Indigenous and Northern Affairs Canada | Affaires autochtones et du Nord Canada

INAC·AANC

Final Report

Why Aren't First Nations Moving Beyond the Indian Act? Exploratory Research into Resources, Relationships, and Self-Determination

Project Number: 1570-7/17145

September 1, 2017

Evaluation, Performance Measurement,

and Review Branch

Audit and Evaluation Sector

Canada

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EXECUTIVE SUMMARY

This report outlines the incentives and disincentives for First Nations to leave the *Indian Act*. Through a qualitative analysis of interviews with 77 respondents, the paper found three areas that had to be explored in order to respond to the question at hand: the relationship between self-determination and self-government agreements, the relationships among and between First Nations and their partners, and the resources, programs and supports that assist First Nations in furthering their autonomy and independence.

The research question provided is inherently problematic as it assumes a linear trajectory with self-government agreements as the ultimate goal for First Nations. The research has found that this is not the reality and in fact, many First Nations do not want to leave the *Indian Act* and pursue self-government agreements.

The findings reveal that self-determination should not be understood through an INAC lens, but should instead be defined by First Nations as it relates to them. Self-government agreements can be a successful mechanism for achieving self-determination, but they are not the only or necessarily the best approach for Indigenous peoples in Canada. The relationship between self-government agreements and self-determination is thus complex, and a holistic approach to community well-being is needed. The connection between self-government agreements and self-determination can be strengthened through more traditional and appropriate language and concepts.

Many First Nation respondents focused on relationships in their interviews, and overall it was found that strong relationships advance self-determination. Negotiating modern treaties and self-government agreements may improve the relationship between the federal government and First Nations, but strong relationships can also develop while communities remain under the *Indian Act*. There is a perception that the nation-to-nation relationship is not fully realized and needs to center on a process of reconciliation to be authentic.

The resources available to First Nations in choosing their own path could be improved. Control and management of land is central to First Nations' autonomy. Adequate and appropriate funding is needed to support First Nations in responding to the needs of their communities. Strong and Indigenous-led leadership founded on trust will fuel an effective governance system. Education, both within communities and across government, is lacking and must be improved so that jurisdictional divides and misunderstandings do not prevent First Nations from exercising their authorities. Lastly, there are barriers that may prevent an otherwise interested community from entering into negotiations for a comprehensive land claim or self-government agreement.

INAC needs to re-evaluate its approach to First Nation self-governance and place First Nation traditional knowledge and understandings of self-determination at the center. The Department should improve funding agreements so that INAC is providing First Nations with funding that is sufficient, flexible, and predictable. INAC needs to respect

the land rights of First Nations, support First Nations governance, and address the barriers that prevent First Nations from entering into negotiations.

This report thus recommends that INAC:

- RE-EVALUATE ITS APPROACH TO FIRST NATION SELF-GOVERNANCE BY
    - Revising its overall policy and communication approach from emphasizing advancement through SGAs to supporting whichever path to self-determination is identified by First Nations.
    - Creating liaisons that represent the Crown and would coordinate all services the federal government offers to First Nations. Facilitating communications through a single point of contact will remove the burden on First Nations to navigate programs and services across federal departments. This will help align the programs and services to meet community needs. In the long-term, programs and services would be tailored to community needs under a whole of government funding approach.
    - Improving Canada's accountability to First Nations. This could be accomplished through the creation of Indigenous-led institutions, such as a First Nations Office of the Auditor General.
    - Clarifying and formalizing the mandates, roles, and responsibilities of provinces and territories for negotiations and First Nations' service delivery.
- IMPROVE FUNDING AGREEMENTS SO THAT INAC PROVIDES FIRST NATIONS WITH FUNDING THAT IS SUFFICIENT, FLEXIBLE, AND PREDICTABLE BY:
    - Providing First Nations with sufficient funding for land management, the implementation of agreements, and capacity to deliver programs and services.
    - Providing sufficient funding for First Nations to have comparable access to public services.
    - Amending the current funding formulas to reflect community realities.
    - Re-evaluating the General Assessment score system and default prevention program as methods of determining risks, so that First Nations are not penalized for investing in the future.
    - Providing targeted funding for a communication strategy for communities in negotiations or ratifying agreements.
    - Creating funding agreements that are delivered through fiscal transfers and are flexible to allow First Nations to reallocate funds based on community needs.
    - Funding First Nations in a manner that is long-term and predictable so that they can build their communities.
- SUPPORT FIRST NATION GOVERNANCE BY:
    - Supporting the legal authority of First Nations. This could be done through better education on First Nation self-government for municipal, provincial and federal public servants.

    - Supporting enforcement capacity of communities so that they are able to administer community bylaws, environmental regulations, land codes, and other laws or regulations.
    - Respecting that First Nation's accountability is to its members first and foremost and not to INAC. This could be accomplished by repealing the First Nations Fiscal Transparency Act, and reducing reporting and data collection requirements.
    - Respecting that INAC's accountability is to First Nations, demonstrated by reporting directly back to First Nations communities, and providing an accessible version of the Departmental Results Report for First Nations.
- RESPECT LAND RIGHTS OF FIRST NATIONS BY:
    - Targeting resources to build capacity for First Nations to ensure that they are able to manage and protect their community land base.
    - Revising the ATR policy to make the process faster, and avoid imposing economic hardship on First Nations.
- ADDRESS THE NEGOTIATION BARRIERS FACED BY FIRST NATIONS BY:
    - Addressing the long-standing negotiation barriers that are preventing First Nations from settling land claims, which include the section 87 tax exemption, Own Source Revenue, extinguishment, and negotiation length.
    - Improving the clarity and flexibility of negotiation mandates.
    - Providing grants instead of loans for negotiation, and forgive outstanding debts.

LIST OF ACRONYMS

Assembly of First Nations	AFN
Additions to Reserve	ATR
Certificates of Possession	CP
Chief Financial Results and Delivery Officer	CFRDO
Comprehensive Land Claim Agreement (Modern Treaties)	CLCA
Evaluation and Performance Measurement Review Branch	EPMRB
First Nation Financial Transparency Act	FNFTA
First Nation Land Management Act	FNLMA
First Nations Market Housing Fund	FNMHF
Indigenous and Northern Affairs Canada	INAC
Inuit Tapiriit Kanatam	ITK
Land Claim Agreement Coalition	LCAC
Lands and Economic Development	LED
Nunavut Tunngavik Inc.	NTI
Own Source Revenue	OSR
Regional Operations	RO
Self-Government Agreement	SGA
Treaties and Aboriginal Government	TAG

ACKNOWLEDGEMENTS

Before we begin, we would like to thank those who were instrumental in the research and writing of our final report. We are grateful to those we had the pleasure to work with during this project.

This report would not have been possible without the invaluable perspective of the First Nation respondents we spoke with and the communities we were fortunate enough to visit. We thank you for sharing your experience and knowledge with us. We are humbled by your responses, and appreciate all those who took the time to speak with us.

The 2017 Evaluation Intern Team would like to thank our mentors and supervisors who supported and encouraged us to think critically about the research question. To Keren Gottfried, Luke Babad, Ellen McKennirey, Natalya Kuziak, and Shannon Townsend, we thank you for your unending support, expertise and optimism. We are grateful for the opportunity to be involved in such a meaningful project.

We would like to thank those individuals who shared their knowledge with us. Thank you to Ravi Pendakur, Nadia Ferrara, J.P. Morin, Kathryn Fournier, Tim O'Loan, Jonathan Dewar and all others who shared their time and teachings.

We want to extend our gratitude to the Evaluation, Performance Measurement and Review Branch (EPMRB) and Indigenous and Northern Affairs Canada (INAC) staff and management who contributed time and expertise to this project. We recognize our colleagues and supervisors from our sectoral placements who provided unique perspectives from across the Department.

Last but certainly not least, the intern team must acknowledge themselves in the creation of this project. Special thanks go to Alexandra Izgerean, Chantal Maru, Connor Hasegawa, Jordano Nudo, Julie Eldridge, Justine Mallou, Kristen Young, Kurt Powell, Roxanne Dumoulin, Sadie Harrison, Sara Worts, and Xavier Léger Guest for their dedication and determination in speaking truth to power.

PREFACE

This project began in May 2017, and the research and findings were concluded before the Prime Minister announced that Indigenous and Northern Affairs Canada would be split into two Departments. Due to the overlapping timelines, our recommendations are written in the context of the socio-political landscape predating the Prime Minister's announcement.

The Prime Minister's announcement came with recognition that the *Indian Act* is a colonial and paternalistic law, and that the existing structure of INAC did not facilitate partnerships and reconciliation with Canada's Indigenous peoples. The Government is following the 1996 Royal Commission on Aboriginal Peoples recommendations by establishing a Department of Crown-Indigenous Relations and Northern Affairs, and a Department of Indigenous Services. The Government is acting to 'end the *Indian Act*' while recognizing that the pace of change will be determined by Indigenous communities themselves. The Intern team recognizes the positive intent behind these actions, but worries they may be paternalistic in nature based on our findings.

INTRODUCTION

Canada recognizes 617 First Nations communities. 25 comprehensive land claim agreements (CLCAs) and 4 stand-alone self-government agreements (SGAs) have been signed, which recognize a wide range of Aboriginal jurisdictions. Currently there are about 90 self-government negotiation tables in progress. Given Canada's priority of advancing self-determination through SGAs, the fact that only 29 agreements have been completed over 44 years is problematic. In this context, the Deputy Minister has asked the Interns to explore INAC's role in supporting or hindering self-governance for First Nations communities.

The relevance of exploring the impact of First Nations self-governance stems from the 1876 *Indian Act*, which formally established the relationship between Indigenous peoples and the Government of Canada. As a means to move towards developing a nation-to-nation relationship, we have immersed ourselves in debate, discussion, and thoughtful research to explore the following question: what are the incentives and disincentives for First Nation communities to move beyond the *Indian Act*?

The objective of this question is two-fold. First, we seek to identify the contributing and inhibiting factors that affect the decision-making process of First Nation communities to either adhere to or move beyond the *Indian Act*. Second, we work towards understanding the perspective of First Nation communities with SGAs. We recognize that the question relies on the biased notion that leaving the *Indian Act* is the targeted outcome and the only means to self-determination. Consequently, it is critical to acknowledge certain drawbacks that have shaped the approach to methodology. As our research progressed, we became increasingly cognisant of the inherent and problematic bias presented in the research question itself. We have thus included within this report a discussion surrounding the concept of SGAs as the preferred tool of the Department to advance self-determination.

METHODOLOGY

THE INTERN TEAM

Indigenous and Northern Affairs Canada (INAC) facilitates an internship project each summer with the Evaluation, Performance Measurement and Review Branch (EPMRB). It is imperative that our team centres our research within our collective experiences. As a group of non-Indigenous interns, our collective knowledge of Indigenous affairs was limited beyond the scope of current trends in Canadian media and society, and the larger legacy of Canada's colonial relationships. Being embedded in INAC has provided knowledge of the administration of Indigenous services, but it was our engagement with Indigenous communities that has grounded our report and our understandings of Canada's colonial legacy. One of the central challenges of the project was meeting the expectations of a standard government report while authentically reflecting the views of Indigenous respondents was central throughout the project.

The term 'respondent' rather than 'partner' is used to describe Indigenous participants throughout this report, as the intern team felt that a true partnership was not achieved over the course of this project.[1]

KEY TERMS

In our research, communities were grouped under four types: non-pursuing communities, communities with opt-in or sectoral legislation, communities currently negotiating, or those with a finalized modern treaty or SGA. Non-pursuing communities are those still fully under the purview of the Indian Act and not currently participating in discussions for any form of agreement. Communities with opt-in or sectoral legislation are those who have some form of agreement that removes them from specific sections of the Indian Act or fills regulatory gaps. Communities in negotiations are those in the process of negotiating an Agreement-in-Principle or a Final Agreement for a CLCA or an SGA, while those communities with a finalized agreement have a current and operational modern treaty, SGA, or both. These pieces of legislation and agreement types are further explored below in the background section. We use the term Indigenous except where the term Aboriginal is historically or legally appropriate. The terms modern treaties and CLCAs are used interchangeably.

[1] For more information on why true partnership was not obtained, see the "Project Limitations" section of the report.

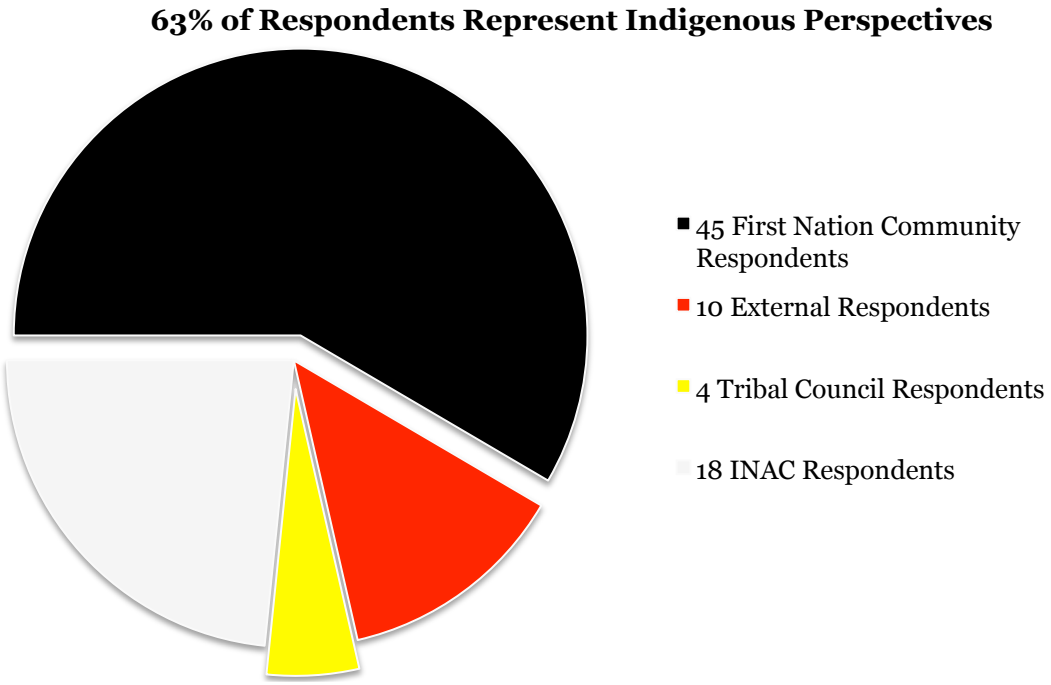


Figure 1. Types of Respondents

The project was split into three phases- preliminary research, stakeholder engagement, and data analysis. First, the intern team completed a literature review of academic and grey literature to learn about key topics and survey the information landscape. Second, the team created an interview matrix and personalized interview guides for the purpose of semi-structured interviews. The interviews were conducted either in person or over the phone with stakeholders in three categories: First Nations communities, internal stakeholders (identified as those within INAC), and external stakeholders (those representing other government departments or civil society organizations). Anonymity was assured for all those respondents unless the respondent chose to identify themselves in the report, and confidentiality was maintained through the research. Considering the research question, the process of analysis weighted the First Nation perspectives more heavily. Ultimately, the team conducted a total of 77 interviews, which includes 53 in-person, 23 telephone interviews and 1 e-mail interview, from a multitude of internal and external partners. This includes communications and engagements with 18 First Nation communities and 4 tribal councils across Canada.[2]

[2] For a comprehensive methodology, please see appendix A.

"PAST"

BACKGROUND

Before Europeans arrived in North America, First Nations peoples constituted self-governing, sovereign nations, exercising jurisdiction over their own land and resources.[3] Today, the principal statute that governs a majority of First Nation peoples is the *Indian Act* of 1876. The Parliament of Canada passed the Indian Act under the spirit of Section 91(24) of the Constitution Act of 1867, which gave the federal government authority to govern "Indians and Lands Reserved for Indians." The *Indian Act* gives the Government of Canada the authority to: define and administer Indian Status, define the powers and operations of reserves and Band Councils as well as set regulations around political rights and freedoms, elections, taxation education and Indian land and resources.[4] The *Indian Act* limits First Nation governance as it sets specific regulations of the powers of Band Councils. When Canada began discussing the patriation of the Constitution from Britain, Aboriginal leaders lobbied for constitutional recognition of Aboriginal treaty rights.[5] While Section 35 of the 1982 Constitution eventually affirmed treaty rights, it did little to advance self-determination for First Nations.

In response to this slow or non-progress, the Inherent Right Policy was created in 1995. This policy recognizes the right of Indigenous peoples to self-govern in relations to "matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources"[6] as stipulated in Section 35 of the *Constitution Act* of 1982. Due to Section 35's vague wording, this policy contemplated for the first time the negotiation of both stand-alone SGAs and SGAs in modern treaties, rather than delegating the definition of specific governance rights to the courts.

Since the 1970s, the courts have been driving the government to act on Indigenous rights. The vague and imprecise wording of Section 35 rights has required the courts to determine implementation. In spite of the recognition of Aboriginal rights through the courts, the fundamental power structure between Indigenous peoples and the Government of Canada remains the same. The Supreme Court has stated that Aboriginal rights must be "reconciled with Crown sovereignty," and Aboriginal law continues to be seen as inferior to legal rights that emanate from the Crown.[7]

MODERN TREATIES (COMPREHENSIVE LAND CLAIM AGREEMENTS) AND SELF-GOVERNMENT AGREEMENTS

The negotiation of CLCAs (CLCA) or modern treaties, requires participation from Canada, the respective province/territory, and Indigenous signatories. Alternatively, the negotiation of a standalone SGA requires only federal and Indigenous consent. While the 1995 policy recognized

[3] http://firstpeoplesofcanada.com/fp_groups/fp_groups_overview.html
[4] http://caid.ca/RRCAP1.9.pdf
[5] Belanger & Newhouse, 146.
[6] "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government," Government of Canada, http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844
[7] Knafta, p.28.

the existence of inherent rights, it did not recognize title to the land and resources, and gives provinces and territories a veto over the distribution of land, resources, and revenues. In recognizing certain rights, it does acknowledge that title held continuously cannot be extinguished without consent, and allows for municipal-style self-government.[8] This approach to negotiations was reaffirmed in 1986 with the Comprehensive Land Claims policy.[9]

Some key purposes of modern treaties are: clarifying ownership and providing certainty of rights of Indigenous land, protecting Indigenous culture and ways of life, providing access to development opportunities, co-management of land and resources, and self-government rights and political recognition.[10] There is no consensus among and between academics, policy-makers, and indigenous groups as to whether these outcomes have been achieved and to what extent.

OPT-IN LEGISLATION

Beginning in the late 1990s, the federal government introduced a series of legislative acts for First Nations that do not possess the capacity to adopt a SGA, or are not interested in pursuing self-government. This legislation can be adopted by First Nations to allow for sectoral governance outside of the Indian Act. Some pieces of legislation take signatory First Nations out of sections of the Indian Act, while others fill the regulatory gaps that exist in the Indian Act.

Our research chose to focus primarily on communities opting in to the First Nations Land Management Act (FNLMA), as it is arguably the most popular of the opt-in legislations. The FNLMA allows participating First Nations to leave 36 full and partial Land Management sections of the Indian Act, and assume control over land management on reserve. Though the reserve land remains property of the Crown, First Nations gain substantially more freedom to govern their reserve lands.

[8] Knafla, p. 25
[9] Renewing Comprehensive Land Claims Policy..., 2014
[10] Indigenous and Northern Affairs Canada, 2015.

"WHAT WE HEARD"

SELF-GOVERNMENT AND SELF-DETERMINATION

WHAT IS THE RELATIONSHIP BETWEEN SELF-DETERMINATION AND SELF-GOVERNMENT AGREEMENTS?

The relationship between SGAs and self-determination is complex and embodies a diversity of views, yet there remain ways that the connection could be strengthened. In order to understand the different perceptions of the relationship between self-determination and self-government, this section will describe the mandate of INAC, the visions of the multiple First Nations engaged, and other partners' views.

As the research question is placed within the mechanisms, frameworks and policies of this Government, it is important to understand the perceptions on self-government and self-determination within INAC. It is equally crucial to understand the ways in which many First Nations view what both concepts mean and how they can be achieved. While self-government can be a successful mechanism to advance self-determination, it is important to acknowledge that this approach will not meet the needs of every First Nation community.

GOVERNMENT VIEWS – DIVERSITY OF CONCEPTUAL FRAMEWORKS

One of the current government's priorities is reconciliation with its Indigenous peoples (Mandate letters). INAC has conceptualized this priority as self-determination, which is operationalized through SGAs (I). The internal push for SGAs comes from the Inherent Right Policy, originally formulated in 1995.[11] This policy, vaguely articulated, did not define what core governance rights looked like or could entail, nor how First Nations could fund the fulfillment of pursuing their Inherent Right (LR). The courts were effectively given the burden of defining and clarifying what the right to self-governance encompasses.

"Self-government is a continuum, but at no point should we say that the end is where all First Nations need to be. Full self-governance isn't what all First Nations need."

The Department measures progress of reconciling the views of the Crown and First Nations via the number of SGAs signed (I), and the number of First Nations working towards signing a SGA or CLCA. The language used within some INAC programs refers to these various SGAs as "self-determining" agreements, using these terms for agreements interchangeably.

INAC appears to equate self-determination with SGAs, which can be a mechanism facilitating greater self-determination. Despite the position of INAC, there are conflicting visions within the Department on how to move forward with self-determination for Indigenous Canadians. Some

[11] INAC website. https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844

employees, particularly negotiators, are uncomfortable defining it, while others, particularly program staff, believe having a definition is crucial for clarity and moving forward (I). It was heard in some interviews that the path towards self-governance follows a linear trajectory, from the *Indian Act* to the end-goal of SGAs, while others argued that this model does not reflect the realities faced by communities.

The Crown's approach to SGAs places primacy on the state and its institutions, which can grant or delegate certain powers, within the framework of the Constitution. In implementing SGAs for Indigenous peoples, the governance models Canada has allowed generally fall into two categories: the mini-municipality model and public governance. Under the mini municipality model, the First Nation band council is granted various administrative powers, and in the past had to agree with an 'extinguishment clause'[12] if they pursue a CLCA. This is the most common form of SGA, as it fits easily within the current Federal government structure.[13] The other model, public government, or adapted federalism, is found in Nunavut. It involves consensus-based rule over residents, regardless of ethnicity or background. This is not likely to be recreated elsewhere in Canada due to Nunavut's unique demographic and territorial conditions, and is generally unrealistic for First Nations given their cultural diversity as compared to Inuit (ITK interview, LR).

VIEWS ACROSS COMMUNITIES

Both distinct and common underlying views about the relationship between self-determination and SGAs exist. Some respondents see the two as complimentary concepts, while others see them in direct conflict with each other.

SELF-GOVERNMENT COMPLIMENTING SELF-DETERMINATION

Many respondents, particularly those in communities with modern treaties, noted that SGAs compliment self-determination by formalizing their existing self-determination. Some have viewed self-determination as deciding what a First Nation wants to do, while a SGA or modern treaty gives the First Nation the power to do it (OI/MT). Many respondents have stressed that there is a need to have non-restrictive definitions of self-determination, but also recognize challenges when these terms are loosely defined. (IN) Other respondents noted that though they are not and may never be ready for a SGA, it is important to keep those options there for any nations wishing to pursue self-determination in this way. (OI)

"*What Works for Us May Not Work for Other Nations*"

[12] Prior to 1986, a surrender and cessation of rights and title were a prerequisite for concluding CLCAs and the legislation which approved the agreements explicitly 'extinguished' Aboriginal rights outside of the territory negotiated. The Government of Canada included these clauses to provide certainty and finality in the agreements. Eyford, *A New Direction,* 2014.

[13] Abele and Prince, 586

For the majority of respondents under a SGA or modern treaty, self-determination means having control and flexibility over the management of their own affairs. Modern treaties were noted as giving some First Nations certainty over aspects of governance, resource, and land management that were left unclear or insufficient under the *Indian Act*. It was also stated that modern treaties and the reclamation of traditional territory and culture are a means to self-determination. As one First Nation respondent said, "The Treaty means unlocking the value and wealth of their territory, and the value and wealth of their people."

SELF-GOVERNMENT AS CONFLICTING WITH SELF-DETERMINATION

Many First Nation respondents in communities without ratified SGAs spoke about their reservations with how SGAs relate to their vision of self-determination.

Respondents from some communities who are not pursuing self-government unanimously rejected that self-government was the ultimate path to self-determination, since a SGA is not needed to tell them what they already know and in some cases, already practice. Some First Nations respondents said that they further reject that in order to achieve a SGA, communities must agree to INAC's terms (OI/IN/NN). This contrasts with self-governance as inherent or intrinsic, stemming from the divine or from nature, as some First Nations communities and Indigenous groups suggest (**LR [particularly AFN]**).

Some community respondents viewed SGAs as advancing 'self-termination' rather than self-determination due to the policy mechanisms inside of the agreements, particularly extinguishment clauses (NN). Other respondents from a community in negotiations also stated that SGAs are viewed as an extinguishment of rights and land claims that were once protected under the Constitution.

One external Indigenous respondent remarked that having another government establish laws is inherently problematic. "Self-determination is about being more in control of our destiny" and thus "cannot be prescribed from above." The prescription of Western-style self-government is not seen by First Nations as genuine and culturally legitimate since it is a top-down approach rather than community driven. One respondent, whose community is currently in the negotiation process, believes the government likes to see some system in place even though it might not have a purpose or meaning for the First Nation communities (**IN**). In a similar vein, it was heard that pursuing self-determination means having one's own sovereignty and autonomy that is based in a local-level development approach (OI).

For some communities pursuing a First Nations Land Management (FNLM) agreement, self-determination is understood in reference to leadership, membership, and having autonomy from the government to decide what direction to move in and how to move there. Current forms of SGAs and opt-in legislation are seen by First Nation respondents as self-administration rather than self-governance. In pursuing self-determination, "it all comes down to recognition of our authority as a nation - without that, [no further agreements] will happen." [OI]

Other respondents from First Nation communities stressed that forcing a governance act through to choose their leaders is not natural and creates conflict, pointing to how election opt-in agreements do not necessarily facilitate self-determination (OI). Self-determination is both a declaration and an ongoing process. The Government's attempts to dilute the Indian Act and push mini-municipality style SGAs disregard the sovereignty and authority of First Nations governments.[14]

HOW THE INDIAN ACT INFLUENCES THE RELATIONSHIP BETWEEN SELF-GOVERNMENT AND SELF-DETERMINATION

Mohawk Council of Akwasasne; St. Regis
"Self-determination is beyond the fiscal, it incorporates the land and people – 'who we are'"

While First Nations communities agree that the *Indian Act* restricts and impedes self-determination, its existence can be seen as the link to the federal government upholding its responsibilities to First Nations, pointing to the complexity and diversity of views in moving beyond it and towards self-government. Some respondents viewed the *Indian Act* as an impediment to self-determination by setting up institutions and mechanisms that block their ability to be self-governing (NN). The same respondents did not recognize the jurisdiction of the *Indian Act* in the first place, but believe that First Nations must move beyond it.

Other respondents stress that self-determination is about recognizing jurisdiction and acknowledging traditional territory rather than the fiscal objectives which frame the federal government's view. Some respondents believe that the *Indian Act* forces the federal government to live up to its fiduciary duty and functions as a protection and guarantee for communities.

For some First Nation respondents, "Self-determination is taking care of yourselves in partnership with other governments," (OI/NEG). Some within INAC pointed to self-government as the federal government's attempt at divorcing itself from the issues and blame left by the *Indian Act*, and said that the research question of moving beyond the Indian Act is "alarming because it seeks to minimize the federal presence to move beyond the *Indian Act*."

[14] Penner report, p. 24.

CURRENT EFFORTS TO RECONCILE SELF-GOVERNMENT AGREEMENTS AND SELF-DETERMINATION

(**LR, I**) A better relationship can be built between SGAs and self-determination by focusing on capacity development, inherent rights, and bottom-up approaches to agreements. First Nations hold more expansive and longer-term visions for self-determination, compared to the government's specific vision of implementing agreements in the next 5, 10, or 15 years. INAC is often accused of being inflexible and risk-averse with regards to its negotiation mandates and what policy changes it is willing to entertain.

First Nation communities require increased capacity to envision the future and plan for it effectively as aspirations for greater self-determination involve imagining a better future or better possible outcomes for a community, (Health Canada interview, Northern Negotiators interview). (**OI, LR**) Given this, what is possible for First Nations is limited by the federal government's conceptions of what self-determination means, in a Western context, and without challenging or changing the status quo.

Some communities with modern treaties say that it is about* reclaiming their inherent right to self-determination, moving out of Indian Act and regaining the power to decide for their population. *Self-determination is essential for reconciliation and to have a nation-to-nation discussion with the crown.

In New Zealand and Australia, rights are not inherently political, but cultural (**LR, I**).[15] The United States, unlike Canada, does not attempt to reconcile Indigenous rights within its constitutional system, instead acknowledging their status as sovereign peoples.[16] In the United States, many Native American tribes argue for self-determination from a point of competing sovereignties.[17] In Canada "sovereignty" as the base for argument is less frequently used, and instead more focus is placed on constitutional rights derived from Indigenous peoples' distinct cultures. Canada's top-down SGAs differ from the local-level development approach found in the United States. As the literature and our interviews reveal, many First Nations don't agree with the top-down approach of federal government defining and controlling paths to self-determination.[18]

In summary, it is essential to understand and respect the multiple views of what self-determination entails, and how it relates to self-government. First Nations respondents have been clear that INAC should consider letting communities do what is best for them and "get out of the way" (**Community interview**). A lack of respect and recognition for their distinct visions can lead to strained relationships.

It is for this very reason that the relationships developed among partners and stakeholders have an important impact on First Nations' decisions as to whether they will move beyond the Indian

[15] For a more comprehensive comparison, see Appendix 1A.
[16] Papillon, M. "Framing Self-Determination", in Comparing Canada: Methods and Perspectives on Canadian Politics ed. Turgeon L, et al. UBC Press (Vancouver) 2014. p. 37.
[17] See Papillon, 2014 (or Marshall Doctrine of residual sovereignty), pg. 31-32.
[18] Papillon, 2014, p. 43.

Act. Some communities see no reason to pursue self-government without a true nation-to-nation relationship and equal footing when sitting at the negotiating table (**Not Negotiating**).

RELATIONSHIPS

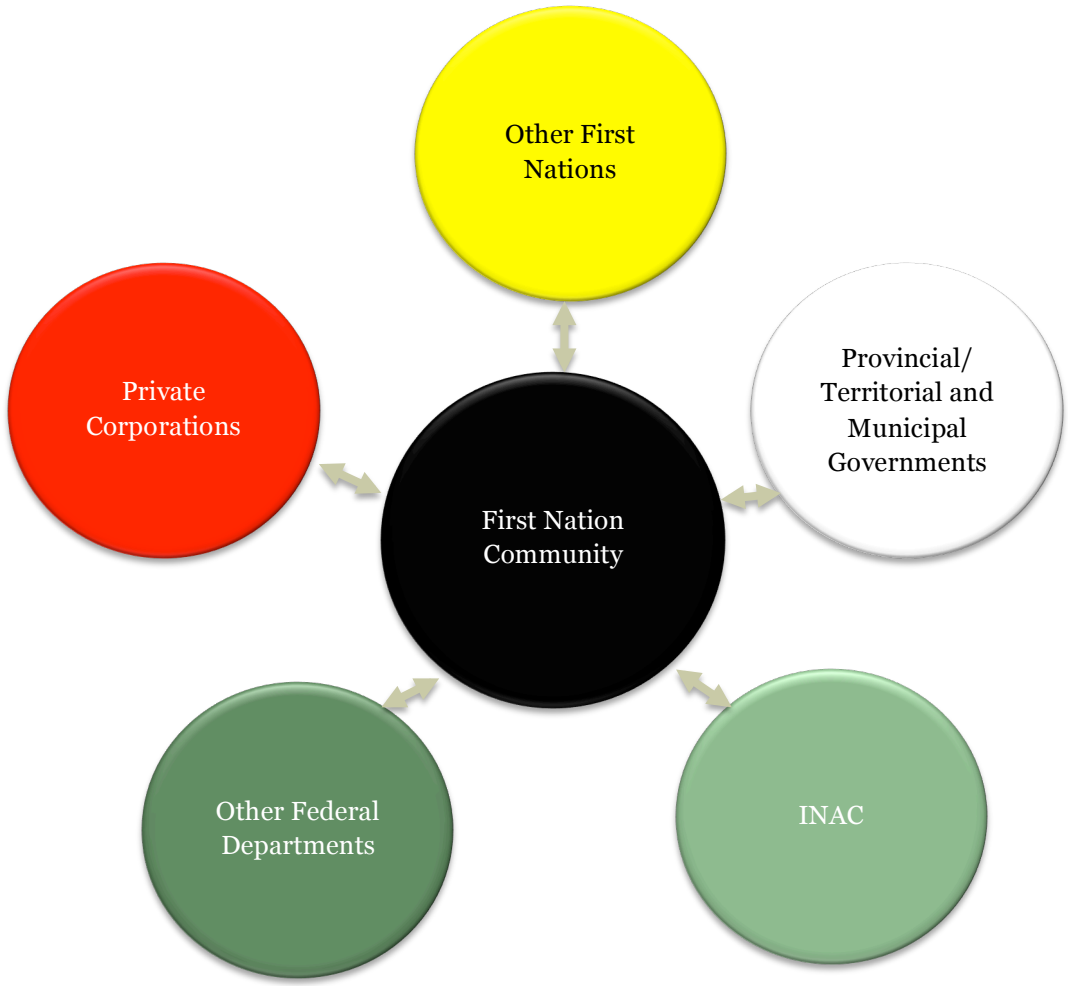


Figure 2. Visual Representation of Respondent's Perception of First Nation Partnerships

HOW DO RELATIONSHIPS BETWEEN FIRST NATIONS AND PARTNERS IMPACT THE PATH TOWARDS SELF-GOVERNMENT?

Strong relationships support self-determination. The negotiation of modern treaties, sectoral, and SGAs may improve the relationship between Canada and Indigenous partners, but strong relationships can also develop for communities living under the *Indian Act*. Our findings show that while Canada's push towards a nation-to-nation relationship is appropriate, it has not been fully realized. The relationships between First Nations and federal, provincial/territorial, and municipal governments, private corporations, and other First Nations are varied, and all play an important role in a Nation's path to self-determination.

FEDERAL GOVERNMENT RELATIONSHIPS

The reported relationship between Canada and First Nations vary greatly across, and within, all respondent groups. Some respondents suggested that a community's relationship with the government is associated with their capacity and funding (OI). Others similarly characterized the relationship as primarily a fiscal one that all comes back to service delivery (N). While some respondents feel that the relationship between Canada and First Nations Peoples is improving, others fear the slow-pace of change is preventing groups from realizing self-determination.

The Canada to First Nation relationship has been marred by failures throughout history. For some respondents, this record has hardly improved, as they believe INAC has changed very little from when it was formally Indian Affairs (OI/NEG). Respondents stated that the federal government's neglect of First Nations' rights, and poor performance meeting treaty obligations, was a direct indication of the relationship. Furthermore, even with the additional constitutional protection under section 35, the Crown only recognizes First Nations governments as municipality-like institutions and not as another distinct order of government. Some respondents feel that the treatment of First Nation peoples continues to place them as second class citizens, despite the shift towards reconciliation, voicing the opinion that senior INAC officials have a paternalistic mindset which deters innovative and supportive relationship-building.

A modern treaty community stated "We are thriving in treaty"

For some groups, recent efforts have improved this relationship. Some modern treaty First Nation respondents felt the dispute resolution mechanisms the treaty provides assure that issues are addressed with due process [MT]. While internal and external respondents acknowledged Canada has had difficulty implementing modern treaties in the past, they are hopeful that new initiatives will improve Canada's approach to treaty implementation.

Many First Nations respondents feel there are inconsistencies in the relationship between different federal departments and agencies. According to community and internal respondents, the level and quality of support provided by INAC offices, LAB resource centers, and others appeared to vary heavily by region and staff. Some respondents identified their interaction with INAC's regional offices to be more frequent than with headquarters and asserted that the relationship with regional officers was better in terms of support and access to resources (OI). Modern treaty respondents cite varied relationships between departments. For example, many west coast First Nations have been disappointed during negotiations with the Department of Fisheries and Oceans, and feel the relationship is strained due to lack of communication and willingness to cooperate. On the other hand, when a department comes to the table willing to listen and create partnerships, even a challenging relationship can be improved. This example was clear between a First Nation negotiating an enforcement agreement with the Royal Canadian Mounted Police. Though it was often referred to as a mismanaged bureaucratic machine, First Nation respondents did recognize that the relationship has improved over the years (NN).

PROVINCIAL/TERRITORIAL AND MUNICIPAL RELATIONSHIPS

Relationships with provinces, territories, and municipalities are generally perceived as poor. First Nations often hold very intricate relationships with their respective province or territory, who are the primary landowners, and are responsible for the exploration, development and conservation of natural resources (Annex, page 22). Settling land issues was frequently cited as a point of tension between provinces and First Nations communities (NN). One province has been referred to as a "duty to consult free zone," but respondents added that this had been slowly improving.

Some respondents expressed frustrations that the legitimacy and authority of their modern treaty or SGAs are not always recognized. Where relationships have improved, respondents noted a simultaneous increase in awareness and collaborative approaches (OI). For example, modern treaty First Nations in British Columbia reported strong relationships with that province, in part due to new initiatives which give First Nations leaders access to provincial ministers (MT).

Some First Nations continue to experience forms of racism from neighboring municipalities and that this impedes progressive relationships (NN). Others saw improvement in municipal relations through working relationships with collaboration and support on key projects (OI). An example of this is a waste-management program that services both the municipality and the First Nation.

CHALLENGES WITH INTERGOVERNMENTAL RELATIONSHIPS

Intergovernmental issues and jurisdictional divides between the three levels of government can also affect First Nations relationships with their partners. Jurisdictional and legal limbo between the provinces and federal government was cited as a relationship strainer (Not Pursuing). When obligations and responsibilities are unclear, First Nations may suffer the consequences. Respondents indicated that provinces and territories did not appear to understand their obligations and responsibilities vis-a-vis First Nations, resulting in miscommunications (OI). This creates jurisdictional confusion in the context of service provisions, especially those which are usually under the purview of the province. There is also fear that the symbolism and legitimacy of treaties may be lost between multiple levels of government, and that this could even affect the relationship with the crown. Furthermore, respondents acknowledged that provinces and territories themselves have capacity and service delivery issues which create concerns for self-government and modern treaty implementation. Respondents indicated that intergovernmental challenges can negatively affect First Nation communities and their relationships with external partners when roles and responsibilities for service provision or treaty implementation are not defined and well understood.

PRIVATE RELATIONSHIPS

Relationships with private corporations encourage First Nations to engage in economic development and capacity-building. A community's relationship with the private sector did appear to be correlated with their agreement type. For those that remain under the Indian Act,

respondents suggested that businesses are only willing to partner with them if they are perceived to be high capacity (Not Pursuing). For respondents working within the FNLMA, the ability to increase land management powers has increased investment and industry growth (OI). However, FNLMA respondents indicated that while the legislation is supposed to boost business potential, those communities who cannot build their capacity (e.g. establish land codes and by-laws) cannot take full advantage of this (OI).

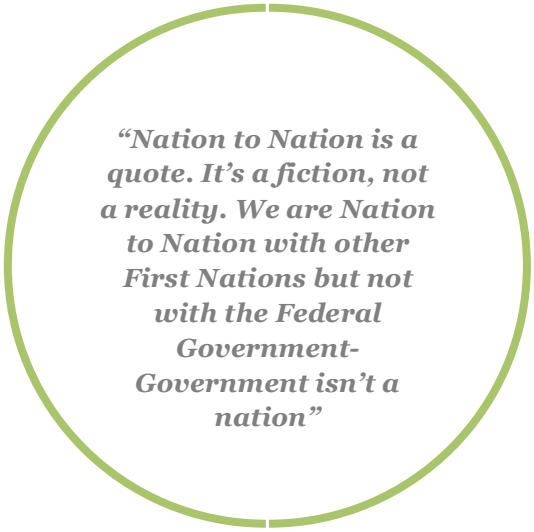
Respondents with modern treaties or SGAs, and those negotiating them, stated that opportunities for economic development encouraged their decision to pursue agreements. Respondents with modern treaties and SGAs have observed vast improvements in their operational efficiency and the willingness of business to engage with them since the effective date of their agreements [MT]. Respondents believe that industry now views these groups as low-risk investments, which has attracted business, and strengthened indigenous-corporate relationships.

OTHER FIRST NATIONS AND FIRST NATIONS ORGANIZATIONS

Collaboration and support was an important consideration for relationships with other First Nations and Indigenous organizations. Some respondents feel working together can increase knowledge and power among groups to pursue mutual interests, like lawsuits and land claims [OI]. One negotiating community noted that the decision to enter SGA negotiations was made easier by a neighbouring First Nation who had already pursued an agreement. For those with a modern treaty as part of a collaborative agreement, the ability to partner and share resources on common priorities was a key factor in the success at the negotiation and table and now during implementation [MT]. Some respondents had a strong and supportive relationship with the AFN, while others believed the AFN favour specific Nations and groups (N). Some respondents feel that the AFN represented the interests of Canada rather than the First Nations communities that made up the membership (NEG/OI).

REALIZING A NATION-TO-NATION RELATIONSHIP

Communities' responses to the meaning of a nation-to-nation relationship are linked to their historic and existing relationships with external partners. Some First Nation respondents challenged the notion of having a nation-to-nation relationship in the first place. They asserted that the Crown is "not a legitimate Nation. The Crown does not consider First Nation peoples as legitimate Nations and [...] self-government is another phase of colonialization" (NN).



The perception that the notion of extinguishment persists is a reoccurring barrier for First Nation to accept that a nation-to-nation relationship will ever be fully realized and that "getting

rid of extinguishment is important for a true nation-to-nation relationship". Others stated that a true nation-to-nation relationship can only begin once Canada is ready to have real discussions about new policies and leave old practices behind [SGA]. As one respondent said "nothing stifles reconciliation like 'this is how things have always been done,'." **(Internal).** The federal government's initiative to restore a nation-to-nation relationship with Indigenous Canadians is a commendable priority, but First Nations feel the relationship needs to be operationalized more fully and concretely before they will accept it as legitimate.

RESOURCES, PROGRAMS, AND SUPPORTS

For communities that are interested to move beyond the *Indian Act*, the pursuit of self-governance is contingent on the provision and access to resources, programs and support. First Nations must be equipped to respond to the financial, territorial and economic challenges that carve a strenuous path to self-governance. Capacity is a contributing factor that plays a significant role in pursuing self-governance. Capacity refers to the ability to administer matters of government and encompasses the human and financial resources which enable communities to build (i.e. economically, socially, and politically) for their future. With this in mind, capacity will continually be identified as a contributing factor throughout this section.

This section seeks to present the successes and challenges of INAC resources, which prevent or support First Nation communities to move beyond the *Indian Act*. First, control and management of land can impact the pursuit of SGAs. Second, sufficiency and flexibility of funding that reflects First Nations' priorities is an ongoing necessity. Third, strong Indigenous-led leadership founded on trust fuels the capacity to establish an effective governance system. Fourth, education and communication on the implications of the *Indian Act,* modern treaties, and SGAs is essential for both First Nation communities and all jurisdictions of the federal public services. Lastly, logistical challenges and misaligned expectations create barriers that prevent Canada and First Nations communities from successfully negotiating agreements.

LAND

The protection and control of land was at the forefront of many interviews with First Nation communities. INAC supports protection and greater control over land through reserve land base (S. 89, *Indian Act*), the FNLMA, and comprehensive land claims. Despite these policies, First Nations have highlighted a general lack of resources to support the management of their land.

PROTECTION OF LAND THROUGH SECTION 89 OF THE *INDIAN ACT*

Some First Nation respondents view the certainty that comes from Section 89 of the *Indian Act*[19] as important to the protection of the community land base and resources [FNLMA, NN]. While several respondents noted that their communities had found ways to apply *section 89* to their needs, others expressed frustrations with certain components of the reserve land policies.

[19] Section 89 of the *Indian Act* prevents reserve land from being seized or mortgaged.

Specifically, respondents were frustrated with the *Additions to Reserve* (ATR) policy[20], explaining that the ATR policy had negatively impacted their community's growth as they had waited years for a response from INAC to their proposal to add lands to their reserve.

Some respondents expressed strong opposition to policies that convert reserve land from crown property to a fee simple system. Although fee simple represents absolute ownership of land and may increase opportunities for economic development through borrowing and partnership with corporations, some First Nation respondents do not want to lose their community land base. Furthermore, a First Nation respondent expressed frustration with the government's mentality of a one-size-fits-all approach to reserve lands, including the concept of imposing fee simple lands (NN).

BENEFITS IDENTIFIED WITH THE FIRST NATIONS LAND MANAGEMENT ACT

Support from INAC and Land Advisory Board

For respondents from communities who have adopted the FNLMA, the support received by their INAC Regional Office and the Land Advisory Board is adequate. They were helpful in providing services and locating additional funding for the community to adopt the FNLMA. Regional associations, such as the National Aboriginal Lands Managers Association and the Regional Lands Association, are also great informational and networking resources.

Economic development

The majority of respondents in communities which had adopted a land code through the FNLMA discussed the benefits of taking on land management, particularly economic development. This legislation enables quicker, easier partnerships with private corporations [OI] and reduces INAC's role in land management. Communities with a FNLMA were no longer impacted by INAC's bureaucratic processes, and were able to "move at the speed of business."

Capacity Building

First Nation respondents stated that the land code helped to institutionalize the land management process, planning and zoning, and that the inclusion of the community in the land management process had created a strong sense of community pride (OI). Several respondents felt that the FNLMA allowed First Nations to retake their historic, inherent right to govern their own lands. Respondents from one community pursued the FNLMA so that they could gain control over their land, move beyond the *Indian Act*, and gain sovereignty. Internal respondents stated that the FNLMA could be considered a success for First Nations because it allowed them to allocate land in a manner they chose.

[20] The Additions to Reserve Policy allows bands to purchase certain plots of municipal land and propose to have it combined with their current reserve land base.

CHALLENGES IDENTIFIED WITH THE FIRST NATIONS LAND MANAGEMENT ACT

Capacity and Access to Information

Several respondents highlighted the challenge of hiring and training land managers. Under FNLMA, the funding to train only one person to manage land is problematic, because it leaves the community vulnerable to their departure. For example, one community had gone through five land managers over a few years because of high workload and lack of assistance from INAC.

For some respondents, Certificates of Possession (CPs)[21] and matrimonial property rules were a barrier to land management. Several respondents expressed that CPs were a constant strain on their community's ability to manage and utilize their lands.

> ***"FNLMA was to retake our inherent right to governing our own lands the way we always had. It had to do more with control over our lands because we were tired [of] being told what we need to do with their lands"***

Some respondents emphasized the lack of resources for environmental aspects of land management. For example, respondents identified a lack of INAC support to monitor and understand the current state of the environment, and therefore did not know how to proceed with the development of environmental protections and plans. Another sentiment heard is that jurisdictional issues complicate the implementation of environmental regulations because communities with a land code need to ensure that their regulations met government regulations.

Some First Nation respondents perceived that INAC had a lack of funds available for all communities to adopt a land code. First Nations are looking to adopt the FNLMA and INAC cannot support all of them. A particular community already faced a funding shortage for the management of lands and estates. Additionally, some respondents also highlighted voting thresholds as a barrier to adopting a land code.

The lack of capacity building initiatives for communities with land codes is especially problematic because it undermines the work that was done to develop the land code in the first place.

Limited information of the supports and resources available can act as a barrier for communities who desire to manage their own land. Specifically, respondents identified the lack of information as one of the biggest challenges to adopting land management, and that this hindered their ability to move forward.

May not reflect community needs

While many of the respondents perceived the FNLMA as a flawed, but generally positive act, some felt that the FNLMA did not work for the community at all. Respondents from a non-negotiating community stated that the FNLMA was a prescriptive and dangerous policy because it had the potential to create the same problems the CPs had created. There was a perception of

[21] Certificates of Possession are a form of on-reserve property ownership

the FNLMA as one of a series of policies in the government toolbox which did not work for the community.

IMPACT OF LAND CLAIMS AND TREATIES IN MOVING BEYOND THE *INDIAN ACT*

Benefits of land claim settlements

For many First Nations wishing to move beyond the *Indian Act* through a modern treaty or SGA, the settlement of land claims is central. First Nation respondents noted that setting land claims provides certainty and clarity of rights to ownership and use of land and resources in regions that are not covered by historic treaties (Internal, MT). Similarly, a respondent stated that certainty helps attract development partners and offers legal protection to a First Nation.

Challenges for First Nations to settle land claims

While there are benefits associated with settling land claims, some First Nations may not possess the capacity to do so. For example, an INAC respondent noted that there is a steep learning curve for First Nations to take control over their lands, and that the limited pool of qualified people to handle the new responsibilities poses a serious problem. Communities have to rely on non-Indigenous advisors until they have built the capacity to take on the roles themselves.

First Nation respondents identified courts as a challenge to moving forward with a land claim and cited the decision in the Tsilhqot'in case as the reason the community did not want to open their land claims. An internal respondent also pointed to the perception of extinguishment and "muncipalization of First Nations" as a barrier to settling land claims. When land claims first came into effect, Canada required Indigenous groups to agree to the extinguishment of their Aboriginal rights as a part of claims settlement. While those within the department state that this is no longer the case, there is still a strong perception from First Nation respondents that Canada requires extinguishment as a part of a claims settlement.

Land selection was identified as a substantial challenge by First Nation respondents because it was recognized that the First Nation would not receive control over its full territory. The removal of land from the reserve and restricted land usage was also contentious.

The process to adopting a SGA is complicated by settling land claims. An external stakeholder felt pressure from the federal government to re-negotiate a treaty that included self-government. Some communities did not want to give up their existing land claim and did not wish to purse a SGA at this time. While some communities do wish to pursue self-government and settle land claims simultaneously, others felt they could not move beyond the *Indian Act* until their land claims were resolved.

FUNDING AND RELATED SERVICES

Current funding agreements do not provide a sufficient amount of funding for First Nation communities. The Government of Canada must improve the way in which First Nation communities are financially supported by reforming the flexibility of contribution agreements, replacing inaccurate funding formulas with those that reflect community realities, and develop a whole of government approach to funding.

INCREASED FEDERAL FUNDING IS REQUIRED

First Nation respondents highlight that they do not receive sufficient levels of funding from the federal government (OI, IN, MT, NN, Literature Review). First Nation respondents state that insufficient levels of funding create significant impediments for community leaders to develop the financial capacity to operate within and outside of the *Indian Act* (OI, IN, MT, NN, Literature Review).

Own Source Revenue

First Nation respondents state that own source revenue (OSR) impacts a community's ability to move beyond the *Indian Act* (OI, IN, NN, MT). Stable levels of OSR allow First Nation to work independently of INAC and develop long-term relationships with private sector organizations for economic development within the community (MT, OI, Literature Review). High capacity communities rely on their OSR to develop local industries that later reinvest in the community's economy creating jobs for band members (IN, NN). Modern treaty respondents felt that OSR contribution requirements are actually counter-intuitive to self-reliance.

Some First Nation respondents stated that high OSR leads to a decrease in the amount of funding provided by INAC in their contribution agreement (OI, NN). This is perceived as "offloading" responsibilities onto the community as they have to divert revenue away from community needs to offset the decreased funding from INAC (OI). Community leaders must take on additional responsibility without the funding provided by INAC; therefore, raising OSR can impact a community's ability to build capacity and become less dependent on funding provided by INAC (NN, MT).

INCREASED FLEXIBILITY IN FUNDING AGREEMENTS ENABLE THE DEVELOPMENT OF FINANCIAL CAPACITY

The lack of flexibility of contribution agreements presents a major barrier for First Nation communities to move beyond the *Indian Act* (IN, OI, NN, Literature Review). Respondents indicate that contribution agreements rarely offer the flexibility to reallocate funds based on community needs (NN, OI, Literature Review). Some respondents in communities that do reallocate funds feel they are penalized for doing so, even in the event of targeting an emergency within the community (NN). Some First Nation respondents would prefer a grant modeled

funding agreement, to eliminate reporting requirements and provide flexibility in funding allocation (NN, OI, IN, Lit).

Most respondents from communities with a modern treaty have expressed their satisfaction with the flexibility offered by their financial agreements (MT). These agreements provide an annual lump-sum payment that is flexible and modeled similarly to provincial fiscal transfers. Community leaders can allocate funds where they see fit (MT). The funding model developed through the modern treaty process is considered a success by First Nation respondents, since it eliminates reporting burdens and enhances flexibility to reallocate funds (MT).

Similarly, increased flexibility of funding is seen as a benefit of the FNLMA. One respondent stated that a benefit of the FNLMA was the ability to receive all land management funding at the beginning of the year, with reduced reporting requirements.

One barrier to moving beyond the *Indian Act* for First Nations is the perceived rigidity of contribution agreements, as funding dedicated to programs is based on INAC priorities rather than community needs (OI, IN, NN). First Nation respondents feel communities may have to manage lower levels of funding, or apply for multiple programs to ensure the community is financially stable (IN, OI). When INAC does not heavily contribute to a community's budget, communities argue that it is has a large share of influence (NN). Some First Nations respondents perceive funding as tied to government priorities superseding community needs and limiting their ability to develop long-term financial plans (NN). Thus, communities are not able to develop long term financial plans for the planning and ensured success of a community without the *Indian Act*.

FUNDING FORMULAS ARE NOT REFLECTIVE OF COMMUNITY REALITIES

Many First Nation respondents perceive that funding allocations are based on obsolete formulas that do not consider community needs (NN, OI, IN, Literature Review). We heard from community respondents that funding formulas do not account for emergencies, development projects, or other uncontrollable factors that may affect the way a community manages its programs (OI, IN, NN). For example, tourists using community facilities and consuming community products are not taken into account in formulas (NN).

Brian Arbuthnot, CEO Wagmatcook First Nation

"Modern Indian Agents are the GA and reporting requirements"

Respondents also identify an issue with how INAC quantifies the information gathered from communities (NN, OI). The literature shows that funding formulas are in place to limit INAC liabilities with communities they deem "high risk." These communities are required to go through intervention programs once they have reached a certain level of risk, which is based on the information gathered from the community (Literature Review). As a result, community leaders lose their ability to manage their own affairs (NN).

For the Mohawk Council of Awkasanse, a nation-to-nation relationship is the idea that it negotiates with Canada,

"We are negotiating with Canada, not INAC"

While INAC uses information collected from the community to determine risk, sparse quantitative data limits the indicators used to measure a community's wellbeing (OI). The indicators used to determine risk are not based on outcomes but rather the degree of added financial liability to INAC (NN). An increase in a community's "risk score" translates into stricter levels of funding, obstructing their ability to target emergencies. This impedes communities from developing the capacity needed to deal with crises.

INCONSISTENT FUNDING APPROACH ACROSS GOVERNMENT DEPARTMENTS

Some respondents from First Nation communities must apply to many different federal departments in order to get funding for a single project (IN, NN). First Nation respondents see the Government of Canada as a single unit and expect to deal with a single body that represents all departments (NN, Literature Review). The lack of coordination between departments leads to communities receiving a disproportionate amount of funding for certain projects (IN, NN). For example, communities may get larger funding to manage health centers from Health Canada but very little funding from INAC to build the same health center (NN).

Different departments use different funding schedules which are often not in line with community project timelines (OI, IN, NN). Communities must therefore upfront the costs to complete or continue these projects (OI, NN). This strains the community's cash flow and hinders the community's ability to develop stable relationship with banks and other private organizations.

GOVERNANCE AND LEADERSHIP

For communities that are interested in moving beyond the *Indian Act*, strong and Indigenous-led governance can enable First Nation leadership to create their own vision and stipulate their own regulations. On one hand, the development of political and administrative accountability fuels the capacity to provide strong leadership and an effective governing system (Internal/External). On the other hand, the inability to properly collect, own and control data, due to the lack of trust from internal and external partners, creates ongoing barriers to establish good governance and strong leadership (NN). Respondents from First Nation communities with modern treaties expressed that strong leadership and good governance structures are important for negotiation and implementation success.

MUTUAL ACCOUNTABILITY LEADS TO AN EFFECTIVE GOVERNING SYSTEM

Respondents note that effective governing systems in First Nation communities are outcomes built on foundations of trust and the presence of strong political and administrative accountability (Internal/External). Most First Nation respondents illustrate that the purpose of accountability in First Nation governance is essential between First Nation leadership and its

community members, and required between communities and the Government of Canada (Internal/External).

First Nation respondents identified, and both internal and external partners confirmed that there are unclear definitions of accountability for First Nations who choose to move beyond the *Indian Act*. The Federal Government does not maintain an accountable relationship with First Nation communities (Internal/External). The relationship is perceived by First Nation respondents as unbalanced when communities are asked to be accountable but the Government is not directly accountable to communities (NN). Both internal and external partners signal reporting requirements as an already-challenging aspect that exudes a one-sided relationship, given that the Government is not required to report back to communities (N, Internal/External). Self-government provisions of treaties allow First Nations governments to be established with a mix of traditional leadership and democratically-elected leaders. Respondents from communities with modern treaties acknowledged that leadership is accountable to its members, not to the Minister of INAC (MT).

LACK OF ACCOUNTABILITY UNDERMINES GOVERNANCE CAPACITY OF NON-NEGOTIATING COMMUNITIES

Respondents from not-pursuing communities view the *Indian Act* as a legal tool to hold the federal government accountable for their fiduciary responsibility to First Nations (NN). First Nations have been able to use this to challenge membership status, land claims, lack of financial resourcing, and overreaching by government. This factor can be challenging as some participants perceive that once a community becomes self-governing, they become divorced from the federal government. Loss of resources is feared once an agreement is signed (Non-Negotiating Respondents). Most community respondents are reluctant to pursue change without a clear indication of the alternatives.

This fear has been experienced by respondents in modern treaty communities who felt they had lost access to certain governmental services, such as pooled-borrowing resources under the First Nation Financial Management Board.

Additionally, respondents from non-negotiating communities argue that measures of compliance with the *First Nation Financial Transparency Act* (FNFTA) counteract the vision of communities as First Nation leadership has already created institutionalized mechanisms of accountability to their membership before the implementation of the FNFTA (Non-Negotiating Respondents).

REPORTING REQUIREMENTS AND THEIR IMPACT ON FIRST NATION GOVERNANCE

Most First Nation respondents note that the number of reports required for INAC funding can negatively impact First Nation governance (N, NN, OI). Respondents noted that human and financial resources are diverted to fulfill reporting requirements, instead of targeting community needs (NN, IN).

Brian Arbuthnot, CEO Wagmatcook First Nation

Community leaders are overloaded with the number of reporting requirements. In their opinion, "By doing this much reporting, we are taking away [time] from helping our community"

Both First Nation respondents and the literature highlight the impact to funding if these reports are not completed. If communities do not comply with reporting requirements, funding can be halted (Literature, NN, N). As a consequence, community administrators are left ensuring reporting compliance for fear of losing funding instead of ensuring that programs are properly targeting community needs.

Many First Nation respondents did not believe that the data obtained by their reporting is going to good use. Instead, community respondents claim that the information is shelved and simply checked off from a list of reports (OI/IN). First Nations respondents feel that this data would serve a greater purpose for communities to keep the data in-house and report only on the outcomes of the governments funding (IN, NN).

Comparatively, communities with a modern treaty or opt-in legislation are satisfied with their level of reporting, as there are virtually no reporting requirements remaining from the *Indian Act*. Modern treaty First Nation respondents had the ability to spend additional time governing and completing daily tasks rather than complying with reporting requirements (MT). Similarly, some respondents from communities under a FNLMA noted that they received 100 percent of their funding, with no reporting requirements associated (OI). Lighter reporting requirements may act as incentive for First Nation communities to move beyond the *Indian Act*, as less human and financial resources are spent.

COMMUNICATION, EDUCATION AND ENGAGEMENT

Communication, engagement and education within First Nations communities are crucial to understanding the options outside of the *Indian Act* and the implications for moving beyond it. First Nation respondents have identified challenges surrounding education and awareness of SGAs for at all levels of government. This limits First Nations in their ability to exercise their jurisdictional authority and access government programs or services.

MOVING BEYOND THE *INDIAN ACT* THROUGH EDUCATION, COMMUNICATION AND ENGAGEMENT WITHIN FIRST NATIONS

Communication, engagement and education within First Nations communities are crucial to understanding the options outside of the *Indian Act* and the implications for moving beyond it. Engaging community members through education and consultation helps members make informed decisions and supports strong implementation once the agreement is effective (MT). First Nation respondents note that it is challenging to garner support and manage expectations within their communities on the provisions and impact of a SGA. Further, respondents noted that they do not always have the capacity to explain the changes associated with new legislation. Respondents from communities adopting the FNLMA noted that community education would ensure members were informed before a ratification vote and would support leaders in explaining associated changes.

Another challenge is disseminating information to community members who live off-reserve. It becomes more challenging to share knowledge and communicate due to distance. Therefore, community members may not vote in favour of changes or vote at all, as the impact of the legislation may not be understood.

MOVING BEYOND THE *INDIAN ACT* THROUGH GOVERNMENT EDUCATION

While the implementation of SGAs has been a learning curve for all parties involved, First Nation respondents with a modern treaty and opt-in legislation identified challenges surrounding education and awareness of all levels of government. They cite a lack of education on the authorities of First Nation governments, which create barriers for communities to exercise their jurisdictional authorities. First Nation respondents note that provincial and municipal courts do not uniformly recognize their legal authorities (ON/NEG). Respondents from communities who have a FNLMA perceive a lack of recognition for their land code by neighbouring jurisdictions, restricting enforceability.

This lack of education presents a disincentive for First Nations to move beyond the *Indian Act*, as modern treaty and opt-in communities have trouble establishing their own government mechanisms and securing services.

NEGOTIATION AND IMPLEMENTATION CHALLENGES AND SUCCESSES

NEGOTIATION CHALLENGES

Benefits of modern treaties have been identified by statistical studies, government evaluations, and interviews with modern treaty groups. Including community pride, improved socio-economic conditions and improved relationships, where disputes can be settled outside of court. These benefits associated with agreements, raise questions as to why so few have been negotiated and why many have not progressed past the negotiation stage.

While the federal government supports First Nations that wish to move beyond the *Indian Act*, there are a number of barriers that prevent communities from entering into negotiations and finalizing agreements. These include: lack of capacity, misaligned expectations between communities and government, and time and funding constraints.[22]

Capacity and Funding for Negotiations

First Nation respondents feel that lacking financial or land management capacity before beginning discussions on self-government, CLCAs or the FNLMA, is a barrier to entering negotiations in the first place. Negotiations require a significant amount of time, money and expertise and some First Nations feel they do not have the financial self-sufficiency, time, and expertise required.. There is a perception among First Nation respondents that the negotiation table is imbalanced, as the resources of the Federal government far exceed their own (N). Similarly, limited capacity after negotiation, or adopting the FNLMA, can prevent successful implementation of agreements or FNLMA legislation (OI, MT).

The Muskeg First Nation stated that "We are not treated as sovereign; we are treated as children that need to be looked after"

Funding was highlighted as a key barrier preventing the successful negotiation of an agreement. While the government of Canada provides loans and funds for the negotiation process, First Nation communities find repayment challenging. For modern treaty First Nations, the average debt is ten million dollars (Evaluation on Neg. CLCs). This strains the resources of the community after the agreement has been negotiated. The amount of debt that is accumulated during negotiation may encourage communities to rush through the negotiation stage to finalize an agreement, resulting in dissatisfaction with the agreement. A particular respondent, who viewed their treaty negatively, believes that their community had settled during the negotiation process due to concern over the built up of debt, and could have negotiated a more suitable agreement if they did not feel financially pressured.

INAC supports one ratification vote but if FNLMA ratification fails, the community is responsible for funding future votes which can be a deterrent to continuing on with the process.

Momentum

The negotiation and implementation of SGAs, CLCAs, or the FNLMA is time consuming and maintaining momentum is challenging for many groups. The process to adopt the FNLMA can take up to three years, while the modern treaty negotiation process takes an average of eighteen years (Eval on Neg. of CLC & SGA). The process requires a significant amount of time and energy which can place significant stress on negotiators and the community. (MT). One

[22] Note: the transition to the FNLMA has been included within this discussion; however, it should be acknowledged that opting into the FNLMA is not negotiated. Nonetheless, the legislative and political processes surrounding the transition require time, support and may pose significant challenges to communities.

respondent even told us about the loss of elders throughout their 20-year negotiation process due to the stress.

Changes in leadership at the First Nation, Provincial/Territorial and Federal level can impact the negotiation process. At the community level, this change can alter the commitment to the agreement. At the federal or provincial level, changes can alter the mandates of what the government is willing to negotiate (Internal, MT). This is especially challenging at the provincial/federal level as this leadership change could suspend or elongate the negotiation process at the expense of the First Nation community (MT).

MISALIGNED EXPECTATIONS DURING NEGOTIATION

OSR Contribution Requirement

Once a n SGA or modern treaty becomes effective, communities must begin making OSR contributions. This means they must start paying a portion of their OSR to the government, reducing their annual transfer for government operations (INAC). The OSR contribution requirement is daunting, and some community respondents see the fiscal arrangement under the *Indian Act* as more cost-effective that a SGA (OI).Some respondents noted that the OSR requirement is counter-intuitive to self-reliance, as it takes away funding from communities (MT).

Tax Exemption

A major disincentive to moving beyond the *Indian Act* is leaving Section 87 of the Act, as it provides an income and sales-tax emption for First Nations on reserve. All respondents noted that forgoing this tax exemption is a major disincentive to leaving the *Indian Act* as it impacts the day-to-day lives of First Nations. Under the FNLMA or stand-alone SGAs, First Nations are not required to forgo their tax exemptions. Respondents noted that the tax exemption clause is a barrier preventing their pursuit of a CLCA and until the government's mandate on tax exemptions change, their community will remain under a stand-alone SGA and reserve land system.

Further, forgoing the tax emption can be a point of tension between First Nation Negotiators and community members; as negotiators feel that establishing taxation powers for the First Nation government is essential to finance the agreement, while community members are reluctant to let go of their tax-exempt status and ratify an agreement.

"MOVING FORWARD"

CONCLUSIONS AND RECOMMENDATIONS

In an attempt to shift away from the colonial structure of the department, this Government prioritizes the goal of advancing self-determination for Indigenous peoples and the renewal of a strong nation-to-nation relationship. To achieve this goal, a strong emphasis has been placed on SGAs as a tool to advancing self-determination. While SGAs can be a successful mechanism to advance self-determination, it is important to acknowledge that this approach cannot meet the needs of every First Nation community. The relationship between SGAs and self-determination is complex, and viewing self-government as a one-size-fits-all solution fails to acknowledge the wide range in capacities and needs of every First Nation. Many First Nations operate within the *Indian Act* and supplement this with opt-in or sectoral legislation. If the department is to move forward on advancing First Nation self-determination, it is important that the department recognize that for some communities there is a disconnect between SGAs and self-determination. INAC must work with First Nations to promote a holistic and community-driven approach to self-government.

Strong relationships are critical to realizing self-determination, whether they are formalized through agreements or built under the *Indian Act*. For First Nations who are looking to move beyond the *Indian Act*, there are several areas which significantly impact their ability to proceed with SGAs and sectoral legislation. While INAC provides a number of different resources and supports for First Nations governance, substantial barriers continue to restrict the ability of First Nations to pursue their visions of self-determination.

It is therefore recommended that INAC:

RE-EVALUATE ITS APPROACH TO FIRST NATION SELF-GOVERNANCE BY

- Revising its overall policy and communication approach from emphasizing advancement through SGAs to supporting whichever path to self-determination is identified by First Nations.
- Creating liaisons that represent the Crown and would coordinate all services the federal government offers to First Nations. Facilitating communications through a single point of contact will remove the burden on First Nations to navigate programs and services across federal departments. This will help align the programs and services to meet community needs. In the long-term, programs and services would be tailored to community needs under a whole of government funding approach.
- Improving Canada's accountability to First Nations. This could be accomplished through the creation of Indigenous-led institutions, such as a First Nations Office of the Auditor General.
- Clarifying and formalizing the mandates, roles, and responsibilities of provinces and territories for negotiations and First Nations' service delivery.

IMPROVE FUNDING AGREEMENTS SO THAT INAC PROVIDES FIRST NATIONS WITH FUNDING THAT IS SUFFICIENT, FLEXIBLE, AND PREDICTABLE BY:

- Providing First Nations with sufficient funding for land management, the implementation of agreements, and capacity to deliver programs and services.
- Providing sufficient funding for First Nations to have comparable access to public services.
- Amending the current funding formulas to reflect community realities.
- Re-evaluating the General Assessment score system and default prevention program as methods of determining risks, so that First Nations are not penalized for investing in the future.
- Providing targeted funding for a communication strategy for communities in negotiations or ratifying agreements.
- Creating funding agreements that are delivered through fiscal transfers and are flexible to allow First Nations to reallocate funds based on community needs.
- Funding First Nations in a manner that is long-term and predictable so that they can build their communities

SUPPORT FIRST NATION GOVERNANCE BY:

- Supporting the legal authority of First Nations. This could be done through better education on First Nation self-government for municipal, provincial and federal public servants.
- Supporting enforcement capacity of communities so that they are able to administer community bylaws, environmental regulations, land codes, and other laws or regulations.
- Respecting that First Nation's accountability is to its members first and foremost and not to INAC. This could be accomplished by repealing the First Nations Fiscal Transparency Act, and reducing reporting and data collection requirements.
- Respecting that INAC's accountability is to First Nations, demonstrated by reporting directly back to First Nations communities, and providing an accessible version of the Departmental Results Report for First Nations.

RESPECT LAND RIGHTS OF FIRST NATIONS BY:

- Targeting resources to build capacity for First Nations to ensure that they are able to manage and protect their community land base.
- Revising the ATR policy to make the process faster, and avoid imposing economic hardship on First Nations.

ADDRESS THE NEGOTIATION BARRIERS FACED BY FIRST NATIONS BY:

- Addressing the long-standing negotiation barriers that are preventing First Nations from settling land claims, which include the section 87 tax exemption, Own Source Revenue, extinguishment, and negotiation length.
- Improving the clarity and flexibility of negotiation mandates.
- Providing grants instead of loans for negotiation, and forgive outstanding debts.

PROJECT LIMITATIONS

The purpose of this section is to identify areas of growth throughout Evaluation Internship Program. These limitations serve as instruments of improvement designed to further ameliorate the implementation of program objectives as well as inform the administration and planning of future internship programs of similar nature.

KEY LESSONS

The following points focus on key lessons derived throughout the duration of the program, starting from May to September 2017:

FRAMING THE RESEARCH QUESTION

The research question is the most substantial element that guides the trajectory of the project. The question, as posed by senior management, entails an idea that leaving the *Indian Act* is the targeted outcome to move forward. There is an inherent bias in the research question that indirectly acknowledges SGAs as the final deliverable.

Best practice: Formulate a research question that is open-ended, non-leading, and is co-designed with First Nations communities.

APPLICATION OF INDIGENOUS FRAMEWORK TO INFORM RESEARCH METHODOLOGY

A lack of cultural competency and the application of a non-Indigenous framework to inform the methodological approach presented as a setback. This report was ultimately *on* Indigenous peoples instead of *with* Indigenous peoples, as they were not part of the research design and methodology. This is problematic as it hinders the incorporation of Indigenous research methods within the report. Specifically, this report struggled to allow Indigenous peoples to speak their whole story and tell their authentic truth on colonization as well as to incorporate Indigenous traditional knowledges. This style of strict question-answer research, which is based in western-academia, does not promote an interview environment that is conducive to listening to First Nation's storytelling and traditional knowledge. Consequently, this style dehumanizes the lived-experiences that were recorded during the interviews which struggle to empower the voices that were heard.

Best practice: Indigenous respondents and INAC must collaborate to co-design a framework and methodological approach. Allocate sufficient time to learn and immerse in Indigenous frameworks prior to developing a methodological approach and analysing research findings.

PREPARATION AND PLANNING TO REACH REMOTE FIRST NATION COMMUNITIES

Conducting site visits is an integral part of data collection. The interns conducted site visits to nine First Nation communities across Canada as a means to attain a holistic representation of community profiles. Given the short timeframe to plan travel logistics, getting an accurate representation of First Nations communities, particularly remote communities, was a challenge.
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Best practice: Plan the logistics of site visits in advance to account for more affordable travel packages to remote First Nation communities.

CLARITY ON DISSEMINATION OF FINDINGS AND REPORT PUBLICATION

This report is written for and by INAC employees to improve support for Indigenous peoples by creating the space within INAC for Indigenous peoples to be heard by senior management. Beyond their voices being heard, this report lacks clear and concrete assurance of the benefits that Indigenous communities will receive upon its completion.

Best practice: Articulate clear and realistic expectations that will serve to benefit First Nation communities. Develop measures to publish the internship report, both internally and externally.

APPENDIX & REFERENCES

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APPENDIX A: COMPREHENSIVE METHODOLOGY

The project was split into three phases- preliminary research, stakeholder engagement, and data analysis. The team conducted a literature review, developed interview guidelines, selected communities for engagement, and conducted interviews. Throughout the planning and data collection process, interns created and attended learning sessions with a variety of notable and knowledgeable experts and public servants. These learning sessions were pivotal in grounding the work, formulating the research and sub-research questions, providing feedback, and creating space for reflection.

PRELIMINARY RESEARCH: LITERATURE REVIEW

The literature review gathered documents by accepting recommendations from management both in Evaluation and in individual sectors, then using those documents to conduct a 'snowball sample' of related reports via the bibliographies. This snowball method was supplemented with a sweep of web-based databases. The team conducted a keyword search of abstracts and academic databases. [23] The literature review identified over 50 documents that would be potentially useful, but narrowed the scope to include approximately 25 academic and NGO documents, 15 government documents, and 10 legal documents. The documents were then organized into specific themes based on their content. The literature review informs the analysis of the findings that are collected through community site visits and stakeholder engagement while helping to frame the research that is being conducted.

PRIMARY RESEARCH: STAKEHOLDER ENGAGMENT

Stakeholder engagement, in the form of semi-structured interviews, was utilized as a method to retrieve diverse data regarding self-government. Interviews were either conducted in person or over the telephone. Stakeholders were divided into three categories: First Nations communities, internal stakeholders (identified as those within INAC), and external stakeholders (those representing other government departments or civil society organizations). Six First Nation communities hosted members of the research team for in-depth site visit interviews. Considering the research question, the process of analysis weighted the First Nation perspectives more heavily.

Interview guidelines were created in a multi-stage continual process. An interview matrix was created to identify different stakeholder groups, and visually connect the research question, research themes, sub-questions and interview questions. Interview questions were organized according to research themes and sub-questions and then were further organized according to stakeholder group. Guides were therefore both personalized and standard. Further tracking documents were created to track stakeholder correspondence and replies.

FIRST NATIONS COMMUNITIES

[23] Keyword search terms are located in the annex.

The team has conducted interviews with communities in varied positions on the spectrum of self-government. Potential communities were divided into the following categories: those not pursuing self-government in any form, those currently in negotiation of an agreement-in-principle or final agreement of an SGA or CLCA, those with a finalized and active CLCA or SGA, and those who have opted in to the First Nations Land Management Act legislation.

First Nations communities were chosen to reflect the vastness and diversity of Indigenous peoples within Canada. The organization criteria for all First Nation stakeholders included: geographic location (rural and urban, south/north of 60), remoteness, population on and off-reserve, tribal councils, most recent INAC visit, presence at RIRSD discussions, type of agreement and stage of agreement, reasoning and brief background, as well as income. From this list, the team broke into pairs and conducted in-person and phone interviews for the same category of stakeholders to ensure consistency across interviews.

The team conducted a total of **77** interviews, which includes **53** in-person, **23** telephone interviews and **1** e-mail interview, from a multitude of internal and external partners. The team reached out and communicated with **18** First Nation communities and **4** Tribal Councils across Canada.

Community Type	Number of Communities	Total Interviews
Not pursuing	3	10
In negotiation	5	13
Have a final agreement	8	12
Sectoral/opt-ins	2	10
TOTAL	**18 communities**	**45 respondents**

Table 1: Communities Chosen for Engagement

INTERNAL AND EXTERNAL PARTNERS

The team then identified internal stakeholders from relevant sectors to gather the INAC perspective on the research question. Individuals within these branches of INAC were chosen for interviews based on the team's existing contacts and recommendations from the Evaluation branch. External stakeholders from other government departments or key civil society organizations were chosen in the same manner. Ultimately, the team interviewed **17** internal respondents and **14** external respondents from various areas, identified in Table 2:

INAC	EXTERNAL RESPONDENTS
Headquarters • Chief Financial Results and Delivery Officer • Education and Social Development Programs and Partnerships • Evaluation, Performance Measurement and Review Branch • Lands and Economic Development	• Department of Health • First Nations Market Housing Fund • Land Advisory Board Resource Centre • Legal Counsel on Maori Law • Nunavut Tunngavik Inc.

• Northern Affairs Organization • Regional Operations • Treaties and Aboriginal Government **Regions** • Governance, Individual Affairs and Government Relations (Ontario) • Funding Services (Québec) • Governance and Partnerships (Northwest Territories)	• Representative who worked on the former Truth and Reconciliation Commission • First Nation Negotiator

Table 2: Internal and External Respondents

DATA COLLECTION AND ANALYSIS

Phase 2 was engaging stakeholders and conducting primary research. The team connected with key stakeholders within the department as well as with First Nations communities across Canada. Data was collected and used respectfully and anonymously, and was conveyed back to the communities and stakeholders who have informed the research. The data was collected in a Raw Data Master Sheet, and then added to the Data Analysis Matrix to line up evidence with research questions.

Phase 3 was the analysis and reporting stage. The team examined the primary data collected through the fieldwork and interviews closely for thematic links and reoccurring patterns. These findings were the triangulated with secondary data, collected through the literature review, to find relevant support or opposition. This was then synthesized into a clear and concise draft report.