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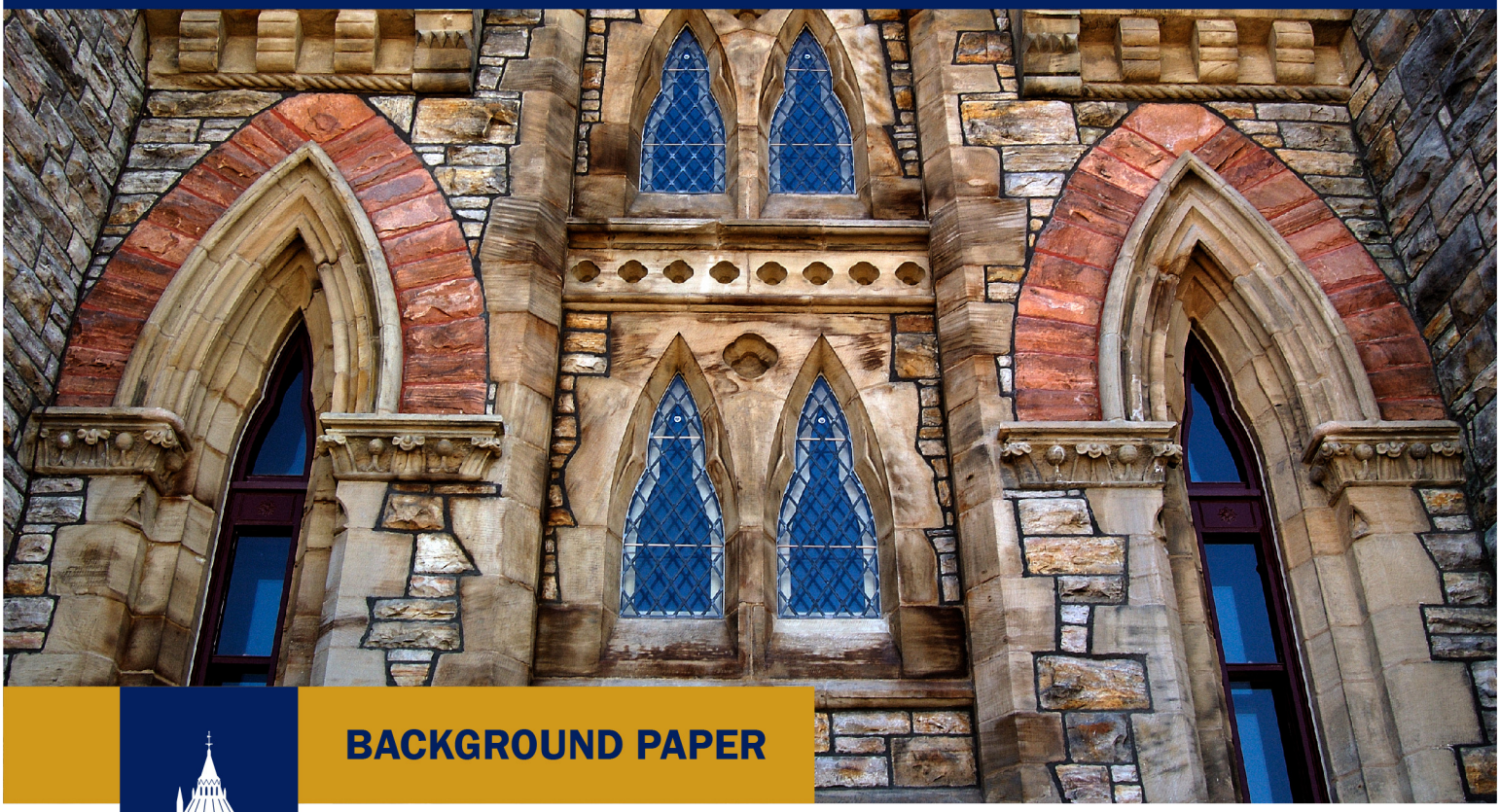

BACKGROUND PAPER

UNDERSTANDING FEDERAL JURISDICTION AND FIRST NATIONS

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Understanding Federal Jurisdiction and First Nations
(Background Paper)

Publication No. 2019-51-E

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EXECUTIVE SUMMARY

Under section 91(24) of the *Constitution Act, 1867*, the federal government has exclusive legislative authority for "Indians, and Lands reserved for the Indians." This responsibility, however, often overlaps with that of the provinces, whose authority extends to areas such as child welfare, education and policing. While "Indians" means all Indigenous peoples for the purpose of section 91(24), the federal government has historically tried to limit its responsibilities to the status First Nations population living on reserves, notably through the *Indian Act*, leaving other Indigenous peoples in a "jurisdictional wasteland." These nuances have influenced the relationships First Nations, Inuit and Métis peoples have with the provincial and federal governments. The emphasis placed on federal and provincial responsibility has also historically overshadowed Indigenous peoples' inherent rights, including their right to govern themselves.

Developments over the past decades in the areas of child and family services, education and policing illustrate how jurisdictional complexities may affect First Nations peoples and their communities, and how gaps have been filled by First Nations themselves as they assert their right to self-government and self-determination. To date, however, these developments have been more limited in scope and have mostly resulted from the federal government's intention to incrementally devolve programming and service delivery.

UNDERSTANDING FEDERAL JURISDICTION AND FIRST NATIONS

1 INTRODUCTION

First Nations have complex and evolving relationships with all levels of government. They experience challenges in determining which level of government is responsible for providing programs and services. As a result, there is a practical need to determine whether jurisdiction lies with the federal or provincial/territorial governments. Jurisdiction is not straightforward and can be contentious, resulting in ambiguity that may impede access to essential services[1] like health care. It can also leave some people, such as non-status (or unregistered) First Nations or Métis people, in what the Supreme Court of Canada has referred to as a "jurisdictional wasteland,"[2] where both federal and provincial governments deny having legislative authority over them.

This Background Paper provides a summary of the constitutional basis for jurisdiction related to First Nations peoples and outlines relevant court decisions that further clarify the division of powers between the levels of government. As the topic is complex, forthcoming publications by the Library of Parliament about non-status First Nations, Inuit and Métis people will provide greater detail on jurisdictional issues affecting these groups. The paper also examines contemporary issues with respect to jurisdiction for First Nations in the areas of child and family services, education and policing.

2 TERMINOLOGY

The federal *Indian Act*[3] is the primary statute through which federal jurisdiction for "Indians, and Lands reserved for the Indians" under the *Constitution Act, 1867*[4] is exercised. It regulates many aspects of First Nations life on reserve and historically had several provisions intended to oppress and assimilate First Nations. The *Indian Act* defines many terms important to understanding First Nations relations with the Crown.

The term "Indian" (sometimes referred to as "status Indian" or "registered Indian"[5]), while outdated and derogatory, has important legal meaning. It denotes those First Nations people registered or entitled to be registered as "Indians" in accordance with the provisions of the *Indian Act*. As of March 2018, there were 990,435 individuals registered as "Indians" in Canada.[6] This Background Paper will use the term "First Nations" unless quoting from the *Indian Act* and will use "Aboriginal" when referring to the term under the *Constitution Act, 1982*.

A "band" is another *Indian Act* term referring to a group of status First Nations with reserve lands or whose moneys are held by the Crown.

A "reserve" is a tract of land held by the Crown and set apart for the exclusive use and benefit of an "Indian band."

3 DIVISION OF POWERS

3.1 FEDERAL AUTHORITY

Section 91(24) of the *Constitution Act, 1867* provides Parliament with exclusive legislative authority regarding "Indians, and Lands reserved for the Indians." For the purposes of section 91(24), the Supreme Court of Canada has concluded that "Indian" includes Inuit (1939), status and non-status First Nations, and Métis people (2016).[7] In practice, however, the federal government has primarily exercised its jurisdiction narrowly by limiting it to status First Nations people resident on reserve and Inuit living in their traditional territories.[8] Two federal departments, Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada, are the main organizations exercising this authority.

Through the *Indian Act*, the federal government controls who is entitled to be an "Indian" via the registration process, which confers legal status. Registration (or status) is used by the federal government to determine eligibility for federal programs for First Nations living on reserve, such as post-secondary education funding and non-insured health benefits; legislated rights, such as tax exemption on reserves; and treaty rights, such as treaty annuities. Non-status First Nations, Inuit and Métis people are not subject to the *Indian Act*.

In the past, the *Indian Act* contained specific measures and prohibitions intended to assimilate First Nations, many of which were highly discriminatory. The *Indian Act* continues to shape the federal relationship with First Nations today.[9]

The *Indian Act* is a foundational statute, which in the past governed all First Nations. Over the past two decades, the federal government has transferred some of its responsibilities to First Nations governments through statutes conferring a degree of autonomy to First Nations to operate outside the *Indian Act*. As a result, participating First Nations may, for example, enter into agreements with the Crown to take over the management of their reserve lands using custom land codes, in accordance with powers granted under the federal *First Nations Land Management Act*.[10] They allow, for example, First Nations to adopt election procedures for band councils under the *First Nations Elections Act*[11] or to enact taxation or financing regimes under the *First Nations Fiscal Management Act*[12] and the *First Nations Good and Services Tax Act*.[13] These statutes have incrementally modified federal powers and obligations in relation to First Nations.[14]

The *Indian Act* also contains provisions that would normally fall under provincial jurisdiction, such as band membership, the organization and exercise of band government, elections, taxation, lands, moneys, wills and estates, and education.

The federal government funds many services, such as health care in some First Nations communities, that are normally provided by provincial, territorial or municipal governments. Such services are limited to First Nations people living on reserve.

3.2 PROVINCIAL AUTHORITY

Broadly speaking, provincial laws of general application also apply to status First Nations by way of section 88 of the *Indian Act*[15] or of their own force to all Indigenous peoples so long as these laws do not specifically deal with the "core of Indianness."[16]

The application of provincial laws to "Indians, and Lands reserved for the Indians" is constrained, however, by five conditions:

- that the provincial law is general in nature and cannot directly target "Indians" or "Lands reserved for the Indians";
- that the law does not affect the primary federal jurisdiction over "Indians, and Lands reserved for the Indians";
- that federal laws take precedence over provincial laws on the same subject;
- that the law does not infringe upon an existing Aboriginal or treaty right protected under section 35(1) of the *Constitution Act, 1982*[17]; and
- that provinces with a Natural Resource Transfer Agreement[18] with the federal government cannot deprive First Nations peoples of the right to take game and fish for food.[19]

While the provinces have not accepted any specific responsibilities for Indigenous peoples, provincial governments provide some services to the off-reserve Indigenous population in such areas as education, health care, and skills and employment services. In most cases, and unlike the federal government, provincial governments have enacted legislation that sets out their roles and responsibilities, as well as eligibility criteria for these essential services.

3.3 DELEGATION AND DEVOLUTION

The lack of clarity between federal and provincial jurisdictions has been referred to by the Supreme Court of Canada as a "jurisdictional wasteland."[20] When jurisdictional responsibilities are unclear, it can result in denials of essential services. For example, Jordan River Anderson was a Cree child who spent his short life in

hospital where he died while the governments of Manitoba and Canada disagreed over which order of government should pay for his at-home care. In 2007, the House of Commons unanimously adopted a motion called Jordan's Principle to address jurisdictional confusion.[21] Under Jordan's Principle, if a jurisdictional dispute arises between two government parties or between two departments of the same government regarding payment for services guaranteed to First Nations children, the agency first contacted must pay for the services without delay or interruption, while the two levels of government resolve who is responsible for the cost only after the services have been provided.

The Office of the Auditor General of Canada (OAG) has reported that a lack of a legislative or regulatory base for programs delivered by the federal government on reserve is a structural impediment that "limit[s] the delivery of public services to First Nations communities and hinder[s] improvements in living conditions on reserve."[22] Essential services are therefore delivered on a policy rather than legislative basis, which has resulted in essential services that are poorly defined and confusion about what is considered adequate funding.[23]

Situations can arise where the federal government spends less money for First Nations services on reserve compared to what is spent by provincial governments on non-First Nations individuals. A prominent example of the lack of comparability between First Nations and non–First Nations programs was highlighted in the 2016 Canadian Human Rights Tribunal (CHRT) ruling that found that Canada discriminated against First Nations people by underfunding the provision of child and family services on reserves.[24]

Over the last several decades, the federal government has delegated the delivery of services to First Nations governments and organizations.[25] The mandate of Indigenous Services Canada reflects this vision whereby the department states it will "support and empower Indigenous peoples to independently deliver services and address the socio-economic conditions in their communities."[26]

Many First Nations leaders and governments have long advocated control and management over the array of federal programs delivered in their communities.[27] However, First Nations are confronted with many obstacles in that regard, including the uncertainty and variation of funding levels from year to year and the lack of a statutory funding base for delivering essential services.[28] Some First Nations leaders have observed that program transfers without control over funding and jurisdiction can result in another order of government making "all key decisions over program content, standards [and] funding."[29]

3.4 ABORIGINAL AND TREATY RIGHTS

Section 35(1) of the *Constitution Act, 1982* stipulates that "[t]he existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed."[30] The constitutional entrenchment of these protections means that Aboriginal and treaty rights cannot be unilaterally extinguished by federal or provincial laws, and they give rise to several obligations on the part of the Crown.

Aboriginal rights refer to the practices, traditions and customs of distinct Indigenous groups. Aboriginal rights, such as hunting, fishing and trapping rights, can therefore vary from group to group depending on the customs, practices and traditions that have formed part of their culture.

Treaty rights refer to Aboriginal rights set out in historic treaties (pre-1975) or negotiated in modern land claims agreements (since 1975) between Indigenous peoples and the Crown. Examples of treaty rights include reserve lands, farming equipment and animals, annual payments, ammunition, clothing, and specific rights to hunt and fish.

The treaty-making process remains incomplete in Canada. Modern treaties are signed where historic treaties or other legal mechanisms have not addressed Indigenous peoples' land rights. Aboriginal title is an Aboriginal right to the exclusive occupation of land, held in common by Indigenous peoples who can use it for a variety of purposes.

The absence of terms defining these rights has placed the task of interpreting the scope of section 35 with the courts. Since 1982, a substantial body of law has developed governing the identification and definition of Aboriginal and treaty rights. For example, *R. v. Sparrow* (1990) confirmed that federal and provincial governments can only limit or infringe upon Aboriginal and treaty rights with respect to title to their lands for specific reasons according to the criteria set out in the decision.[31]

Indigenous groups have also had to resort to the courts in the context of Aboriginal title. Proving title exists, however, is a contentious subject for Indigenous peoples, who argue the land was never ceded to the Crown in the first place.

The Supreme Court of Canada recognized that Aboriginal title exists, that it predates Crown sovereignty, and that the Crown has a fiduciary obligation or duty to "deal with the land for the benefit of the Indians."[32]

3.5 FIRST NATIONS AUTHORITY

Recently, many Indigenous leaders have called for rights that are consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP),[33] such as the right to autonomy, self-government or self-determination. First Nations peoples maintain that they have an inherent right to govern themselves, meaning that the right does not derive from the Canadian Constitution but from their own systems of governance and historic occupation of the land.[34] An inherent right originates from within First Nations people and, therefore, it can never be "extinguished."[35] According to some, the federal government assumed sovereignty over Indigenous peoples and their lands, and they have called into question the sovereignty of the Crown over their lands and affairs.

Under the terms of the Royal Proclamation of 1763,[36] all land was the property of Indigenous peoples until it was ceded through a treaty with the Crown. In some cases, treaties were signed in parts of Canada where the Crown sought to extinguish Aboriginal title to the land while it was actively trying to assimilate First Nations people via various oppressive measures. First Nations argue that they understood the agreements differently than the Crown. As former Chief Crowchild of the Tsuut'ina Nation explains, "[W]e only agreed to share the lands under Treaty. We did not relinquish our sovereignty and we continue to live our way of life, our inherent laws, and governance structures."[37]

In *Tsilhqot'in Nation v. British Columbia* (2014), the Supreme Court of Canada agreed with Indigenous leaders when it found that the existence of the Royal Proclamation meant that the doctrine of *terra nullius*, often used to justify the European settlement of North America, whereby "no one owned the land prior to European assertion of sovereignty," did not apply in the Canadian context.[38]

In 1995, the federal government adopted a policy on the inherent right of self-government.[39] The policy on self-government has led to constitutionally protected comprehensive land claims and self-government agreements. These tools provide Indigenous governments with law-making authority in many areas.

4 CONTEMPORARY LEGAL AND POLITICAL ISSUES

This section of the Background Paper provides examples of contemporary jurisdictional issues arising in the areas of child and family services, education and policing in First Nations communities across the country. These are areas in which the federal government has passed, has committed to pass, or has tried to pass legislation in recent years. The section also explores ways in which First Nations have been reasserting their own jurisdiction, sovereignty and right to self-determination. These issues highlight the tensions between the federal government's approach to the devolution of service and program delivery, and

Indigenous peoples' inherent rights to self-government and self-determination. They also demonstrate that jurisdictional overlaps often lead to funding shortfalls when responsibilities are poorly defined between Indigenous, federal and provincial partners. Also of note is the fact that, in 1983, the House of Commons Special Committee on Indian Self-Government explained that the federal policy of devolving responsibility for the management and delivery of programs to First Nations does not amount to self-government as "control over programs, policies and budgets remains with the Department."[40]

4.1 CHILD AND FAMILY SERVICES

In Canada, child welfare falls under provincial jurisdiction.[41] Despite the federal government's legislative authority for "Indians," provinces have gradually become involved in the provision of child welfare services in First Nations communities. This is a result of the federal government's incorporation of provincial laws by reference through section 88 of the *Indian Act* in the 1950s.[42] For its part, the federal government has sought to limit its role to programming and funding for First Nations child welfare.[43] Thus, First Nations have had to abide by federal funding parameters and provincial child welfare laws.[44] According to researchers, this shared jurisdiction "results in inconsistent policies and practices, and fragmented data across the country," as well as "in inequitable funding and a 2-tiered system of care" that disadvantages First Nations children.[45] Notwithstanding this split jurisdiction and the role played by the provinces, the CHRT in its 2016 decision found that "Canada–not the provinces–is primarily responsible for child welfare and must be held accountable for knowingly underfunding services to some of the most vulnerable people in this country, First Nations children."[46]

First Nations strongly assert that they have never surrendered their right to care for their children and, therefore, they have an inherent right to exercise their jurisdiction as it pertains to child welfare.[47] Still, First Nations governments exercise complete control in this area in only a few instances. Some jurisdictions have developed a shared model, where the child welfare system is governed jointly by First Nations communities and the provincial government. However, most jurisdictions operate under a delegated model, where First Nations child welfare agencies are granted the authority by the province to carry out specific duties as identified in agreements. Under the delegated model, First Nations agencies must still comply with provincial standards in order to receive federal funds. Thus, control over standards and funding parameters remains within the purview of provincial and federal governments.

Adopted in 2019, *An Act respecting First Nations, Inuit and Métis children, youth and families* recognizes that the inherent right to self-government of Indigenous peoples includes jurisdiction over child and family services.[48] Under that Act, Indigenous governing bodies' legislative authority in relation to child and family

services is recognized. Despite this recognition, the legislation has been criticized for "limit[ing] Indigenous authority" and for not explicitly referring to Jordan's Principle, thereby leaving the door open to further "jurisdictional quagmire" around funding and fiscal responsibility.[49]

4.2 EDUCATION

4.2.1 Federal and Provincial Roles

Education is another area of jurisdictional overlap.[50] Pursuant to section 93 of the *Constitution Act, 1867*, education is an area of provincial legislative authority. However, the federal government historically played an active role in Indigenous education, and education was at the centre of Canada's assimilationist policies, notably through the residential schools system.[51] Education was seen "as a way of 'civilizing' the Indians, training them in western agriculture and of keeping them out of the way of the settlers."[52] To this day, sections 114 to 117 of the *Indian Act* still provide for the establishment, operation and maintenance of schools on First Nations reserves. Consequently, the federal government still has power over education in communities where the *Indian Act* applies, notably through its statutory funding authority.[53] However, section 114, which stipulates that the federal minister may enter into agreements with provinces and territories for the education of First Nations children, specifically opens the door to the provision of education services by provinces and territories.

Despite its role in Indigenous education, the federal government has never passed legislation in this area. In 2014, it tried to pass Bill C-33, First Nations Control of First Nations Education Act, to delegate to First Nations the administration of elementary and secondary schools on reserves.[54] This initiative was opposed by many First Nations, in part because the bill did not explicitly recognize their jurisdiction over education.[55] The bill was never adopted, and education on reserve continues to be mostly provided under the pre-existing framework: through band-operated schools receiving federal funding and following the provincial curriculum.[56] First Nations are left with no clear standards, funding levels or oversight mechanisms. However, the lack of legislative framework has also created room for First Nations to be innovative in working toward increased self-government.

4.2.2 First Nations Jurisdiction Over Education

First Nations have long asserted their right to be in charge of their education systems. According to UNDRIP, Indigenous peoples have the right to self-determination and to design and control their own education systems.[57] To this day, however, most First Nations communities have "only a modest level of control … in the form of delegated authority," and often lack the necessary resources to gain full control of their education systems.[58] Moreover, as has been noted with regard to child and

family services, the recognition of jurisdiction over education is meaningless without building capacity or providing the necessary financial resources.[59]

Education is identified as a matter for negotiation under the 1995 Inherent Right of Self-Government Policy.[60] Most modern treaties and stand-alone self-government agreements have included provisions enabling Indigenous signatories to enact laws in relation to primary, elementary and secondary education (and post-secondary education in some cases).[61] Self-government agreements have also been signed in specific areas, such as education. This is the case in Nova Scotia and Ontario, where agreements delegate legislative and administrative control over education to participating First Nations, replacing education-related sections of the *Indian Act*. The two sectoral education agreements have been given effect through federal legislation in 1997 (*Mi'kmaq Education Act*[62]) and 2017 (*Anishinabek Nation Education Agreement Act*[63]).

In British Columbia, the First Nations Education Steering Committee also concluded a framework agreement with the federal and provincial governments in 2012 that allowed First Nations served by the steering committee "to access new funding under a new 'comparable education approach.'"[64] This agreement was later replaced by the *British Columbia Tripartite Education Agreement* (BCTEA) in 2018.[65] The BCTEA recognizes that

> Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.[66]

4.3 POLICING

Due to the nature of the division of provincial and federal powers in the *Constitution Act, 1867*, policing in First Nations communities is another area of shared jurisdiction. Until the 1950s, the Royal Canadian Mounted Police (RCMP) supplied all policing on reserves. Following Supreme Court of Canada decisions in the 1960s, the RCMP gradually withdrew from Quebec's and Ontario's reserves, leaving a gap.[67] In the 1980s, concerns were raised about the poor policing services available in First Nations communities across the country.[68] Researchers noted that, among other concerns, there was a lack of clear standards and confusion over the roles and responsibilities of the various levels of governments.[69]

In 1991, the federal government responded by introducing the First Nations Policing Policy (FNPP), pursuant to which First Nations (and Inuit) communities may negotiate agreements to self-administer policing services or to have these services provided by the RCMP.[70] In both cases, costs are generally shared between the federal and provincial governments.[71] The FNPP is another example of the

government adopting a programming approach to Indigenous services: because Parliament has yet to legislate on Indigenous policing, it has been dealt with through ad hoc programs and policies, rather than as an essential service.[72] According to a report of the Council of Canadian Academies, this programming approach to policing leaves First Nations and Inuit communities vulnerable to changes in policies, and it "has proven problematic in that it fails to deliver equality of services, or to take into account the particular needs of Indigenous communities, as identified by the communities themselves."[73]

Other concerns have been raised about the FNPP, including that "its funding model requires frequent contract renewals, neglects capital costs and critical facilities and equipment, and fails to provide funding commensurate with the real costs of policing services in isolated communities."[74] One researcher also noted that the "reliability and adequacy of funding" under the FNPP is a source of concern for First Nations leadership and that the program does not provide for sufficient capacity building in communities.[75] Similarly, the Council of Canadian Academies concluded that

> [t]he current policy frameworks governing provision of policing services for Indigenous Peoples are inadequate. *They fail Indigenous communities on the grounds of self-determination*; have led to gross underfunding of critical police resources, facilities, and infrastructure, culminating in human rights violations; and perpetuate jurisdictional ambiguity and confusion about responsibility for policing services on reserve.[76] [AUTHORS' EMPHASIS]

Like education, policing is also within the scope of self-government negotiations.[77] To date, however, opportunities available to First Nations and Inuit communities have mainly consisted "of signing tripartite agreements so that they can create self-administered police forces" under the FNPP, rather than through self-government.[78] For instance, the Nishnawbe Aski Nation reached an agreement with the Province of Ontario and Canada in the 1990s. As a result, the Nishnawbe Aski Police Service now serves 34 First Nations communities within the Nishnawbe Aski Nation's territory.[79] Other examples include the Tsuut'ina Nation Police Service, which has "full policing authority for the Tsuut'ina Nation, under Section 5 of the *Alberta Police Act*."[80]

Some observers have argued that the current model of delegated authority may be insufficient in terms of self-determination and self-government. According to the Chief Executive Officer of Nipissing First Nation, the FNPP has not responded to their aspirations for increased self-governance.[81] For its part, the National Inquiry on Missing and Murdered Indigenous Women and Girls concluded that jurisdictional disputes between provincial and federal governments, as well as the non-recognition of Indigenous peoples' own jurisdiction, lead to denial of essential services, human rights violations and violence.[82] With respect to policing, its final report noted that

the FNPP did not amount to "an authentic exercise of the Indigenous right to self-govern police services" and that, due to the underfunding and lack of resources of self-administered Indigenous police services, they are unable "to properly respond to and investigate violence against Indigenous women, girls, and 2SLGBTQQIA people."[83] As a result, the final report called "upon all governments to immediately and dramatically transform Indigenous policing from its current state as a mere delegation to an exercise in self-governance and self-determination over policing."[84]

5 CONCLUSION

As this Background Paper has highlighted, the division of powers in Canada's Constitution as they pertain to matters related to First Nations is nuanced. Despite the federal government having exclusive legislative authority for "Indians, and Lands reserved for the Indians," several areas falling under this authority overlap with provincial legislative authority. This is notably the case for child and family services, education and policing. Confusion about who is responsible for what has often led to denials of services or inadequate and insufficient programming in Indigenous communities. In this era of reconciliation, these issues will undoubtedly continue to be of importance to parliamentarians and to the federal government and its partners.

NOTES

1. In general, essential services can be defined as "those basic public services that governments provide to their citizens … such as education, health, social services, public infrastructure and emergency and security services." Council of Canadian Academies [CCA], *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities*, Report of the Expert Panel on Policing in Indigenous Communities, Ottawa, 2019, p. 8. Regarding essential services, some observers have pointed out that the lack of a legislative base for the provision of services by the federal government to First Nations on reserve is a fundamental problem. See Office of the Auditor General of Canada [OAG], *Programs for First Nations on Reserves*, Chapter 4 in *Report of the Auditor General of Canada – June 2011*, 2011. Furthermore, the CCA noted that in Canada, essential public services are underpinned by provincial or federal legislation that confers on them the resources, including adequate and stable funding, required to deliver and manage the services safely and effectively. CCA (2019), p. 73.
2. *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, para. 14.
3. *Indian Act*, R.S.C. 1985, c. I-5.
4. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), s. 91(24).
5. Government of Canada, *What is Indian status?*
6. Government of Canada, "Demographic impacts of past *Indian Act* amendments," *Background on Indian registration*.
7. *Reference as to whether "Indians" includes in s. 91 (24) of the B.N.A. Act includes Eskimo in habitants of the Province of Quebec*, [1939] S.C.R. 104; and *Daniels v. Canada (Indian Affairs and Northern Development)*.
8. Traditional territories or lands refer to areas that an Indigenous people, group or nation has occupied and used for many generations prior to the establishment of reserves, which were imposed on First Nations by the Crown. The boundaries of reserves do not always correspond to an Indigenous groups' traditional territories; some reserves were established that required Indigenous people, groups or nations to relocate, in some cases far away from their homelands.

9. United Nations [UN], Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in Canada*, 2014.

10. *First Nations Land Management Act*, S.C. 1999, c. 24, ss. 6.01–7.1.

11. *First Nations Elections Act*, S.C. 2014, c. 5.

12. *First Nations Fiscal Management Act*, S.C. 2005, c. 9.

13. *An Act respecting first nations goods and services tax* (short title: *First Nations Goods and Services Tax Act*), S.C. 2003, c. 15, s. 67.

14. Jack Woodward, "Federal Government's Exclusive Powers in Relation to Aboriginal Matters," *Native Law*, para. 3§9, Thomson Reuters Canada Limited, 2017; and Ibid., "Federal Legislation Adopted Pursuant to Federal Government Jurisdiction," paras. 3§560 to 3§1110.

15. Section 88 of the *Indian Act* was added to incorporate provincial laws by reference. Generally, Indigenous peoples, including reserve residents, are subject to provincial laws of general application. According to Jack Woodward, where the provinces have enacted legislation in relation to matters assigned to them under the *Constitution Act, 1867* (section 92), those laws apply to Indigenous peoples both on and off reserve, either of their own force if they do not specifically target "Indians" or with the assistance of section 88. Section 88 extends provincial laws of general application to Indians living on reserve within the province. See Woodward (2017), "Federal Government's Exclusive Powers in Relation to Aboriginal Matters," para. 3§270 and following.

16. Peter W. Hogg, "Aboriginal Peoples: Provincial legislative power," *Constitutional Law of Canada*, Section 28.2, 5th ed., Carswell, Toronto, 2016; and Woodward (2017), "Federal Government's Exclusive Powers in Relation to Aboriginal Matters," para. 3§270 and following.

17. "Rights of the Aboriginal Peoples of Canada," Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35(1).

18. Alberta, Saskatchewan and Manitoba have Natural Resource Transfer Agreements protected under the *Constitution Act, 1867*.

19. Hogg (2016); and Woodward (2017), "Federal Government's Exclusive Powers in Relation to Aboriginal Matters," para. 3§450.

20. *Daniels v. Canada (Indian Affairs and Northern Development)*.

21. House of Commons, "Private Members' Business M-296," *Journals*, No. 36, 2nd Session, 39th Parliament, 12 December 2007.

22. OAG (2011).

23. Ibid.

24. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.

25. Naiomi W. Metallic, *Making the Most Out of Canada's New Department of Indigenous Services Act*, Yellowhead Institute, 12 August 2019.

26. In July 2019, Indigenous and Northern Affairs Canada was split into two new departments: Indigenous Services Canada (ISC) and Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC). ISC's mandate can be found at Government of Canada, *Mandate*. CIRNAC's mandate can be found at Government of Canada, *Mandate*.

27. A document reflecting the views of First Nations on assuming greater control over education came out in 1972. National Indian Brotherhood/Assembly of First Nations [AFN], *Indian Control of Indian Education: Policy Paper Presented to the Minister of Indian Affairs and Northern Development by the National Indian Brotherhood/Assembly of First Nations*, Ottawa, 1972.

28. OAG (2011).

29. AFN, "Affirming Treaty Rights and Inherent Rights, Title and Jurisdiction," Presentation by Rogers Jones at the 4 Policies and Nation Building Conference, Edmonton, 1–2 May 2019, p. 4.

30. Section 35(2) of the *Constitution Act, 1982* specifies that "[A]boriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada." This paper uses the term "Aboriginal" to refer to the rights recognized under section 35 of the *Constitution Act, 1982*.

31. Specifically, if the federal or provincial government can prove that the infringing measures serve a "valid legislative objective" (such as natural resource conservation) and that such measures are consistent with the fiduciary or trust relationship the government has with Indigenous people. See *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

32. *Guerin v. The Queen*, [1984] 2 S.C.R. 335. See also *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313; and *R. v. Sparrow*.

33. UN, *United Nations Declaration on the Rights of Indigenous Peoples* [UNDRIP], UN Doc. A/RES/61/295, 13 September 2007, art. 4, p. 8.

34. Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government," *Windsor Yearbook of Access to Justice*, Vol. 22, 2003, pp. 329–361.

35. AFN (2019), p. 10.

36. *The Royal Proclamation October 7, 1763*.

37. "Chiefs Call for Treaty Based Funding Arrangements," *NationTalk*, 23 October 2019.

38. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 69.

39. Government of Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*.

40. House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee*, 1st Session, 32nd Parliament, October 1983, p. 20.

41. *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45.

42. Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada," *Journal of Law and Social Policy*, Vol. 28, No. 1, 2018, p. 135.

43. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, para. 83.

44. Cindy Blackstock, "Residential Schools: Did They Really Close or Just Morph Into Child Welfare?," *Indigenous Law Journal*, Vol. 6, No. 1, 2007, pp. 74–75.

45. Brittany Barker, Gerald Taiaiake Alfred and Thomas Kerr, "An uncaring state? The overrepresentation of First Nations children in the Canadian child welfare system," *Canadian Medical Association Journal*, Vol. 186, No. 14, 7 October 2014, p. E534.

46. Naiomi Walqwan Metallic, "A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the Caring Society Case," *Journal of Law and Social Policy*, Vol. 28, No. 2, 2018, p. 35.

47. See, for example, recommendation 12 of the AFN's *Interim Report of the National Advisory Committee on First Nations Child and Family Services Program Reform*:

> Recognize the *inherent right and vested authority of First Nations and communities to provide for their children*, as is affirmed in the Creator's laws, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Truth and Reconciliation Commission's (TRC) Calls to Action. [AUTHORS' EMPHASIS]

AFN, National Advisory Committee on First Nations Child and Family Services Program Reform, *Interim Report of the National Advisory Committee on First Nations Child and Family Services Program Reform*, January 2018, p. 14.

48. *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24.

49. Naiomi Walqwan Metallic, Hadley Friedland and Sarah Morales, *The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit, and Métis Children, Youth and Families*, Yellowhead Institute, 4 July 2019, pp. 7–8.

50. Jodi Bruhn, "Do Tripartite Approaches to Reform of Services for First Nations Make a Difference? A Study of Three Sectors," *Aboriginal Policy Studies*, Vol. 7, No. 1, 2018, pp. 16–21.

51. Harvey A. McCue, "Education of Indigenous Peoples in Canada," *The Canadian Encyclopedia*, 18 July 2018.

52. Woodward (2017), "Federal Services for Aboriginal Persons: Section B. Education," para. 19§140.

53. Bruhn (2018), p. 17.

54. See Tonina Simeone, *Legislative Summary of Bill C-33: First Nations Control of First Nations Education Act*, Publication no. 41-2-C33-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 28 April 2014.

55. Grammond (2018), p. 144.

56. Simeone (2014), p. 1.

57. UN, UNDRIP, art. 14(1), p. 13.

58. AFN, *First Nations Control of First Nations Education: It's Our Vision, It's Our Time*, July 2010, p. 6.

59. Nancy A. Morgan, *"If Not Now, Then When?" First Nations Jurisdiction over Education: A Literature Review*, Report to the Minister's National Working Group on First Nations Education, First Nations Education Steering Committee, 19 November 2002, p. 58.

60. Government of Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*.

61. Examples include the *Nisga'a Final Agreement* (Chapter 11); the *Tsawwassen First Nation Final Agreement* (Chapter 16); the *Maa-nulth First Nations Final Agreement* (Part 13.20); the *Yale First Nation Final Agreement* (Part 3.25); the *Labrador Inuit Land Claims Agreement* (Part 17.12); the *Tłı̨chǫ Land Claims and Self-government Agreement* (Part 7.4.4); the *Sechelt Indian Band Self-Government Agreement* (Section 14); the *Westbank First Nation Self-Government Agreement* (Part XVI); the *Sioux Valley Dakota Nation Governance Agreement and Tripartite Governance Agreement* (Part 18); and the *Déljnę Final Self-Government Agreement* (Chapter 6). Nunavut is the only jurisdiction with an Indigenous public government (pursuant to the *Nunavut Land Claims Agreement*). Indeed, Nunavut is a unique case where the territorial government delivers education services to all based on Inuit societal values.

62. *Mi'kmaq Education Act*, S.C. 1998, c. 24.

63. *Anishinabek Nation Education Agreement Act*, S.C. 2017, c. 32.

64. Bruhn (2018), p. 18.

65. *BC Tripartite Education Agreement: Supporting First Nation Student Success*, 2018, p. 1.

66. Ibid., s. 1.1 a), p. 5.

67. Public Safety Canada, *2014-2015 Evaluation of the First Nations Policing Program*, Final Report, 17 March 2016, p. 1.

68. OAG, *First Nations Policing Program–Public Safety Canada*, Chapter 5 in *Report of the Auditor General of Canada – Spring 2014*, 2014.

69. Savvas Lithopoulos and Rick Ruddell, "Aboriginal Policing in Rural Canada: Establishing a Research Agenda," *International Journal of Rural Criminology*, Vol. 2, No. 1, December 2013, pp. 101–125.

70. Public Safety Canada, *Policing in Indigenous Communities*.

71. OAG (2014), para. 5.5.

72. CCA (2019), pp. 72–80.

73. Ibid., p. 80.

74. Ibid., p. 109.

75. Bruhn (2018), p. 12.

76. CCA (2019), p. 182.

77. Government of Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*.

78. Commission d'enquête sur les relations entre les Autochtones et certains services publics, *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress*, Final Report, 2019, p. 135.

79. Nishnawbe Aski Police Service, *NAN Police Services Agreement*.

80. Tsuut'ina Nation Police Service, *About the Tsuut'ina Nation Police Service*.

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82. National Inquiry into Missing and Murdered Indigenous Women and Girls [NIMMIWG], *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Vol. 1a, Ottawa, 2019, p. 572.

83. Ibid., p. 690.

84. NIMMIWG, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Call for justice no. 5.4, Vol. 1b, Ottawa, 2019, p. 183.