work and farm either on- or off-reserve, and First Nation people also want to be able to make these kinds of choices for themselves.<sup>59</sup> Some kinds of economic integration therefore have the potential to become the object of overlapping consensus and legislative reform of the *Indian Act*.

Several sections of the current *Indian Act* drastically, and arbitrarily, limit First Nation participation in the broader economy. For example, consider the *Indian Act*'s fixation on farming.<sup>60</sup> Section 71(1) provides that the minister may operate farms on reserves, and may purchase and distribute pure seeds to Indian farmers without charge.<sup>61</sup> As for the profits from these farms, section 71(2) says that the minister may apply profits to extend farming operations on reserves, to make loans to Indians to enable them to farm, or in "any way that he considers to be *desirable to promote the progress and development of the Indians*".<sup>62</sup> Further, section 71 must be read in conjunction with section 32(1), which provides that any transaction of agricultural goods by a band or band member to a non-member is void unless the "superintendent approves the transaction in writing".<sup>63</sup> In other

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59. See John Borrows & Sarah Morales, "Challenge, Change and Development in Aboriginal Economies" in Joseph Eliot Magnet & Dwight A Dorey, eds, *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis Butterworths, 2005) 137.

60. During the earliest incarnations of the *Indian Act*, and into the early twentieth century, farming was understood to be the ultimate means of assimilating Indigenous people into the labour market. To the extent these efforts were successful in producing prosperous Indian farmers, the *Indian Act* was modified to make participation more difficult. See Sarah A Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990); Tony Ward, "Reserve Farming on the Canadian Prairies 1870-1910" (Paper delivered at the Canadian Network for Economic History Conference, 3 October 2009), online: Canadian Network for Economic History <<http://cneh09.dal.ca>> .

61. *Indian Act*, *supra* note 3, s 71(1).

62. *Ibid*, s 71(2) [emphasis added].

63. *Ibid*, s 32(1). These provisions only apply to Indians living on reservation in the prairie provinces where, of course, the best farmlands are to be found.

words, the *Act* allows the minister to promote farming, but restricts the sale to non-Indians of agricultural goods produced by Indians. Similarly, section 93 of the *Indian Act* prohibits, without ministerial approval, the removal from an Indian reserve the following items: minerals, stone, sand, gravel, clay, soil, trees, timber, cordwood or hay.<sup>64</sup> Thus, Indians can sell neither the produce of their farms, nor the naturally occurring wealth of their reserve lands without ministerial approval.

Another deterrent to economic participation created by the *Indian Act* for First Nation people living on reserve are restrictions on access to capital. Under sections 29 and 89 of the *Act*, the property of an Indian on reserve cannot be seized, and the *Act* specifically rules out the possibility of mortgaging reserve lands (with the exception of leasehold interests per section 89(1.1)).<sup>65</sup> This means that First Nation people living on reserve cannot access capital through conventional means and cannot enjoy the intergenerational transfer of wealth through real estate that is common off reserve.

Recent proposals to amend the *Indian Act* to allow for the creation of real property interests have merit and should be considered on their own terms.<sup>66</sup> Some of those terms, however, include the very uneasy history that Indigenous people in the Americas have had with efforts to encourage economic integration through the privatization and commodification of Indigenous lands. Past efforts at privatization have resulted in Indigenous people losing vast portions of their communally held lands with virtually no benefit to the economies of Indigenous communities. In Canada in the 1870s, Métis people were issued “scrip”—a form of currency that could be used to purchase Crown lands. Most scrip ended up enriching unscrupulous settler representatives, including members of the federal government, a lieutenant governor and even the Chief Justice of Manitoba.<sup>67</sup> Métis people on the other hand, ended up

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64. *Ibid.*, s 93(a).

65. *Ibid.*, ss 29, 89, 89(1.1).

66. See e.g. Tom Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's University Press, 2010).

67. See *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol 4 (Ottawa: Supply and Services Canada, 1996) at 199–386.

with very little of the 1.4 million acres subject to scrip.<sup>68</sup> Similarly, in the United States, the *Dawes Act* carved Indian reservations into allotments of private property.<sup>69</sup> Between 1887 and 1934, Indian land holdings in the US dropped from 138 million acres to just 48 million acres, and nearly 20 million of those remaining acres are desert or semi-desert lands. In other words, more than eighty percent of Indian lands were transferred into the hands of non-Indians, with virtually no economic development for the Indian nations subject to the *Dawes Act*.<sup>70</sup>

Given that the history of privatizing Indigenous lands is largely the history of transferring those lands at low cost to non-Indigenous people, many First Nations are rightly skeptical of any such proposals. At the same time, however, I note that property reforms may be helpful to some First Nation communities. Some communities may wish to relocate entirely and, to do so, they would need to sell their lands and obtain new ones. While I do not expect private property reform to end poverty or even lead to substantial economic growth in First Nation communities,<sup>71</sup> I acknowledge that some communities might feel that they could benefit from the spirit of entrepreneurship that could be fostered by access to capital.

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68. See Linda Goyette, “The X Files” (2003) 123:2 *Canadian Geographic* 70; Nicole C O’Byrne, “A Rather Vexed Question . . . : The Federal-Provincial Debate over the Constitutional Responsibility for Métis Scrip” (2007) 12:2 *Rev Const Stud* 215. See also *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623.

69. See DS Otis, *Dawes Act and the Allotment of Indian Lands, (Civilization of American Indian)* (Norman, Okla: University of Oklahoma Press, 1973).

70. See US, *The Purpose and Operation of the Wheeler-Howard Indian Rights Bill*, Office of Indian Affairs (19 February 1934) (John Collier), online: Connecticut State Library <<http://cslib.cdmhost.com>> at 3. See also US, *The Indian Reorganization Act 75 Years Later: Renewing our Commitment to Restore Tribal Homelands and Promote Self-Determination Hearing Before the Senate Committee on Indian Affairs* (2011) (G William Rice), online: Senate Committee on Indian Affairs <<http://www.indian.senate.gov>> .

71. See Jamie Baxter & Michael Trebilcock, “Formalizing Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform” (2009) 7:2 *Indigenous LJ* 45. These authors assert that land tenure reform should be only one of a range of possible solutions to advance economic development in First Nation communities.

### *B. The Potential for Overlapping Consensus on Economic Integration*

Thus, on the issue of economic integration, I will suppose that there is generally broad overlapping consensus with respect to reform of at least some sections of the *Indian Act*. The prohibition on sales of natural resources and farmed produce, for example, cannot possibly be justified, and is ripe for consensual reform. Revisions to the *Indian Act* that would make reservation lands private property are controversial, but such proposals should not be entirely off the table as a part of a suite of potential reforms. But, at present, there is not a broad consensus among First Nations that would justify putting property reform at the top of the reform agenda. This is just to say that to proceed with property reforms in the absence of other significant reforms that are part of an overlapping consensus between First Nations and the Crown is to substitute the priorities of the Crown and a small group of First Nations (who do want private property on reserve lands) instead of beginning with reforms on which there is broad consensus. It is simply better policy to proceed first in areas where there is already broad consensus on the reforms that are needed.

### *C. Integration Through Membership*

I now turn to address the question of membership in a First Nation community, and in particular the extension of membership to what are termed non-status Indians. Let me begin by saying that the *Indian Act* itself determines who is an Indian for the purposes of the *Act*. The rules are very complex, and have changed a number of times in recent decades. Families and individuals have, over the generations, found themselves removed from the registration rolls in Ottawa and made into non-Indians, and then later found themselves considered Indians again after legislative reform.<sup>72</sup> Others who were removed from the rolls continue, along with their children and grandchildren, to be non-Indians. To assist the reader, I have compiled the many rules governing who, and under

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72. See my own example recounted in Douglas Sanderson, Book Reviews of *Tribal Constitutionalism: States, Tribes and the Governance of Membership* by Kirsty Gover and *Beyond Blood: Rethinking Indigenous Identity* by Pamela D Palmater (2013) 63:3 UTLJ 511.

what circumstances, one is legally an Indian into one set of rules that are generally true. You can only be an Indian for the purposes of the *Act* if:

- a. Your parents were both legally Indians, in which case you are a section 6(1) Indian, and your children will be section 6(1) Indians.
- b. One parent was a section 6(1) Indian and the other was not a legally registered Indian, in which case your children will be section 6(2) Indians.
- c. One parent was a section 6(2) Indian, and the other parent was a section 6(1) Indian, in which case your children will be section 6(1) Indians.
- d. Both parents were section 6(2) Indians, in which case your children will be section 6(1) Indians.<sup>73</sup>

To put this in plainer language, if your grandmother held legal status as an Indian and had a child with a non-Indian, that child—your mother or father—would be a section 6(2) Indian. And then if your mother or father also had a child with a non-Indian, that child—you—would not be legally recognized as an Indian. This is informally called the “two generation rule”, and while it does not explicitly use terminology like “blood quantum”, the implicit effect is to categorize First Nation people as a race whose purity requires blood lineage that is traceable to the fetishistic ideal of a “pure” Indian.<sup>74</sup>

Without government recognition and registration attesting to your status as an Indian person, you cannot legally be an Indian in Canada, at least not for the purposes of the *Indian Act*. However, being an Indian for the purposes of the *Indian Act*—that is, being a status or treaty Indian—and being a member of a First Nation community are not the

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73. *Indian Act*, *supra* note 3, s 6.

74. See Sébastien Grammond, “Discrimination in the Rules of Indian Status and the *McIvor* Case” (2009) 35:1 *Queen’s LJ* 421.

same thing.<sup>75</sup> It is possible to be a member of a First Nation community without being recognized by the federal government as an Indian. The *Indian Act*'s membership provisions allow communities to develop their own membership codes and to admit new members as they please,<sup>76</sup> but the vast majority now have membership provisions patterned after the *Indian Act*.<sup>77</sup> To understand why this is so, one must consider the financial implications of membership for First Nation communities. Section 10 of the *Act* decouples membership from funding by saying that funding depends to some degree on the number of status Indians in a community (as determined by the federal government), rather than on the number of recognized community members (as determined by the membership codes of the Indian Band).<sup>78</sup> Communities that avail themselves of section 10 to expand their membership receive no additional federal or provincial funding for new members. But all members, including non-status members, are entitled to certain benefits, including the right to be beneficiaries of trust funds,<sup>79</sup> compensation from expropriated lands,<sup>80</sup> a certificate of possession allowing for exclusive occupation of a plot of land

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75. For example, band members who are not registered as status Indians with the federal government may still be band members. Band members have the legal capacity to make claims with respect to certain kinds of community resources and processes such as accessing trust funds and voting in band elections, but do not have the right to other rights such as the federal health insurance provided to status Indians. See *McIvor v Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153, 91 BCLR (4th) 1. See also Mary C Hurley & Tonina Simeone, "Bill C-3: Gender Equity in Indian Registration Act" *Library of Parliament Research Publications* (2010), online: Parliament of Canada <<http://www.parl.gc.ca>>.

76. While bands can create membership codes and membership rules under section 10 of the *Act*, this does not make members "Indians" for purposes related to the federal registrar of Indians. Indians remain by definition persons registered as Indians under section 5(1) of the *Indian Act*. *Supra* note 3, s 5(1). For more on the virtues and risks associated with coupling and decoupling membership in Indigenous communities, see Kirsty Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford: Oxford University Press, 2011).

77. Indeed, some communities have membership provisions that are even more restrictive than the *Indian Act*'s blood quantum provisions. See Palmater, *Beyond Blood*, *supra* note 14.

78. *Supra* note 3, s 10.

79. *Ibid.*, ss 61(1), 63.

80. *Ibid.*, ss 18.1, 35(4), 65.

on the reserve,<sup>81</sup> benefits from band revenue<sup>82</sup> and the ability to receive benefits related to farming, among others.<sup>83</sup> Given that many of these rights draw on the resources of an Indian band, without any concomitant rise in the community's funding levels, it is no surprise that bands are unwilling to extend membership in a more generous fashion than does the *Indian Act*.

There is another, more troubling aspect of the *Indian Act*'s rules about who is and who is not an Indian. By setting out incentives to limit First Nation community membership only to those persons who are already legally status Indians, the federal government has created a whole class of persons—non-status Indians—who are by every appropriate measure First Nation people, but who can claim no legal recognition of their status, and for whom membership in a community is possible in theory, but not in practice.<sup>84</sup>

I might best be able to explain the situation of non-status Indians by relating a story from my own past. One of the worst experiences that I have ever endured was a two-day workshop when I worked as a videographer for the *Royal Commission on Aboriginal Peoples*. I was hired as part of a small research project called the "Urban Identity Project". We assembled small groups of young urban Indians between the ages of fifteen and twenty. None were status-Indians, but they were all clearly Indians. They looked like Indians, they talked like Indians, they knew who they were. And many of them had tried to go home. They had hitched rides to the

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81. *Ibid*, ss 20, 22–25, 58(3).

82. *Ibid*, s 66(2).

83. *Ibid*, s 71. Other rights may include the right of residency and the right to be buried on reserve. *Ibid*, s 81(1)). They may also include the right to vote in or hold office in a First Nation community election.

84. On the issue of the two generation rule, and the creation of a class of persons deemed non-status Indians, the *RCAP* says this:

Thus, it can be predicted that in future there may be bands on reserves with non-status Indian members. They will have effectively have been assimilated for legal purposes into provincial populations. Historical assimilation goals will have been reached, and the federal government will have been relieved of its constitutional obligation of protection, since there will no longer be any legal 'Indians' left to protect.

*Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 307.

reserves where they knew they were from, where they knew their parents or grandparents had lived, and they begged to come home, home to this place where they thought they could find themselves, their cultures, and their place in the world. But they were, each and every one, told to leave. There were no resources to feed these kids, let alone house them. There were no language classes or ways for them to connect with their culture, their heritage, or their sense of identity. And they cried. They cried and they cried in front of my camera. They just wanted to go home, they just wanted to be who they were, but they lacked all the social and geographic and linguistic tools to find strength in their identity because the source and place of that identity was and is their home community. For all their pitiable state, these teens were deemed not to be Indians. The *Indian Act* said they were not Indians, and so they were told to leave the very communities that they so desperately wanted to join.

In many ways, this situation—Indigenous children who want to reclaim a part of their culture but who have no access to the institutions of that culture—is emblematic of a serious problem affecting contemporary Indigenous communities. The problem is the lack of alignment between the incentives of membership and the appropriate resources that would allow First Nations to repatriate the non-status Indians who want to rejoin their home communities. First Nation people who are legally non-status Indians know where their home communities are located, and the communities know how to adopt these persons into their families and clans because there are many ways of doing so both under provincial and Indigenous law. The reintegration of non-status Indians back into their home communities is the kind of policy issue that could become an object of overlapping consensus between First Nation people and the broader Canadian public. In the next section, I will demonstrate how to tie together the issues of financial and membership integration with the issues around financial accountability, leading to a package of reforms that is capable of being the object of an overlapping consensus.

## VI. Creating Overlapping Consensus by Combining Accountability and Integration

The reason that First Nation communities cannot easily integrate non-status Indians into their communities is a lack of alignment between resources and membership. Because First Nation communities have little in the way of effective powers of taxation, the vast majority of all revenues coming into a First Nation community are federal transfer dollars, and these dollars pay for education, housing, child welfare, maintenance, salaries of public officials and the maintenance of public infrastructure such as roads, bridges and water treatment plants. These costs are borne by small and often remote communities who have no negotiating power with their primary funders and whose distance from large urban centres can mean increased costs for all manner of projects, from the mundane acquisition of printer toner, to the construction of houses and the provision of groceries.<sup>85</sup> So, the reality is that while First Nations can determine their own membership, doing so means that a community's

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85. See *Special Study*, *supra* note 41 at 31–32:

There is no real negotiation of funding arrangements with [First Nations] and [Tribal Councils]. They are drawn up and delivered for approval by Chief and Council or the Tribal Council with very little discussion. [First Nations] and [Tribal Councils] perceive it as a “take it or leave it” proposition. Budgeting, allocations and formulae are not well understood and budgets may be cut without warning. For most recipients, there is little discussion of their plans or outcomes; little guidance on best practices; and little opportunity to network and share experiences with others in the same region or across the country . . . .

Funding arrangements as currently implemented do not promote the movement of First Nations, Tribal Councils and other Aboriginal recipients towards increasingly responsive, flexible, innovative and self-sustained policies, programs or services . . . . The profile of funding arrangements has been static over the past decade . . . .

Amounts allocated to management and administration at the band and the Tribal Council level are low and attempts to gain additional funding in the past have failed. There is very little funding available for capacity building related to institutions or programs. The cap of 2% on funding to the regions is putting pressure on any discretionary spending in an effort to protect income assistance and education spending.

already stretched resources become still further stretched because no new resources attach to new community members.

*A. Linking Membership and Revenue Through Federal Income Tax*

To make the ability to determine their membership meaningful, First Nation communities must be granted the power to raise revenues to provide basic government services in conjunction with the ability to admit new members. Ideally, membership and revenue should be linked so that as membership or citizenship lists grow, so too grows the ability to provide government services. One way to do this is to include a box on federal income tax forms that would, if checked, direct a First Nation community member's income tax to their home community regardless of whether the community member lived on- or off-reserve.<sup>86</sup> I do not believe that members' income taxes alone could ever eliminate the need for other funding sources, but I do believe that this tax base could meet at least some of the needs of First Nation communities. Moreover, the collection of members' federal income tax, while not sufficient to replace existing revenue streams, is an example of a proper fiscal relationship between First Nations and the Crown that is itself capable of being the object of an overlapping consensus because the proposed reforms advance both First Nations' goal of self-determination and the Crown's goal of promoting economic development and fiscal accountability among First Nations.

This linking of federal income tax of community members to band revenue via membership has several implications. First, it would mean that First Nation communities would have an opportunity to raise revenues independent of federal transfer payments or other grant programs. This in turn would mean that First Nation communities could begin to set their

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86. In principle, First Nations could negotiate with the federal government a tax abatement system similar to that used by the provinces and some large corporations. The federal government would be contracted to collect the tax revenue, and then the federal government would write annual cheques to each of the communities taking part in the abatement agreement. For the seed of this idea, see Borrows, "Seven Generations", *supra* note 6 at 28. The ability to choose to direct tax monies to support a particular institution is not new in Canada. Ontario's *Assessment Act* allows individuals to direct a portion of their property taxes to support Catholic schools rather than the public school system. RSO 1990, c A31, s 16.

own ends: they could decide to build schools and houses, or they could choose to fix their broken water treatment plants or invest in language and cultural programs for their members. First Nation communities could, in other words, set priorities, and then set out to achieve ends of their own making, and with their own financial resources.<sup>87</sup>

A second implication of allowing First Nations to tax their members is that chiefs and councils would be accountable to their citizens rather than to the federal government. Because federal transfer payments are the primary source of income in an Indian community, leadership can be forced to spend all their time making sure that the money keeps flowing, and that means making sure the federal government's priorities are met. Band administration is required to do this because without meeting Ottawa's priorities, the communities would not continue to receive funding, or their funding would become wholly managed by third-party entities appointed by the Crown. By collecting income tax from community members, chiefs and councils would find themselves more accountable to their own community members because they would be spending the tax money collected from their own citizens.<sup>88</sup>

Third, by being empowered to determine membership, and being able to collect income tax from members, communities will realize the appropriate incentives to bring home all those non-status Indians who want to come home, who want to learn their language and who want to live proudly as members of their communities. Communities will be able to bring home non-status Indians, to teach them their language and culture, and then to have them start making an income to contribute to their home communities, whether that means employment on- or off-reserve. Those teenagers who I filmed so long ago would not be turned away, they would be welcomed, and they would be embraced, because the incentives for doing so would be properly aligned.

A fourth implication of my membership proposal concerns reciprocity of opportunity. So, just as a member of the Nippissing First Nation can, if he or she wishes, leave his or her community, move to

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87. Of course, the amount of money at issue here is relatively small, but it is not insignificant.

88. See Mariana Mota Prado & Michael J Trebilcock, *What Makes Countries Poor? Institutional Determinants of Development* (Northampton, Mass: Edward Elgar Publishing, 2012).

Vancouver, become a marine biologist, and never once think about or engender his or her Anishinabek identity, it simply has to be the case that membership in a First Nation community can, in principle be open to anyone. A Hungarian cab driver in Sudbury or a National Post columnist in Toronto should be able, in principle, to decide “I hate this life” and make the decision that he or she wants to move to Northern Quebec. And if after doing so, he or she learns Cree, acquires a Cree name, marries into a Cree family and is adopted into a clan, then I cannot see any reason why that person should not be Cree.<sup>89</sup> Being Cree is, after all, a matter of culture, of language, of world-view, and these things can be learned.<sup>90</sup> I do not think there is any set of objective tests that, if passed, makes you Cree, but there is certainly a subjective set of community standards, and if we allow these standards to develop within cultural norms, then we stand able to create a fluid boundary of identity and nationhood.<sup>91</sup> Indeed, the existing powers in section 10 of the *Indian Act* are already sufficient to allow communities to develop creative, community-based standards that could include length of residency in the community, fluency in the community’s language, and other demonstrations of cultural integration.

One might think that this could allow large numbers of settler people to declare their Indigenous identity and move to First Nation communities. But, there are no tax advantages to doing so, no secret well of casino money that pours riches onto First Nation members, no special access to social resources of any kind. Indeed, as discussed above, most First Nation communities enjoy no socio-economic advantages whatsoever over their non-Indian counterparts. It is true that some First Nation communities are very wealthy due to their proximity to urban developments, or on lands rich in oil, or through good old-fashioned strong leadership over many years. But these communities have incentives to keep their membership rolls limited and are eager to do so. For example, the Sawridge band, which is rich in oil revenues, had to be sued by the Crown and forced to admit new members after changes to the *Indian Act* allowed those

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89. Indeed the judicial test for identifying rights-bearing Métis persons has just three components: (1) self-identification as a Métis person, and (2) acceptance by a Métis community that (3) is itself a historic rights-bearing community. See *R v Powley*, 2003 SCC 43 at paras 31–33, [2003] 2 SCR 207.

90. For a related discussion, see *Borrows*, “Seven Generations,” *supra* note 6 at 30.

91. See Sanderson, “Argument from Corrective Justice,” *supra* note 5 at 121–25.

people to be registered as legal Indians.<sup>92</sup> Thus, I do not think we need to worry that there would be a vast move of non-Indians into First Nation communities. Moreover, allowing more people to become members of First Nation communities and to support those communities with tax dollars allows those communities to better compete *as communities*.

Another way to spread the benefits of my proposed income tax redirection is to enable the funds collected to be used as collateral against loans for large infrastructure projects. Section 89(1) of the *Indian Act* currently restricts the seizure or mortgaging of “property on reserve”.<sup>93</sup> This means that secured transactions like loans are impossible when the assets of a person or business are located on reserve, because section 89(1) makes it impossible to collect any collateral that may have been offered to secure a loan. I propose that First Nation communities be able to opt out of this section of the *Act* with respect to the revenue stream generated by the income tax of band members. This would enable communities to borrow money for infrastructure and other projects and to secure those loans with future tax revenues, something that is currently impossible under the existing *Indian Act*.<sup>94</sup> A similar scheme already exists with respect to property taxes collected by communities that have opted into sections of the *First Nations Fiscal Management Act*.<sup>95</sup>

### *B. How these Reforms Facilitate Overlapping Consensus*

A key part of my argument is about the alignment of incentives with legislative reforms that are capable of becoming the object of an overlapping consensus between First Nations and the broader Canadian public. By providing both a means and a motivation to identify community members who lack legal status as Indians, First Nations can grow their communities by welcoming home the current diaspora

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92. *Sawridge Band v Canada*, 2004 FCA 16, [2004] 3 FCR 274.

93. *Supra* note 3, s 89(1).

94. This proposal is different than other recent proposals such as the *First Nations Property Ownership Act* which would allow, one presumes (the legislation is not yet drafted), First Nations to sell their lands to non-Indians, and to mortgage those same lands with banks and other lenders. My proposal is not tied to land, only to the future tax revenue streams.

95. *Supra* note 44. See also Paul Salembier et al, *Modern First Nations Legislation Annotated* (Markham, ON: LexisNexis Butterworths, 2012) at 65–71. Salembier et al note that, as of November 2011, there has yet to be an issue of bonds under this scheme.

of non-status Indians. Additionally, in bringing home this diaspora, and linking membership with the allocation of federal income tax, First Nation communities gain access to a stream of revenue that grows with the success of their communities: as more people become educated and employed, more money will flow back to their home communities, and one can hope to establish some sort of a virtuous circle with increasing membership leading to increased revenues. As the number of First Nation community members grows, and as more and more of those community members begin to pay income taxes to their home communities, community members themselves will have incentive to demand greater accountability between themselves as citizens and the chief and council who allocate the spending of community resources.

One way of ensuring this accountability is through legislation that is itself the object of overlapping consensus. To the extent that First Nations and the Crown agree on the proper ambit of that accountability—namely, that chiefs and councils are to be accountable to their members—an overlapping consensus on this issue can be achieved and enshrined in legislation such as an amendment to the *First Nations Fiscal Transparency Act*.

By tying together integration and accountability, my proposal aims at a broad core of overlapping consensus between First Nation and non-First Nation people. What is more, the changes I propose couple legislative change with the revenue necessary to sustain Indigenous communities. It is worth comparing the approach that I advocate with an alternative approach proposed by the Kelowna Accord, a political agreement reached between the provinces, the federal government and Aboriginal organizations from across the country<sup>96</sup>. The Kelowna Accord promised five billion dollars in funds from the federal and provincial governments over five years, with the promise to renegotiate another five year term once the first term had expired. The object of the Accord was to invest in Aboriginal health, education and housing such that at the end of the ten year term, Aboriginal people would be more or less on par with non-Aboriginal Canadians on a wide range of social outcomes, including education, health and housing. Within months a minority Conservative government was elected to Parliament and refused to budget the resources to fund the Accord.

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96. *Kelowna Accord Implementation Act*, SC 2008, c 23.

Since then, some commentators have called for a return to the Kelowna Accord as a road map for the relationship between Aboriginal people and the Crown.<sup>97</sup> I have my doubts. Five billion dollars is a lot of money, and provides for very significant investment in Aboriginal communities. I applaud that effort. But, I cannot help but think about a story my mother once told me about a community centre that was built in one of the northern communities, as part of a deal between the community and government. What was not considered in the negotiations to build the community centre, however, was the upkeep cost of maintaining the building over years and decades. Nor was there revenue available to staff the centre so that the building could be supervised and provide activities for community members. The building became underused, and then experienced the kind of physical deterioration one would expect without sufficient maintenance. The Kelowna Accord is like that community centre. I applaud the investment, but how are we First Nation people to fund our communities in the long term? Investments are important, but even ten year investments do not alter the landscape of funding, but instead maintain the existing relationship of dependency and paternalism.

It is worth stating that despite its shortcomings, the death of the Kelowna Accord was a tragedy because enormous investments *are* required in First Nation communities. But we are remiss if all we do is mourn the loss of the Kelowna Accord and long for its return. Much can be learned from the Accord's demise, and perhaps one of the clearest lessons is that the process of building and maintaining consensus must be strong enough to endure and deliver the reforms outlined in the agreement. The Kelowna Accord died because the incoming minority government did not share the values of the previous government, and the opposition parties were unwilling to vote against a budget bill because doing so would have brought down the minority government. The overlapping political consensus identified by the Accord may have been strong, but it was not strong enough to endure the natural ebb and flow of power nor the raw politics of Ottawa.<sup>98</sup>

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97. See e.g. Christopher Alcantara, "Kelowna Accord holds key to native renewal" *Toronto Star* (3 January 2013), online: Toronto Star <<http://www.thestar.com>> .

98. For a detailed critique of the Kelowna process, see Lisa L Patterson, "Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations" *Library of Parliament Research Publications* (2006), online: Parliament of Canada <<http://www.parl.gc.ca>> .

## Conclusion

In this paper I have tried to lay out a set of proposals that address some of the issues currently affecting First Nation communities: who is a citizen of a First Nation, what rights attach to that citizenship, and how do First Nation communities access revenues? I have done so in a manner that seeks to identify the shared priorities of both First Nations and the broader Canadian public.

The proposal I make in this paper stands to alter many things about First Nation communities in Canada. I do not propose to end the *Indian Act*, but rather have suggested ways to improve the relationship between First Nations and the Crown. Of course, there are more than six hundred First Nations in Canada with a wide range of economic, cultural and political aspirations that do not easily converge on blunt pan-Indian legislation such as the *Indian Act*.<sup>99</sup> The federal Crown, too, is composed of a myriad of ministries with competing interests. There is then no reason to suppose that the *Indian Act* alone can, or even should be the sole legislative instrument for meeting the needs of the complex relationship between First Nations and the Crown. The principles of overlapping consensus that I have developed in this paper can be usefully applied to the development of other legislative instruments that regulate the relationship between First Nations and the Crown.

I believe that an overlapping consensus can be achieved if we engage in a fair and respectful process and focus on the principles underlying the reforms. We need to focus on the right issues, and pay attention to the very real need for adequate funding in First Nation communities. If we do these things, we can begin to come to terms with an *Indian Act* that is not the subject of derision, does not stand for inequality and paternalism, but rather, sets out the right relationship between First Nations and the Crown for generations to come. We can set this generation on the right path. What we owe the seven generations to come is not the abandonment of the *Indian Act*. We owe the next seven generations an *Indian Act* that sets out a proper relationship between themselves and the Crown and the settler people who live around and among us. We owe that to the next

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99. For an accounting of just some of the diverse legal traditions making up Canada's First Nations, see Borrows, *Indigenous Constitution*, *supra* note 58.

seven generations, just as we owe it to the seven generations who came before us and in whose shadow we walk today.