Aboriginal Self-Government, Extra-Territorial Powers, and the BC Treaty Process

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Abstract

British Columbia has pursued a land-based jurisdictional model since the province became engaged in negotiating treaties with BC First Nations. This approach recognises a Treaty First Nation's right to exercise law-making authority over a defined land-base but not beyond it. Because a substantial number of First Nation members reside off-territory, this territorial approach has created governance problems beginning with a policy distinction based on residency, but which also includes jurisdictional, funding, and servicing gaps, as well as socio-cultural challenges associated with being dislocated from one's nation of origin.

Emphasising efforts to alleviate the servicing gap, a jurisdictional scan of current practices, stakeholder interviews, and a review of the literature regarding indigenous governance practices and minority rights within pluralistic societies are used to devise a funding strategy and determine policy alternatives for improving and expanding extra-territorial service delivery. The alternatives are evaluated using a multiple-criteria analysis, and a recommendation is made.

Keywords: A self-government; off-territory First Nations; extra-territorial law; citizen-based jurisdiction; governance; treaties.

Dedication

For Arilea

Acknowledgements

"The sense of freedom was so strong I thought this must be something like how Mandela felt... And our nation breathed a sigh of relief."

— Tom Happynook, Hereditary Chief, Huu-ay-aht First Nation

Table of Contents

List of Tables

List of Acronyms

BCTC   British Columbia Treaty Commission

CA   Constitution Act

CRA   Canadian Revenue Agency

FFA   Fiscal Financing Agreement

IRP   Inherent Right Policy

NUL   Nisga'a Urban Local

OSR   Own Source Revenue

TFN   Treaty First Nation

RCAP   Royal Commission on Aboriginal Peoples

Glossary

Treaty Settlement Lands	Territory that will be owned and managed by a First Nation pursuant to a Final Agreement.
Extra-Territorial Jurisdiction	Rights and law-making authority that is attached to self-identifying population segments as opposed to jurisdiction that can be enforced within a specified geographic space. Other terms used to describe this form of jurisdiction include citizen-based jurisdiction, communal jurisdiction, personal law/jurisdiction, personal autonomy, national cultural autonomy, corporate federalism, and self-government off a land base.
Side Agreements	Intergovernmental agreements between TFNs and their federal and provincial partners that support constitutionally entrenched Final Agreements and may be mentioned in them, but are not likewise protected.

Executive Summary

Status-bearing First Nations residing on First Nation-controlled lands are treated differently from status First Nations that live in urban and other off-territory locales. This inequitable pattern of entitlements has its origins in the *Indian Act* regime but it is replicated in the post-treaty self-government world to the extent that Treaty First Nations (TFN) in British Columbia are not able to provide comparable programs and services to their in-territory and off-territory members, or to do so in a consistent fashion. This policy problem manifests itself as a funding gap that constrains the ability of TFN governments to care for their citizens, but it is also a product of the current land-based jurisdictional model that guides the BC Treaty Process. This inherently territorial approach to the treaty package reinforces, rather than removes, distinctions that favor status-bearing First Nations that remain in their communities while aggravating tensions between in-territory citizens and their off-territory counterparts as each population segment vies for scarce resources.

Beyond the socio-cultural consequences associated with the in-territory/off-territory distinction and the governance problems it creates for those living away from home, failing to attend to off-territory issues has dire implications for treaty-making in BC if for no other reason than the voting power that off-territory citizens have with respect to ratifying Agreements in Principle (AiP) and Final Agreements. When the stakes are this high, it is imperative that the treaty package address the justifiable concerns that off-territory have expressed over inequitable servicing outcomes and, seen from this perspective, it becomes clear that bridging policy gaps and blurring *Indian Act* distinctions is in the interest of all those who want to see the treaty process succeed.

In keeping with the priorities First Nations place on providing the same or similar services in a consistent fashion to their citizens wherever they may reside, this capstone outlines three alternatives for improving service delivery to off-territory TFN citizens. These alternatives are derived from a jurisdictional scan of current practices, stakeholder-inspired recommendations, and a review of the literature regarding indigenous governance practices and the protection of minority rights within pluralistic societies. The existing, albeit underutilized, intergovernmental side agreement approach serves as the first option. The second option proposes that TFNs consolidate their

resources within inter-First Nations institutions that cater to the collective servicing needs of their off-territory citizens. The final option proposes that First Nations negotiate contracts that will enable them to serve as regional service providers in keeping with the efforts that are currently being made by the Tsimshian First Nations Treaty Society.

These three options offer varying degrees of jurisdictional expansion and some include aspects of citizen-based jurisdiction, but none of the policy options that are evaluated within these pages are operational, let alone viable, in the absence of the citizen-based funding strategy that is presented as a condition of implementation. This study ultimately recommends that the principles to the BC Treaty Process pursue and more broadly use individualized Intergovernmental (Off-Territory) Services Agreements for the purpose of extending TFN jurisdiction off-territory and providing an equitable distribution of servicing outcomes to their scattered citizens.

1.   Introduction

First Nations frequently enter treaty talks with the hope of negotiating law-making authority that has force beyond the boundaries of the lands they control. This has been a "common theme over the years" characterized by "fairly consistent push across the board" notes one BC government employee but, the interviewee added, the response from the senior levels of government has been "a common theme of 'No.'"[1] Beyond the philosophical imperatives that drive First Nations to seek ways of expanding jurisdiction, for most First Nations this issue is about decolonization and with it, the desire to eliminate the policy distinctions that exist between those citizens that live on First Nation-controlled territory, and those that live away from home. Because they prioritize residency over identity and favour status-bearing First Nations that remain in their communities, the so-called "regime of distinctions"[2] aggravates tensions between in-territory citizens and their off-territory counterparts as each population segment vies for scarce resources. But many First Nations also see these distinctions as a form of disinheritance that diminishes their citizenship and robs them of their patrimony when work, school, or other aspects of life takes them off-territory. "If you are of Tsimshian ancestry," argues one Chief Negotiator, "you should be recognized as a Tsimshian person" wherever you are and it "[j]ust doesn't make sense" to hold such a narrow view of rights and entitlements.[3]

As it stands, funding and jurisdictional gaps that are symptomatic of the regime of distinctions prevent self-governing First Nations from offering their off-territory citizens the same or comparable programs services as they offer on-territory. With that in mind, the policy problem that this capstone addresses is that: Self-governing First Nations are

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[1] BC Government Stakeholder B, interview by author, 31 January 2013.
[2] Katherine A.H. Graham and Evelyn Peters, "Aboriginal Communities and Urban Sustainability," Discussion Paper F/27, Canadian Policy Research Network Inc. (2002), p. 5.
[3] Gerald Wesley, interview by author, 10 January 2013.

not able to provide similar levels of programs and services to their in-territory and off-territory members, or to do so in a consistent fashion. As such, the purpose of this research is to determine how Treaty First Nation jurisdiction can be maximised for the purpose of eliminating distinctions based on residency and providing equitable servicing outcomes.

This issue is not an inter-community spate over who gets what. Rather, it is a policy problem that has broad implications for treaty-making in BC because off-territory citizens have voting power when it comes to ratifying Agreements in Principle (AiP) and Final Agreements in the wake of the Supreme Court decision in *Corbiere v. Canada*. These milestone agreements are challenging to pass at the best of times, and negotiators have found it increasingly difficult to engage off-territory First Nations in a treaty package from which they feel excluded. Being twenty years into a treaty process plagued by limited results and recent AiP rejections punctuates the broad political implications of failing to attend to off-territory concerns and, as one governance consultant argued, a treaty process that does not place weight on issues that bring off-territory citizens into the discussion is only "setting itself up to fail."[4] Treaty benefits need to "flow" to those members that live off-territory because they will ask "[w]hat is in it for them,"[5] noted the Chief Commissioner of the BC Treaty Commission, and this explains why First Nations are coming to the negotiating table eager to bridge those gaps and blur distinctions so they may be in a position to tell their citizens:

> [y]ou're eligible [for things like educational allowances, elder care, and health-related travel costs] because you live in our territory and at home. You're eligible on the other side of the street because you are one of our members and you are both going to be eligible and will receive the same level of assistance that we offer regardless of your geographic location.[6]

The data collected over the course of this study emphatically indicates that First Nations are eager to seek ways of delivering the "same level of assistance that [they]

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[4] Michele Guerin, interview by author, 29 January 2013.
[5] Sophie Pierre, interview by author, 13 January 2013.
[6] Gerald Wesley, interview by author, 10 January 2013.

can offer regardless of geographic location."[7] In some pluralistic societies, extra-territorial or citizen-based solutions to problems such as these have been employed, and a limited suite of extra-territorial powers were negotiated as part of the Nisga'a, Tsawwassen, and Maa-nulth Final Agreements, but funding, capacity, and jurisdictional complexities have inhibited the First Nation signatories of these treaties from taking on the extra-territorial dimensions of their authority, and the regime of distinctions remains in place.

This study examines the challenges faced by urban and other off-territory First Nation citizens, as well as the policy options available for addressing the jurisdictional, funding, and servicing gaps that affect them. This analysis of academic and policy research has prioritized understanding the Canadian context, with particular attention being given to the land-based jurisdictional model and the application of extra-territorial governance approaches as they relate to TFNs in Canada. However, this research also draws on models of governance used to accommodate the unique needs of indigenous peoples and national cultural minorities in pluralistic societies around the world. Interview data not only supplements and expands upon published sources and academic literature, but also provides stakeholder input on strategies for addressing the general policy gaps affecting off-territory First Nations, and governance approaches that will facilitate a consistent level of service delivery among TFN citizens. Three service-related policy options are evaluated, and a stakeholder-inspired funding strategy for improving off-territory service delivery is presented as a condition for implementation. This study ultimately advocates the use of Intergovernmental (Off-Territory) Services Agreements as the instrument through which an equitable distribution of servicing outcomes are achieved, and TFNs advance a step further in the decolonization of their citizens.

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[7] Gerald Wesley, interview by author, 10 January 2013

2. Background Issues and Theoretical Underpinnings

This chapter begins with a brief discussion of treaty-making in British Columbia, before proceeding with an examination of the land-based jurisdictional model of self-government. Its purpose is to illustrate that self-government has traditionally been dominated by territorial thinking, despite the fact that a substantial number of First Nation members cannot be incorporated into the jurisdictional framework established by the land-based approach that currently exists. As an alternative to current practices, an extra-territorial approach to self-government is introduced in the final sections of the chapter.

2.1. The BC Treaty Process

As noted legal scholar Hamar Foster has indicated, prior to the 1990s the government of British Columbia pursued a "consistent tradition of intransigence" when it came to acknowledging Aboriginal land title and negotiating treaties.[8] As opposed to either Ontario or the Prairie provinces where the process of treaty-making was "pursued to completion," and with the notable exception of Treaty 8, the Douglas Treaties represented BC's only foray into treaty-making. Concluded between 1850 and 1854, the Douglas Treaties did not cover any of the BC mainland and only one-fortieth of Vancouver Island. When the brief interlude that had allowed these treaties to be reached had come to a close, the colony (and later the province) became Canada's only "local government [that] vociferously denied that there was any Aboriginal title to extinguish."[9] Notwithstanding BC First Nations' continued belief in the existence of hereditary land title

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[8] Hamar Foster, "We Want a Strong Promise": The Opposition to Indian Treaties in British Columbia, 1855-1990," *Native Studies Review* 18, no. 1 (2009), p. 116.
[9] Foster, "We Want a Strong Promise," p. 114.

and their efforts to use protest and litigation to agitate for land rights, the provincial pattern of refusing to negotiate treaties, or acknowledge that title, persisted.[10]

The intervening years between the end of the Douglas system and the inauguration of the modern treaty process witnessed Aboriginal protest, community blockades, and litigation that culminated in a landmark Supreme Court decision in the Calder case of 1973.[11] The split decision in *Calder v. British Columbia* permitted the BC government to disregard the ruling, but the court's recognition of Aboriginal title helped to bring the federal government back to the negotiating table with First Nations in the 1970s and 1980s. This process ultimately led to the explicit acknowledgment of "existing treaty and Aboriginal rights" in Section 35(1) of the *Constitution Act,* 1982 (*CA*, 1982).[12] Yet, despite this considerable evolution of opinion on the part of the federal government, British Columbia did not change its stance on Aboriginal title and treaty negotiation until 1990 when the BC Claims Task Force was established.

The BC government's policy shift regarding treaty negotiation was the product of a number of factors that began to coalesce in the late 1980s. Speaking of the political will to change course, a former Minister of Native Affairs cites Premier Bill Vander Zalm's "genuine personal conversion" as a clue to this reversal,[13] but the accumulation of case law in the two decades that followed Calder,[14] in addition to the economic cost of maintaining the status-quo were also factors. With respect to the latter point, a Price Waterhouse study conducted in the late 1980s indicated that uncertainties surrounding land ownership and protests targeting development projects on claimed land were costing the province in the neighbourhood of $1 billion dollars in lost revenue, and as

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[10] B.C. Claims Task Force Report, http://www.gov.bc.ca/arr/reports/bctf/bc_claims_task_force_introduction. html (last accessed 10 December 2011). Foster, "We Want a Strong Promise," pp. 116-135.

[11] An amendment to the *Indian Act* essentially prohibited First Nations from using litigation to pursue rights and recognition after 1927 and when this provision was retracted in the early 1950s a new rights movement soon emerged. Foster, "We Want a Strong Promise," p. 134-135.

[12] Stephen Brooks, *Canadian Democracy: An Introduction* (Don Mills: Oxford University Press, 2004), p. 130.

[13] Foster, "We Want a Strong Promise," p. 116.

[14] This includes Sparrow and Delgamuukw which were by then in the courts.

many as 1500 mining and forestry jobs annually.[15] For a provincial economy that was geared towards resource extraction, these findings were hard to ignore.

During the summer of 1990 the Oka Crisis in Quebec focused national attention on Aboriginal issues and it was in this context – with BC First Nations engaged in a renewed round of protest in solidarity with the Mohawk of Kanesatake – that the province's modern treaty process ultimately emerged. Shortly after making the decision to join the federal government in its ongoing negotiations with the Nisga'a of the Nass Valley, British Columbia, Canada, and BC First Nations leaders agreed to establish the British Columbia Claims Task Force for the purpose of developing a formal process of treaty negotiation.[16] Following up on the Task Force's 19 recommendations, Canada, British Columbia, and BC First Nations established the BC Treaty Commission to act as an independent facilitator and they also agreed upon a process through which treaty negotiations were to proceed.[17] Guided by the Commission's six-stage process, treaty negotiations typically involve financial settlements, the resolution of land claims and clarification of ambiguities over resource ownership, but the negotiation of self-government agreements is the cornerstone of the BC Treaty Process.

In this process, defining jurisdictional space for those governments within the Canadian federation is paramount.[18] This is because, as Stephen Cornell is fond of noting, jurisdiction matters. In this instance, jurisdiction refers to "real decision-making power in the hands of indigenous nations" and this, write Cornell and other scholars associated with the *Harvard Project on American Indian Economic Development*, is the key to building a "vision of government as law-maker, dispute-resolver, and vehicle for pursuing collective goals."[19] When First Nations have *genuine* jurisdiction it effectively

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[15] *What's the Deal with Treaties? A Lay Person's Guide to Treaty Making in British Columbia* (Vancouver: BC Treaty Commission, 2000), pp. 3-4.

[16] BC Claims Task Force Report, http://www.gov.bc.ca/arr/reports/bctf/bc_claims_task_force_introduction. html (last accessed 15 October 2012).

[17] *What's the Deal with Treaties? A Lay Person's Guide to Treaty Making in British Columbia* (Vancouver: BC Treaty Commission, 2000), pp. 37-38.

[18] *What's the Deal with Treaties?*, p. 9. Richard T. Price, "The British Columbia Treaty Process: An Evolving Institution," *Native Studies Review* 18, no. 1 (2009), p. 141.

[19] Stephen Cornell, Catherine Curtis, and Miriam Jorgenson, "The Concept of Governance and its Implications for First Nations," *Joint Occasional Papers on Native Affairs*, no. 2 (2004), p. 14.

"marries decisions to consequences" producing better decisions and First Nations' accountability for those decisions – both the good and the bad.[20] Thus, according to Cornell, Curtis, and Jorgenson, building the type of New Relationship that BC and Canada seek to have with First Nations begins with the recognition that governance, including robust areas of practical sovereignty, "matters for indigenous people as much as it does for others."[21]

2.2. Territoriality, the "Regime of Distinctions," and the Land-Based Jurisdictional Model

In the twenty years since the province became engaged in the negotiation of modern treaties, British Columbia has pursued a land-based jurisdictional model. This means that, with few exceptions, the parties to Final Agreements negotiate a legal regime in which TFN governments exercise law-making authority within clearly defined geographic spaces, but not beyond them. It also means that, as Peter Hogg and Mary Ellen Turpel note, a member of a TFN cannot "'take the law with them' when they leave Aboriginal territories" and that those who reside off-territory are neither subject to, nor able to benefit from, laws passed by the land-based home government established by their nation of origin.[22]

The emergence of the land-based jurisdictional model of self-government is, in part, the product of the primacy of territorial thinking within which the Canadian structure of government sits. As Geoff Hall notes, within the Anglo-Canadian legal system,

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[20] Stephen Cornell, "The Harvard Project Findings on Good Governance," in *Speaking Truth to Power III: Self-Government Options and Opportunitie*s (Vancouver: BC Treaty Commission, 2002), pp. 4-5. On this point, Cornell, Curtis and Jorgenson have argued that "true decision-making power accepts mistakes. Our sense is that non-indigenous governments in Canada are often nervous that, without careful limits on their self-governance powers, First Nations will make costly and possibly dangerous errors. But possibilities are part of self-government, and non-indigenous governments are hardly immune to the same problem." Cornell, Curtis, and Jorgenson, "The Concept of Governance and its Implications for First Nations," p. 25.

[21] Cornell, Curtis, and Jorgenson, "The Concept of Governance and its Implications for First Nations," p. 8.

[22] Peter Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues," in *Aboriginal Self-Government: Legal and Constitutional Issues: Papers Prepared as Part of the Research Program of the Royal Commission on Aboriginal Peoples* (The Commission, 1995), p.393.

sovereignty is usually conceived of in territorial terms. "Sovereignty is exercised over territory rather than over people," writes Hall, which taken to its logical conclusion means that a "state has absolute jurisdiction within its territory and has no jurisdiction beyond it."[23] However, the primacy of territorial thinking extends well beyond the Anglo-Canadian context. The modern nation-state as well as their internal subunits are themselves territorially-defined spaces to the extent that it is, in Jans' words, hard to imagine the exercise of state, provincial, or even municipal power in the absence of "exclusive rights over a particular territory."[24]

Given the primacy of territoriality in this discourse it is not surprising that a burgeoning body of research has emerged exploring the metaphysical, biological, and psycho-social dimensions of territoriality; the most illuminating of which involves identity formation, the "central role of territory in ethno-nationalism,"[25] and the "special relationship"[26] that indigenous peoples have with their ancestral lands. Rejecting orthodox and state-centered conceptions of territoriality, this research often begins with the premise that pre-destined or natural boundaries do not exist.[27] Rather, it is argued that the biological need to defend and control space, reproduce, and access resources has converged to *create* territories in order for these functions to be sustained. In so doing, territory has become "a way of seeing ...framing and imagining the environment," as well as a "crucial strategic dimension of power" within it.[28] For Brighenti, this means that territory serves as a "prop for social relationships,"[29] a tool for "social sorting,"[30] and has been the "pivot of 'blood and belonging' rhetorics." This is because, in his view,

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[23] Geoff Hall, "The Quest for Native Self-Government: The Challenge of Territorial Sovereignty," *University of Toronto Faculty of Law Review* 50, no. 1 (1992), p. 40.

[24] Maarten Theo Jans, "Personal Federalism: A Solution to Ethno-National Conflicts What it has Meant in Brussels and What it Could Mean in Abkhazia," in *Federal Practice: Exploring Alternatives for Georgia and Abkhazia*, ed. Bruno Coppieters, David Darchiashvili and Natella Akaba (Brussels: VUB Press, 1999), p. 215.

[25] Jans, "Personal Federalism: A solution to Ethno-National Conflicts? What it has Meant in Brussels and What in Could Mean in Abkhazia," p. 216.

[26] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Part One, Volume 2* (Ottawa: The Commission, 1996), p. 139.

[27] Andrea Brighenti, "On Territory as Relationship and Law as Territory," *Canadian Journal of Law and Society* 21, no. 2 (2006), p70.

[28] Brighenti, "On Territory as Relationship and Law as Territory," pp. 68-69.

[29] Brighenti, "On Territory as Relationship and Law as Territory," p. 76.

[30] Brighenti, "On Territory as Relationship and Law as Territory," p. 74.

"identity is in itself territorial."[31] This point was further developed by Jans who argues that territory is not only a "particularly potent identity-builder" that "makes the myth of common origin tangible," it is often the very "cornerstone of the identity." From Jans' perspective, it follows that if an ethno-national or indigenous minority ceases to exercise control over land to which it holds an historical or ancestral claim, it "also loses part of its self-definition and of the imaginings which bind individuals and forge them into an ethno-national group." [32]

While much of the research within this field has been inspired by efforts to accommodate ethno-national, linguistic, and religious minorities in the post-colonial and post-communist world, there are obvious connections to be made in the realm of Aboriginal policy. As such, the Royal Commission on Aboriginal Peoples (RCAP) spoke at length about the deeply infused "spirituality" and "inter-connectedness" that contemporary Aboriginal thinking attributes to *the land* as the "source and sustainer of life." More to the point, the Royal Commission found that concepts such as sovereignty, self-government, and the co-management or exclusive use of land are typically bound together by this world-view. As Frank McKay of the Windigo First Nation told the Commissioners, "[i]t is foolish to pretend that self-government can be practised without a land base"[33] – a view that is clearly shared by Jim Aldridge. "To a greater or lesser extent, treaty provisions are anchored in the territory," argued the long-time legal counsel to the Nisga'a, adding:

> I think that there is an inevitable territorial base for these projects...I think trying to avoid that changes the underpinning of the conversations a great deal, the negotiations a great deal, so I think that there is inevitably a territorial base in order to achieve th[e] on-going existence of a nation.[34]

[31] Brighenti, "On Territory as Relationship and Law as Territory," p. 72.
[32] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant for Brussels and What it Could Mean in Abkhazia," p. 216.
[33] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Part One, Volume 2*, p. 144.
[34] Jim Aldridge, interview by author, 30 January 2013.

Complementing this insider view, Jans' survey of the topic found that indigenous or ethno-national claimants of minority rights, such as the Nisga'a and other BC First Nations, often demand territorial solutions to their governance issues.[35]

While the primacy of territorial thinking may help to explain the lure of the current land-based jurisdictional model of self-government in BC, the tendency to view matters in territorial terms is also a function of the federal division of powers in Canada. The *Constitution Act*, 1867 (*CA*, 1867) positions jurisdiction over "Indians and Lands reserved for Indians" firmly in the domain of the federal parliament and the *Indian Act*, after 1876, became the key legislative mechanism for exercising federal authority in this area. As a matter of policy, the *Indian Act* established what Graham and Peters call a "regime of distinctions" between *status Indians* and other Aboriginal peoples where Indian status was derived from historical connections that certain individuals had with the reserve-based Indian Bands that were established as administrative units under the *Indian Act*.[36]

Although the *Indian Act's* regime of distinction ultimately created legal differences that separated in-territory Indians-*cum*-First Nations and Inuit in their communities from all other Aboriginal peoples, the current research is primarily concerned with the in-territory/off-territory distinction as it relates to status First Nations, and off-territory members of Treaty First Nations in particular. This legal regime began to take its current shape during the 1940s when significant numbers of status-bearing First Nations began to leave their reserves for urban and other off-territory areas. Rejecting the very idea that urban First Nations would want to perpetuate their aboriginality in their new surroundings, the federal government interpreted this pattern of migration as a sign that off-territory First Nations were seeking social integration. It responded by transferring responsibility over "urban Indians" to its Citizenship Branch and gradually came to view federal responsibilities under section 91 (24) of *CA,* 1867 as pertaining exclusively to

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[35] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant for Brussels and What it Could Mean in Abkhazia," p. 216.

[36] Katherine A.H. Graham and Evelyn Peters, "Aboriginal Communities and Urban Sustainability," Discussion Paper F/27, Canadian Policy Research Network Inc. (2002), p. 5.

reserve-based First Nations and, after 1939, Inuit living within their communities, to the exclusion of all other Aboriginal peoples.[37]

For their part, as Graham and Peters note, "provincial governments have been reluctant players in Aboriginal policy."[38] They reject any notion that the provincial Crown has responsibilities over Aboriginal peoples whoever they may be and wherever they may reside, insisting instead that those individuals who do not fit into the narrow area of legislative competency that the federal government has carved out around in-territory status First Nations, should be treated as "citizens of the province" like any others.[39]

Beyond serving to perpetuate "an association of authentic Aboriginal identities with reserves and non-urban places and reinforc[ing] historic ideas about urbanization and assimilation,"[40] being situated within this politically-inspired "jurisdictional maze" has produced a policy vacuum where off-territory First Nations are concerned.[41] This has meant inequities regarding the provision of (and funding for) services and programs to First Nations that reside outside reserves and Treaty Settlement Lands (TSL), but it also complicates efforts to realize off-territory First Nations' desire for self-government. "Complicates" is the key word here because, as Michele Guerin of Guerin Tetreault & Associates has pointed out, "the same inherent rights are held by anybody, whether they live off-territory or on reserve," and it is "how you exercise those rights and where you exercise those rights on some matters [that] becomes an issue."[42] It may be "less convenient for them to exercise" their rights, noted Aldridge, but "they are not deprived of any rights, other than if you don't live there [on-territory] you don't exercise them."[43] Nonetheless, as John Weinstein noted, there has been a "tacit understanding" among the key stakeholders involved in the discourse regarding self-government "to downplay if

[37] Evelyn J. Peters, "Aboriginal Public Policy in Urban Areas: An Introduction," in Urban Aboriginal Policy Making in Canadian Municipalities, ed. Evelyn J. Peters (McGill-Queen's University Press, 2011), p. 13.
[38] Graham and Peters, "Aboriginal Communities and Urban Sustainability," p. 8.
[39] Graham and Peters, "Aboriginal Communities and Urban Sustainability," p. 8.
[40] Peters, "Aboriginal Public Policy in Urban Areas: An Introduction," p. 16.
[41] Graham and Peters, "Aboriginal Communities and Urban Sustainability," p.iii.
[42] Jim Aldridge, interview by author, 30 January 2013.
[43] Michele Guerin, interview by author, 29 January 2013.

not avoid issues of aboriginal people living off a land base."[44] Weinstein made that observation more than twenty-five years ago in respect to a heated round of federal-provincial discussions, but the sentiment remains just as true today under the BC Treaty Process as it was then.

2.3. Self-Government off a Land Base

Given the emergent maze of jurisdictional decisions that prioritizes in-territory First Nations, in combination with the centrality of land within the Aboriginal world-view, there is little wonder that the BC Treaty Process is premised on a land-based jurisdictional model. But, as Weinstein also argued, this approach "fails to address the aspirations of a large part of Canada's aboriginal population...to pursue their own form of self-determination."[45] As it stands, a substantial portion of the First Nations population currently resides outside of First Nation-controlled territories and this number continues to grow with the majority of this demographic living in urban areas. It is for this reason that recognizing the "inadequacy of the territorial solution," and calls for governance approaches that "dissociate power and self-rule from territory"[46] in the Canadian context are usually discussed in relation to urban Aboriginals.

To this end, RCAP's Urban Perspectives Team explored the extra-territorial implications of this issue during the course of its investigations. As a basic starting point, the RCAP final report recognized that, despite the diversity of Aboriginal lives, First Nations' visions of governance shared a "common core" that prioritized self-government as "one of the main vehicles" for realizing "two distinct but related goals." According to RCAP, the first "broadly territorial" goal involves exercising greater authority over ancestral lands and the inhabitants of those lands, and the second "communal" goal envisions the strengthening and protection of the national "culture, identity and collective well-being" of a "specific Aboriginal group and its members, wherever they happen to be

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[44] John Weinstein, *Aboriginal Self-Determination Off a Land Base* (Kingston, Ontario: Institute of Intergovernmental Relations, 1986), p. ix.
[45] Weinstein, *Aboriginal Self-Determination Off a Land Base*, pp. 4-5.
[46] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could Mean in Abkhazia," p.219.

located." The Royal Commission regarded these goals as "complementary rather than contradictory," regardless of whether the First Nation in question had access to an extensive land-base, a small portion of their traditional territory, or no land at all.[47] Recognizing this diversity of circumstances not only acknowledges that First Nations can and do find themselves in differing situations, but also that land – as a symbolic and identity-forming feature of aboriginality – is inseparable from the discussion of self-government even amongst those individuals that lack exclusive (or shared) control of a recognized land base. As such, RCAP acknowledged that many First Nations people retained a "strong sense of connection with their nations and communities of origin" despite their physical distance from those lands and the people they support. Those individuals that leave Aboriginal-controlled lands have described the feeling of "floating" without an anchor to ground and comfort them. As one interviewee told the Commission's round table on urban issues, it was as if her identity would change if she moved; "that it [was not] tied to her, that it depend[ed] on where she liv[ed]."[48]

2.4. The Citizen-Based Jurisdictional Model

Be they located in urban regions or other areas distant from First Nation-controlled territories, many First Nations living off an exclusive land base look to their nations of origin for a means to participate in emergent self-government arrangements and extra-territorial or citizen-based approaches can provide the means to do so. While it is less known than its territorial counterpart, a citizen-based jurisdictional model represents an alternative to the current land-based model underpinning self-government negotiations in BC. A subject of much discussion in the context of nineteenth and early twentieth century ethno-nationalism, territorial jurisdiction does not exist for any community of rights holders in a fully-formed system of citizen-based government. Rather, the power to legislate and deliver services is distributed over "population groups"

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[47] *Report of the Royal Commission on aboriginal Peoples: Restructuring the Relationship, Part One, Volume 2*, p. 141.

[48] *Report of the Royal Commission on aboriginal Peoples: Restructuring the Relationship, Part One, Volume 2*, pp. 151-2.

as opposed to being "distributed over territories."[49] As such, the system targets specific communities of rights recipients without conventional notions of territory – as a defined space – acting as an intermediary. In this way, citizen-based approaches employ a broader meaning of "territory." This broader meaning is connected to Andrea Brighenti's argument that "[i]n order to be, law needs to be somewhere. But," as Brighenti continued, "the 'where' of law need not be a country (a nation-state), nor a region. It can be a person, as well as an interpersonal relation."[50] Thus, according to Brighenti, this "relational conception of territory enables us to see that personal law is as territorial as traditional state law, except for the fact that its territory is not a land but an ensemble of people."[51]

The "personal law" that citizen-based approaches produce has the effect of territorializing people by including them in, and permitting them to benefit from, the legal regime created for a non-territorial political space.[52] In such a space, "the limits of governmental jurisdiction are determined by group membership" and communities of rights recipients are singled out by establishing them as corporations of public law. Seeking neither to integrate nor assimilate, citizen-based approaches allow communities of rights recipients to exercise a "degree of self-rule without assigning exclusive control over land or territory."[53] Among other things, this means that several distinct ethno-national communities can exercise the right to govern themselves within the same geographical space and that "individual members of an autonomous group do not lose their cultural protection when they move from an area where they had formed a local majority to one where they are a small minority."[54] With this in mind, Ruth Lapidoth argues that the "great advantage" of the personal autonomy created by a citizen-based jurisdictional model is that it applies only to those individuals who voluntarily opt to be

[49] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant for Brussels and What it Could Mean in Abkhazia," p. 219.
[50] Brighenti, "On Territory as Relationship and Law as Territory," p. 83.
[51] Brighenti, "On Territory as Relationship and Law as Territory," p. 84.
[52] Brighenti, "On Territory as Relationship and Law as Territory," p. 74.
[53] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could mean in Abkhazia," p. 220.
[54] Rainer Bauböck, "Territorial or Cultural Autonomy for National Minorities?" IWE Working paper Series, No 22 (December 2001), p. 13.

members of a clearly defined rights bearing community.[55] For Bauböck, this system amounts to a "radically individualistic" structure of government, notwithstanding its origin as a method for protecting group and collective rights. For this reason, he applauds the approach in its pure form from a philosophical perspective for devising a structure of government in which each rights bearing group rules "only over their members rather than over territory that includes people who do not see themselves as belonging to the same nation."[56]

Thus far, purely non-territorial forms of government have been theoretical constructs without real world applications,[57] which generally appear in the literature as illustrative examples of how citizen-based government could work. By contrast, most scholars and analysts interested in the approach concede that, in any practical application, extra-territorial jurisdiction would need to be combined with territorial forms of government.[58] This is precisely how RCAP envisioned that citizen-based governance could be used to satisfy the self-government desires of off-territory First Nation citizens. As such, many of the briefs and research studies submitted to the Royal Commission recommended adopting a mixed jurisdictional model for the purpose of bridging servicing gaps, dissolving legal distinctions based on residency, and re-connecting urban and other landless First Nations with their communities of origin. This mixed model would allow a TFN government that has jurisdiction over an exclusive land base to exercise extra-territorial jurisdiction over citizens of that nation who reside outside its TSL. RCAP described this as a form of "communal jurisdiction" and specified that by communal jurisdiction, it meant a form of jurisdiction that "relates exclusively to members of an Aboriginal group living in an area with a mixed population and an existing [non-Aboriginal] government." The report added that this type of jurisdiction is dependent for

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[55] Ruth Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts* (Washington DC: United States Institute of Peace Press, 1997), p. 39

[56] Bauböck, "Territorial or Cultural Autonomy for National Minorities?" pp. 19, 1.

[57] A possible exception might be what Emanuel Maier has called the Torah as "movable territory." He writes: "The Talmud (i.e. Torah and commentaries) gave the landless and persecuted Jew of the diaspora another world into which he could escape and survive when the vicissitudes of the real world had become too great to bear. 'It gave him a fatherland, which he could carry about with him when his own land was lost.'" Emanuel Maier, "Torah as Moveable Territory," *Annals of the Association of American Geographers* 65, no. 1(1975), p. 20.

[58] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could Mean in Abkhazia," p.221.

its existence upon "individuals freely identifying themselves as members of the group in question and submitting to the authority of its governing body."[59]

Alleviating the feeling of floating described elsewhere, this form of jurisdiction *is* tied to people rather than territory,[60] and it has two related dimensions. In the first instance, it implies that the individuals for whom this form of jurisdiction applies can indeed "take the law with them" when they leave TSL by choosing to be bound by the legal regime of their land-based community of origin. This constitutes law-making authority. In the second instance, it means that land-based First Nation governments could establish service agencies, cultural institutions, and educational facilities that are located beyond the reaches of their exclusive land-base in order to serve their scattered citizens. In this regard, a parallel can be drawn between the extra-territorial provisions that RCAP contemplated for First Nations and the nature of the authority exercised by a denominational or minority-language school board.[61] In either case, the communal jurisdiction being exercised would only apply to individuals who voluntarily agreed to be bound by the rules and to benefit from the services provided by the governing body to which they adhere.

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[59] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Part One, Volume 2*, p. 141.

[60] This explains why it is often called personal jurisdiction, personal law, personal federalism, or personal autonomy.

[61] Jill Wherrell and Douglas Brown, "Self-Government for Aboriginal Peoples Living in Urban Areas: A Discussion Paper Prepared for the Native Council of Canada," Institute of Intergovernmental Relations (1992), p. 29.

3.   Jurisdictional Scan: From Theory to Practice

This chapter begins by briefly examining the historical roots of extra-territorial governance and its current usage as a tool for accommodating ethno-national, linguistic, and religious minorities in pluralistic societies. Its purpose is to illustrate that the Anglo-Canadian institutional structure is flexible enough to incorporate extra-territorial elements (and has included them), as well as to show that citizen-based approaches are successfully functioning in the contemporary world. The second section of this chapter narrows the focus by concentrating exclusively on the extra-territorial features of existing treaties with Canadian First Nations.

3.1.   The Genesis of Non-Territorial Thinking and its Contemporary Application

While a seemingly new and novel idea, non-territorial forms of government predate the modern nation state. For instance, the crowned heads of England conceived of the relationship they had with their subjects as a personal bond of allegiance that could transcend English borders. As McHugh notes, "[l]igeance" of this sort "required obedience to one's sovereign wherever one ventured [and it] travelled with the individual beyond the realm."[62] This basically feudal relationship gained an increasingly legalistic definition under the Tudors via statutes providing for English citizens to be tried in England for crimes that were committed elsewhere. Extra-territorial applications of British law became a key, if constitutionally challenging, element of nineteenth century imperialism as the reach of British law was extended to include jurisdiction over British subjects residing within the informal empire where Britain did not exercise sovereign

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[62] P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2009), p. 69.

authority.[63] With that said, however, contemporary conceptions of personal autonomy and extra-territorial jurisdiction are believed to have their roots in ideas and practices originating in the Ottoman and Hapsburg Empires.[64] With respect to the Turkish *millet* system, Laponce explained:

> Minority religious communities had the right to legislate on every matter which, for the Moslems, came under the jurisdiction of the Sharia; education was one such matter – and hence the language of instruction. In the Millet's sphere of competence, minority individuals had no direct personal relations with the Turkish administration; they dealt perforce with the minority's courts, schools, and other authorities.[65]

This, for Laponce, represented an extreme case where law was disassociated from land.

In a similar vein, Austria-Hungary's experimentation with what Lijphart calls "corporately federal proposals" of extra-territorial law, stem from the theoretical work of Otto Bauer and Karl Renner as they sought ways of salvaging the late empire from the vicissitudes of minority nationalism.[66] First developed in Renner's "State and Nation" (1899), these proposals "envisioned the state as a federation of nations" that did not need to be grounded in territorial terms. "Having been established by the state as persons of public law," Lapidoth explains, individual rights recipients became autonomous cultural communities that "would be free to pursue their interests in certain areas (such as education, the arts, and literature) without interference of the state."[67] As fleeting as they were, elements of the Bauer-Renner proposal found application in the Moravian compromise (1905), Bukovina (1910), Galicia (1914), as well in inter-war attempts to restructure Ukraine and the Baltic States.[68] In this sense, perhaps the greatest triumph occurred in the Estonian Republic where personal law was identified in

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[63] McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination*, pp. 206-213.

[64] Kayla Kingdon-Bebb, "In the Spirit of Sayt-K'il'im-Goot: Legal Jurisdiction and the Extraterritorial Social Reconstitution of the Nisga'a Nation," (MPhil diss., University of Cambridge, 2009), p. 40.

[65] J.A. Laponce, *Languages and their Territories* (Toronto: University of Toronto Press, 1987), p. 171.

[66] Arend Lijphart, *Democracies: Patters of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press, 1984), p. 183.

[67] Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts*, p. 39.

[68] John Coakley, "Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-Territorial Autonomy," *International Political Science Review* 15, no. 3 (1994), p. 300.

the Constitution as mechanism for protecting national cultures. Estonia's *Cultural Autonomy National Minorities Act* (1925), built upon provisions set out in the Constitution,[69] with the end result being a situation in which German, Jewish, Russian, and Swedish minorities that numbered at least 3000 members and who chose to take advantage of the mechanism were "organized as entities of public law."[70] The larger and geographically concentrated Russian and Swedish minorities chose instead to rely on land-based local government mechanisms in order to protect and preserve the salient aspects of their culture, but the more scattered German and Jewish minorities took advantage of the opportunity by establishing their own institutions with the authority to legislate, regulate, and tax their members. The system came to an abrupt end with the onset of the Second World War, but it was resurrected in 1993 via provisions outlined in its post-Communist Constitution, as well as a new *Cultural Autonomy for National Minorities Act*.[71]

While the Estonian experience with a form of citizen-based governance provides a real and tangible example proving that institutional experimentation of this sort could work, the literature on federalism usually points to Belgium as the greatest contemporary success story. Belgium's transition from a unitary entity into a federal state that included a mixture of both territorial and personal federalism was the result of a protracted struggle between the country's three distinct ethno-linguistic communities – the Flemish, French, and German speakers. Devising an appropriate structure of government was complicated by the distribution of each language community within the three regions of Belgium. Flanders is distinctly Flemish in composition, and Wallonia is primarily French with the addition of a small but concentrated German-speaking community in its Eastern cantons.[72] As such, it was Brussels that posed the problem because all three communities were distributed within the Brussels-Capital region. Because both of the

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[69] Kayla Kingdon-Bebb, "In the Spirit of Sayt-K'il'im-Goot: Legal Jurisdiction and the Extraterritorial Social Reconstitution of the Nisga'a Nation," (MPhil diss., University of Cambridge, 2009), p. 42.

[70] Laponce, *Languages and their Territories*, p. 171; Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts*, p. 38.

[71] Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts*, pp. 37-40; Laponce, Languages and their Territories, pp. 171-172; Kingdon-Bebb, *In the spirit of Sayt-K'il'im-Goot: Legal Jurisdiction and the Extraterritorial Social Reconstitution of the Nisga'a Nation*, p. 42.

[72] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could Mean in Abkhazia," pp. 221-225.

major language communities claimed Brussels as their own, the process of federal reform became marred in a thirty-year struggle that threatened to destroy the country. Jans has described the complex mix of personal and regional federalism that ultimately prevailed in Brussels as follows:

> The federation consists of three territorial entities (the regions) and three partly territorial/personal units (the communities). The regions - Flanders, Wallonia and Brussels - were designed in the following way: these territorial governments have jurisdiction over territorial matters such as environment, economic policy, infrastructure, urban planning, etc. In addition to the regions, three community governments were created. The communities are *partly* personal in conception. The Flemish community consists of the inhabitants of the Flemish region (territorial) and the Flemish inhabitants of Brussels (personal), the German community covers the German language area (territorial) and the French community covers the inhabitants of Wallonia without the German area (territorial) and the Francophone inhabitants of Brussels (personal). The community governments have jurisdiction over policy matters relating to ethno-national characteristics of persons, namely, language, culture, education, welfare, etc., for as far as Wallonia and Flanders are concerned the communities operate in a territorial way: all inhabitants of those regions are considered to be Francophone and Flemish respectively...It is only in Brussels that the personal characteristics of the Belgian federation come to the fore.[73]

Adding to the complexity, the Belgium approach to citizen-based federalism avoided the temptation to establish ascriptive identifiers for establishing community membership on account of the desire to accommodate blended families and people with mixed origins. Rather, institutions with the power to regulate, legislate, and tax in relation to educational, cultural, or welfare matters are designated as either Flemish or French, and individuals can freely choose to be bound by the institution that best suited their needs.[74]

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[73] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could Mean in Abkhazia," p. 224.

[74] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could Mean in Abkhazia," p. 224.

Recognized by Jans as "the single most important factor which keeps the Belgian federation from splitting up,"[75] citizen-based or personal federalism has worked in Belgium but where there are successes, there have also been failures. Most notably, a discriminatory system of personal federalism was used to prop up South Africa's apartheid regime and the capacity to misuse a system that was originally designed to protect the marginalized has fuelled the concerns of democratic theorists who argue that structures of government that are based on personal federalism have produced illiberal governments of the worst sort. "Although such need not be the case," writes John Coakley, "this form of government is often seen as entailing non-voluntaristic and non-modern forms of group affiliation" partly because of the "associations that history has linked with this device."[76]

3.2. The Application of Extra-Territorial Law in the Aboriginal Policy Context

With the unsavoury aspects of non-territorial federalism regarded by advocates as "accidental rather than intrinsic,"[77] citizen-based structures of government have been discussed (and elements of them utilized) in the context of indigenous self-government. As early as the mid 1980s legal scholar Atle Grahl-Madsen contemplated the development of a mixed jurisdictional model that included extra-territorial provisions for the purpose of conferring self-government on the Scandinavian Sami people,[78] and as suggested elsewhere, the Nisga'a Final Agreement contains extra-territorial provisions, as do aspects of both the Tsawwassen and Maa-nulth treaties. While Nisga'a,

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[75] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could Mean in Abkhazia," p. 222.

[76] Coakley, "Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-Territorial Autonomy," p. 311.

[77] Coakley, "Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-Territorial Autonomy," p. 311.

[78] Grahl-Madsen's "Draft of a Sami Convention" proposed that "Matters concerning culture, language, and education might be singled out as the domain of a separate organ, a Sami National Council with a constituency and a mandate extending far beyond the confines of the autonomous territory [i.e. the region where a land-based system would function]." It is worth noting that the extra-territorial provisions proposed here would have extended beyond the international borders that have located the Sami across Finland, Norway, and Sweden. Atle Grahl-Madsen, "Introduction," and "Draft of a Sami Convention," *Nordic Journal of International Law* 55, no. 2 (1986), p. 5.

Tsawwassen, and Maa-nulth structures are discussed in the pages that follow, this section continues by highlighting the innovative extra-territorial provisions that were included in the *Yukon First Nations Self-Government Act* (1994).

Twenty years of negotiation between Canada, Yukon, and the Council of Yukon Indians culminated in the signing of the Umbrella Final Agreement in 1993. The Umbrella Agreement has served as a framework for the Final Agreements and separate self-government agreements that eleven of the fourteen Yukon First Nations have signed to date. The approach taken by the parties in the Yukon process was innovative in the sense that it separated self-government from entrenched Final Agreements, and also because the framework for self-government and the resultant agreements included elements of extra-territorial authority.[79] In particular, section 11(b) of the *Yukon First Nations Self-Government Act* recognized First Nations' authority to make laws that would apply to subscribing members – on a voluntary basis – anywhere within the boundaries of the Yukon Territory.[80] These provisions constitute extra-territorial authority in the sense that the jurisdictional reach of law-making authority under section 11(b) is not confined to the exclusive territory controlled by the First Nation, although in this instance the federal division of powers requires that these laws be inoperable outside of the Yukon.

In accordance with the terminology used in the European context, Professor Hogg refers to this aspect of the Yukon structure as an example of "personal law" and as this system of government was coming into effect in the 1990s Hogg and Turpel speculated that capacity and resource issues may prevent First Nations from exercising the extra-territorial dimension of their authority.[81] With that said, Part II of Schedule III of the enabling Act enumerates fifteen specific matters that are subject to extra-territorial jurisdiction. These include the power to legislate in areas pertaining to the social envelope (language, education, spiritual and cultural practices); in addition to a full range

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[79] "The History of Land Claims and Self-Government in the Yukon," Aboriginal Affairs and Northern Development Canada, http://www.aadnc-aandc.gc.ca/eng/1100100028417, (last accessed 20 June 2012).

[80] *Yukon First Nations Self-Government Act* (S.C. 1994, c. 35), Department of Justice, http://laws-lois.justice.gc.ca/eng/acts/Y-2.6/page-3.html#h-5 (last accessed 20 June 2012).

[81] Hogg and Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues," p. 393.

of topics related to adoption, custody, and child welfare; inheritance, wills, intestacy; dispute resolution; the solemnization of marriages; and certain aspects of licensing for the purpose of revenue generation. Yukon First Nations can also exercise extra-territorial authority over welfare and health services (including the authority to determine mental competency of their citizens), but this package of powers is subject to certain off-territory restrictions.[82]

Similar in some ways with the Yukon First Nations self-government agreements, the Final Agreements that BC has reached with the Nisga'a, Tsawwassen, and Maa-nulth First Nations have included provisions allowing their signatories to exercise a degree of extra-territorial authority within specified subject areas. In each case, the TFN's extra-territorial authority extends the farthest in relation to adoption as exemplified by the Nisga'a Treaty which specifically indicates that: "Nisga'a *law applies to* the adoption of a Nisga'a child off Nisga'a Lands" under circumstances where the consent of "the parent, parents, guardian," or a court of competent jurisdiction have been attained (emphasis added).[83] In similar fashion, the Tsawwassen and Maa-nulth Final Agreements stipulate that the respective First Nation signatories "may make laws in respect of" the adoption of "Children *in British Columbia*" who are members of the First Nation in question or are resident on TSL (emphasis added).[84]

Notwithstanding the slightly different language used by these documents, all three of the agreements noted above position the extra-territorial extension of First Nation authority over adoption as a constitutionally protected treaty right to be employed at the discretion of the First Nation. By contrast, other aspects of these Final Agreements provide for the possible extension of a delegated form of extra-territorial

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[82] *Yukon First Nations Self-Government Act* (S.C. 1994, c. 35), Department of Justice, http://laws-lois.justice.gc.ca/eng/acts/Y-2.6/page-3.html#h-5 (last accessed 20 June 2012).

[83] Specifically, the Nisga'a Treaty stipulates that the consent of "the parent, parents, or guardian of the child" for Nisga'a Law to apply to adoption, or for "a court to dispense with" this consent requirement. *Nisga'a Final Agreement*, http://www.nnkn.ca/files/u28/nis-eng.pdf (last accessed 9 March 2013), pp. 175-176.

[84] *Tsawwassen First Nation Final Agreement*, http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/tsawwassen_final_agreement_english_mar_20_2009.pdf (last accessed 9 July 2012), p. 145; *Maa-nulth First Nations Final Agreement*, http://www.gov.bc.ca/arr/firstnation/maa_nulth/down/maa_nulth_final_agreement_signed2009.pdf (last accessed 9 July 2012), p. 165.

authority in discrete and enumerated policy areas by way of intergovernmental side agreements. K-12 education, community correctional services, the solemnization of marriages, as well as certain aspects of child custody, child protective services, and social services (including income assistance and housing) all fall with this more limited package of negotiated extra-territorial powers.[85] In these instances, the language employed specifies that British Columbia and the First Nation government "will negotiate and attempt to reach agreements in respect of" the particular field in question. First Nations' extra-territorial authority over the preceding list of subject areas is more limited than their previously mentioned authority over adoption in the sense that, as a specified sphere of law-making jurisdiction that was clearly indicated in each of the Final Agreements, the power of Treaty First Nations to make adoption laws becomes entrenched in the Constitution as a consequence of being enumerated in the treaties. First Nation law-making authority over those powers that are open to negotiation via separate side agreements are not similarly protected. In either case, however, the concurrent law model upon which the BC Treaty Process sits ensures that provincial and federal laws of general application will remain in place unless or until a TFN with competent jurisdiction – through constitutionalized law-making authority or un-entrenched side agreement – decides to draw down its authority by establishing its own law.

Beyond the list of subject areas noted above, the Nisga'a Final Agreement provided for the First Nation to exercise extra-territorial authority in relation to policing and the adjudicative powers of the Nisga'a Court[86] – powers that have not been conferred on other Treaty First Nations – while also recognizing (and giving standing in the Final Agreement to) the Nisga'a Urban Locals (NUL) that have been established in Prince Rupert and Port Edward, Terrace, and Vancouver.[87] Given that as many as 60% of Nisga'a citizens reside (for at least part of the year) off-territory, and because there is a stipulation under the Nisga'a Constitution entitling off-territory citizens to the same rights and privileges as in-territory citizens, the NUL are intended to provide key

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[85] *Nisga'a Final Agreement*, Chapters 9, 11, and 12; *Tsawwassen First Nation Final Agreement*, Chapter 16; Maa-nulth First Nations Final Agreement, Chapter 13.
[86] *Nisga'a Final Agreement*, Chapter 12.
[87] Kingdon-Bebb, *In the Spirit of Sayt-K'il'im-Goot: Legal Jurisdiction and the Extraterritorial Social Reconstitution of the Nisga'a Nation*, p. 16.

representative and participatory functions with the power to enhance the extra-territorial reach of the land-based Nisga'a government.[88]

While the signatories of the Tsawwassen and Maa-nulth Final Agreements are able to exercise extra-territorial powers within certain spheres, the opportunities available to the Yukon First Nations and the Nisga'a are more extensive, yet all of these First Nations have been slow to draw down the extra-territorial dimensions of the powers they have. In this regard, Kayla Kingdon-Bebb's research on the Nisga'a Treaty is illuminating. This first substantive treatment of citizen-based governance in the context of Aboriginal treaty-making indicates that, by and large, the key departments of the Nisga'a Lisims Government have been "quite limited" or "very limited" when it comes to involving themselves with the extra-territorial provisions of their law-making authority.[89] "For the Nisga'a," writes Kingdon-Bebb, "this is in part a result of their Tribal Council having assumed a wide range of Provincial-level powers through Delegated Services Agreements in the decades before the Treaty actually came into effect." Nisga'a Child and Family Services, Nisga'a School Board, and Nisga'a Valley Health Services are "prime examples" of fields wherein the Nisga'a First Nation was engaged in some level of extra-territorial service provision pre-treaty.[90]

Taking Child and Family Services as an example, it is apparent that, while the Nisga'a Treaty has equipped the First Nation with "sufficient autonomous basis and authority to escape from the restrictions inherent in the delegated authority model... [,] to date, the nation has chosen to continue to operate under the delegated authority model."[91] As such, this research suggests that the Nisga'a government's "if it's not broken, why fix it?" approach has been a disincentive for the First Nation to experiment with personal jurisdiction in a more fulsome way.[92] Kingdon-Bebb's research also indicates that Nisga'a authorities have felt constrained by the rigid regionalization of the

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[88] Kingdon-Bebb, "In the Spirit of Sayt-K'il'im-Goot: Legal Jurisdiction and the Extraterritorial Social Reconstitution of the Nisga'a Nation," p. 15.
[89] Kingdon-Bebb, "In the Spirit of Sayt-K'il'im-Goot: Legal Jurisdiction and the Extraterritorial Social Reconstitution of the Nisga'a Nation," pp. 84, 86.
[90] Kayla Kingdon-Bebb, electronic letter to the author, 26 May 2012.
[91] Kingdon-Bebb, "In the Spirit of Sayt-K'il'im-Goot: Legal Jurisdiction and the Extraterritorial Social Reconstitution of the Nisga'a Nation," p. 88.
[92] Kingdon-Bebb, electronic letter to the author, 26 May 2012.

funding structure employed by BC Child and Family Services believing that resource issues have made it more difficult for the First Nation to exercise its authority in off-territory regions outside the Prince Rupert/Port Edward and Terrace areas.[93] This situation, writes Kingdon-Bebb, has made assuming extra-territorial authority "the biggest challenge" facing Nisga'a Child and Family Services and she argues that the story is similar with regards to the extra-territorial reach and activities of the Nisga'a Village Governments and Urban Locals.[94]

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[93] Kingdon-Bebb, "In the Spirit of Sayt-K'il'im-Goot: Legal Jurisdiction and the Extraterritorial Social Reconstitution of the Nisga'a Nation," p. 90.
[94] Kingdon-Bebb, "In the spirit of Sayt-K'il'im-Goot: Legal Jurisdiction and the Extraterritorial Social Reconstitution of the Nisga'a Nation," p. 90.

4. Methodology

This chapter outlines the methodology used to gather, sort, and analyse interview data produced by First Nations and government stakeholders. It describes the selection of interviewees, the information sought from them, and the thematic analysis that guided the interpretation of key findings.

4.1. The Interviewees

A total of nineteen semi-structured interviews were conducted involving nine First Nations stakeholders and ten government stakeholders. Interviewees whose work and/or professional experiences involved governance were targeted for inclusion in this study, and where potential interviewees were identified, connections were made through professional contacts in the BC Ministry of Aboriginal Relations and Reconciliation (MARR), Aboriginal Affairs and Northern Development Canada (AANDC), and Simon Fraser University's School of Public Policy. The semi-structured approach was selected in order to accommodate the type flexibility needed for a dynamic two-way conversation to emerge between the principle researcher and interviewee. In the semi-structured interview process, writes Judith Sixsmith, "both partners to the interview help to shape the form and content of the conversation." Moreover, the "partially structured form of conversation"[95] that it produces is thicker and deeper than would be possible using a fully structured approach.

Interviewees included provincial and federal government employees; the Chief Commissioner of the BCTC, elected and Hereditary First Nations Chiefs, Chief Negotiators, legal counsel, and governance consultants; each acting in their professional capacities. Most of the interviewees that were representing First Nations' interests were

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[95] Judith Sixsmith, "Working in the Hidden Economy: The Experience of Unemployed Men in the UK," *Community, Work, & Family* 2, no. 3 (1999), p. 262.

themselves off-territory First Nation citizens and there was a nearly equal gender balance among participants (five of the government stakeholders and four of the First Nations stakeholders were men, and five interviewees from each group were women). In terms of geography, First Nations perspectives from Vancouver Island, the Lower Mainland, the Northern Interior, and the East Kootenays were all represented. The First Nations represented reflected urban and rural perspectives and First Nations in various stages of the treaty process.

Interviews with First Nation stakeholders provide insight on the reasons why First Nations place a priority on the extra-territorial application of their authority, in addition to providing input on governance mechanisms that could be used in order to maximise TFN jurisdiction with respect to providing services to their off-territory citizens. Interviews with representatives from the BC government and Canada focus on the policy implications of negotiating agreements that include extra-territorial elements, or the provision of services to off-territory First Nations.

4.2. Thematic Analysis

The interview data was transcribed producing a text that was interpreted using thematic analysis. "[T]hematizing meanings," according to I. Holloway and L. Todres, is perhaps the most widely used method of analysis within qualitative work,[96] but as Virginia Braun and Victoria Clarke note, because this method is "essentially independent of theory and epistemology," thematic analysis has the "theoretical freedom," "flexibility," and accessibility to be compatible with a diverse variety of analytical approaches.[97] In essence, this method is used to identify and analyze "patterns of meaning" in a data set by following a six step process that involves (1) becoming familiar with the data, (2) generating initial codes, (3) searching for recurring themes, ideas, or data-points present in the material, (4) reviewing themes in search of common, complementary, or

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[96] As cited by Virgina Braun and Victoria Clarke, "Using Thematic Analysis in Psychology," *Qualitative Research in Psychology* 3 (2006), 78.
[97] Braun and Clarke, "Using Thematic Analysis in Psychology," p. 78.

contradictory meanings, (5) defining and naming themes, and finally (6) producing a report.[98]

Faced with an "unstructured and unwieldy" data set, these methods allow the researcher to impose structure and coherence through a process that involves "sifting, charting, and sorting material."[99] While the approach is rigorous, identifying themes that "capture something important in the data" is a researcher-driven endeavor requiring what Ritchie and Spenser call "[r]eal leaps" in analytical thinking that "rel[y] on the creative and conceptual ability of the analyst to determine meaning, salience and connections."[100] To offer greater specificity, it should be noted that a "'theoretical' thematic analysis" approach operating at the "latent level" has been used in this study. In the first instance, this implies that the analysis has been driven by an "analytic interest" in determining how TFN jurisdiction can be maximized for the purpose of providing a consistent level of service provision to urban and other off-territory First Nations.[101] The approach is thus an appropriate tool for use in this project because, as Ritchie and Spencer note, this policy-oriented approach is used to "meet specific information needs" and has the "potential for actionable outcomes."[102]

Further to the goal of sorting and analyzing the data with "specific information needs" in mind, Ritchie and Spencer's four categories of questions used in applied policy research were adapted for use in the initial sort of the data. These categories were used to sort blocks of data under the following headings: (1) contextual information that identify the form and nature of what exists, (2) diagnostic information that examines the reasons for, or causes, of what exists, (3) evaluative information that appraises the effectiveness of what exists, and (4) strategic information that identifies new theories,

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[98] Space prevents a full elucidation of these stages. For a detailed treatment, see Braun and Clarke, "Using Thematic Analysis in Psychology," p. 87; also see Jane Ritchie and Liz Spencer, "Qualitative Data Analysis for Applied Policy Research," in *Analysing Qualitative Data*, ed. A. Bryman and R. Burgess (London: Routledge, 1994), pp. 179-193.

[99] Ritchie and Spencer, "Qualitative Data Analysis for Applied Policy Research," pp. 176-177.

[100] Ritchie and Spencer, "Qualitative Data Analysis for Applied Policy Research," p. 177.

[101] Braun and Clarke, "Using Thematic Analysis in Psychology," p. 84.

[102] Ritchie and Spencer, "Qualitative Data Analysis for Applied Policy Research," p. 174.

policies, plans or actions to replace what exists.[103] The disadvantage of taking this "'theoretical' thematic analysis" approach, according to Braun and Clarke, is that it "provide[s] less rich description of the data overall," but this was a willing sacrifice to make as it means a thicker and deeper understanding of themes that address pertinent research questions.[104]

Conducting this analysis at the latent level implies moving "beyond the semantic content of the data" for the purpose of "identifying the underlying ideas, assumptions, and conceptualizations...that are theorized as shaping or informing the semantic content of the data."[105] This approach is common to the use of thematic analysis and it provides the basis for unpacking a thicker and richer account of the "sociocultural contexts, and structural conditions" that come to bear when devising methods for addressing the governance concerns of off-territory First Nations.[106]

The interview data that was collected, sorted, and analyzed via the method described here has been infused with evidence derived from the literature review, as opposed to separating the information into discrete elements. The result is a more substantial and integrated analysis than would otherwise be possible.

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[103] Other than describing these categories as information types, rather than types of questions, and modifying verb tense, these categories are borrowed directly from Ritchie and Spencer. See Ritchie and Spencer, "Qualitative Data Analysis for Applied Policy Research," p. 174.
[104] Braun and Clarke, "Using Thematic Analysis in Psychology," p. 84.
[105] Braun and Clarke, "Using Thematic Analysis in Psychology," p. 84.
[106] Braun and Clarke, "Using Thematic Analysis in Psychology," p. 85.

5. Research Findings

The successful deployment of a citizen-based jurisdictional model for the Brussels-Capital region, and the inclusion of a limited suite of extra-territorial elements within existing Final Agreements support Geoff Hall's contention that the Anglo-Canadian legal structure "contains concepts necessary to achieve this apparently radical structure."[107]   To this end, a jurisdictional scan and review of the academic literature reveals that extra-territorial structures of government have the potential to operate within a number of discrete policy fields. These include education and training; language, culture and spirituality; social welfare; sport and recreation; custody and guardianship; adoption and child protective services; certain aspects of civil law, taxation, and health policy; as well as correctional services, in addition to any number of other policy areas that are not inherently territorial in scope.[108]

The First Nations stakeholders interviewed for this project placed the greatest priority on services and/or law-making authority falling within the social envelope and made specific reference to adoption, child protection, education, and social and family services. Yet, notwithstanding the eagerness with which First Nations have expressed an interest in negotiating extra-territorial authority in these fields, as Jans' research on national cultural minorities suggests, the "very few and only partial real world examples of personal systems of governance" has left most policymakers "less inclined to engage

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[107] Hall, "The Quest for Native Self-Government: The Challenge of Territorial Sovereignty," pp. 40, 41.

[108] This list is a compilation of policy areas that have been specifically mentioned in the literature regarding citizen-based approaches and urban governance. While off-territory citizens would certainly have an interest in (and right to be heard on) the spending and policy decisions made by their nations of origin on in-territory matters such as infrastructure and transportation, environmental and ecological policy as well as a host of natural resource and land management issues, it would not make sense for off-territory citizens to develop their own transportation systems in their places of residence, nor would it be possible for competing environmental protection regimes to operate in the same territory.

in such institutional experiments."[109] Beyond the general reticence hinted at above, a number of specific concerns with deploying fulsome Belgian-like citizen-based solutions have surfaced from the literature review and interview data conducted for this project. This chapter discusses these concerns before turning to the more limited policy changes proposed by the stakeholder participants in this study.

5.1. Assessing Citizen-Based Approaches in the Canadian Context

Determining the criteria for identifying rights recipients is a fundamental concern in any system involving collective rights; thus, membership issues provide the first complication when it comes to citizen-based governance. Part of the difficulty here involves devising membership criteria that mix a strictly voluntary mode of group affiliation with rules of entry (and exit) that also pay heed to the need for community acceptance and the expectation that rules of membership will respect basic human rights.[110] As BCTC Chief Commissioner Sophie Pierre noted, off-territory members "may be quite prepared to have their services come from the province [and] you really have to respect what it is the individual would want." She continued, "I would not want to see the authority be very strict to say all people of Ktunaxa ancestry must be under our authority no matter where they live.... we would very soon regret having asked for that jurisdiction."[111] Pierre, like all other First Nations and government stakeholders interviewed, was adamant that off-territory members retain the freedom to choose how they wish to relate with their nations of origin, and her response also reflected a common concern regarding the capacity of small First Nations to cope with responsibilities that they fear may be thrust upon them. While this second point will be touched upon subsequently, the Eligibility and Enrolment section of BC's modern treaties makes this

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[109] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could Mean in Abkhazia," p. 216.

[110] Wherrell and Brown, "Self-Government for Aboriginal Peoples Living in Urban Areas: A Discussion Paper Prepared for the Native Council of Canada," pp. 32-36; Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts*, p. 38; Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could Mean in Abkhazia," p. 220.

[111] Sophie Pierre, interview by author, 13 January 2013.

issue a far from insurmountable obstacle in the context of Aboriginal self-government with regards to membership, but choices will still have to be made regarding how a TFN deals with what the Tsawwassen First Nation calls "individuals" – i.e. members that chose not to enroll in their treaty, or who subsequently un-enrolled – in addition to non-status members and non-status individuals living both on and off-TSL.[112] While First Nations are generally eager to preside over the removal of these *Indian Act* distinctions,[113] membership questions of this sort must be left to the First Nation to decide and this speaks to the broader complexity that accompanies governance systems that are citizen-based.

On this point, the example provided by the Brussels-Capital region makes it abundantly clear that citizen-based governance agreements will require "context-specific solutions" that can be elaborate if not extraordinarily complex. It was for this reason that consultant Michele Guerin rejected anything approaching the Belgian solution as a "constitutional nightmare" unlikely to be accepted at a treaty table.[114] Elaborate bureaucratic structures are costly to maintain and difficult to devise and, as former Tsawwassen Chief Kim Baird noted, "the more confusing [a structure] is the more likely it is to make mistakes."[115]

Beyond the complications posed by what has been referred to elsewhere as a potential "checkerboard of governments"[116] with a "confusing array of services and standards,"[117] jurisdiction and funding in particular, remain prime concerns for the provinces. As has been made clear by RCAP as well as the growing literature on urban Aboriginals, Canada views its jurisdiction in relation to section 91(24) of *CA 1867* as a permissive area of legislative competency rather than an obligatory responsibility to act, and the federal government also maintains that any responsibilities that it does have

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[112] Tsawwassen First Nation, "Programs and Benefits Eligibility Guide," May 2011.
[113] All stakeholder interviewees representing First Nations interests made this point.
[114] Michele Guerin, interview by author, Vancouver, 29 January 2013.
[115] Kim Baird, interview by author, 17 December 2012.
[116] Weinstein, *Aboriginal Self-Determination Off a Land Base*, p. 4.
[117] Wherrell and Brown, "Self-Government for Aboriginal Peoples Living in Urban Areas: A Discussion Paper Prepared for the Native Council of Canada," p. 31.

pertain only to reserve-based status Indians.[118] Provincial governments have historically refuted this position and this key jurisdictional grey area sparked tactfully-expressed fears from provincial governments that Canada was motivated to explore various off-territory self-government mechanisms through its Inherent Right Policy (IRP) of 1995 as a way of abdicating responsibility and downloading costs. As BC has never agreed with Canada's position on this jurisdictional matter, the imposition of a system of personal law and non-territorial governance would surely amplify the extent of this existing conflict, while creating new jurisdictional grey areas as First Nation governments made their own decisions on when to exercise their authority. At best, this would lead to competition between governments seeking to exert their power, but a more likely scenario would see a deepening of the policy vacuum experienced by urban and other off-territory Aboriginals. "Are we the people left to deliver the services at the end of the day if there is a lack of clarity," asked Baird, to which she responded with one word: "[w]orrisome."[119]

If current structures of citizen-based government provide any clue, extending the legal regimes and service provision capacities of First Nation governments to include off-territory citizens would occur at the discretion of a First Nation government invested with extra-territorial powers. As noted in the jurisdictional scan, the Nisga'a, Tsawwassen, and Maa-nulth Final Agreements all contemplate the negotiation of intergovernmental side agreements as a means through which TFN governments could extend their jurisdiction off-territory in certain policy areas. The authority exercised via this approach is not constitutionally entrenched, but it does alter jurisdiction by putting "real decision-making power in the hands of indigenous nations" in accordance with how *Harvard Project* co-founder Stephen Cornell defines "practical sovereignty."[120] Yet, as has been noted, the signatories of these treaties have been slow to assert this authority

Chief Negotiator Gerald Wesley suggested that TFNs can neither afford to draw down all of their authority at one time, nor have the capacity to do so, as a way of

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[118] *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Volume 4* (Ottawa: The Commission, 1996), pp. 539-551; Evelyn J. Peters, "Aboriginal Public Policy in Urban Areas," in *Urban Aboriginal Policy Making in Canadian Municipalities*, ed. Evelyn J. Peters (Montreal & Kingston: McGill-Queens University Press, 2011), pp. 12-17.

[119] Kim Baird, interview by author, 17 December 2012.

[120] Cornell, Curtis, and Jorgenson, "The Concept of Governance and its Implications for First Nations," p. 7.

explaining self-governing First Nations' apparent reluctance to take advantage of the intergovernmental side agreement option that is already available to them.[121] Kim Baird saw the issue in equally pragmatic terms. While acknowledging the funding constraints, she argued that sorting out their internal jurisdiction has been the Tsawwassen First Nation's "primary focus," adding "maybe there is some more we could do in some areas but...reality has overtaken us." Baird continued: "We can only take it on when we can take it on" but "[w]e would fight tooth and nail for every bit of jurisdiction we could get...[in order to] preserve [the] ability to deliver in the future." That way, she explained, "we don't have to keep fighting the same fight."[122] The underlying message that pulls together what Wesley and Baird had to say, as well as the arguments made by Kingdon-Bebb in relation to the Nisga'a, is that funding and the related capacity constraints make the existing intergovernmental side agreement approach unworkable, despite First Nations' eagerness to exploit these and other opportunities to extend their jurisdiction off-territory.

Funding and capacity constraints aside, it must also be noted that exercising extra-territorial authority by way of side agreements or through other means requires a significant degree of intergovernmental cooperation.[123] Government-to-government interactions are crucially important for smooth transitions of authority to occur argued Baird,[124] while the RCAP report emphasized the need to "ensure that decisions made by individual Aboriginal governments take account of the effects of their policies on other governments."[125]

Given the importance of intergovernmental cooperation in the best of circumstances, critics of citizen-based approaches have argued that relations between governments would surely be tested as a consequence of the jurisdictional issues noted above, as well as the expectation that First Nations' territorial governments would or should act as protectors of their dispersed members. "The danger," wrote Rainer Bauböck when speaking of the European context, "is that [the] reliance on external

[121] Gerald Wesley, interview by author, 10 January 2013.
[122] Kim Baird, interview by author, 17 December 2013.
[123] Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could Mean in Abkhazia," p. 221.
[124] Kim Baird, interview by author, 17 December 2012.
[125] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Part One, Volume 2* (Ottawa: The Commission, 1996), p. 282.

protection will reinforce the political alienation between communities." The researcher continued by speculating that attempts by a land-based government to protect, serve, and speak for their members could be seen as "interference" and this, he worried, "will not only breed resentment against the interfering political agencies," it will also perpetuate the perception that recipients of protected collective rights "don't belong to the community in whose midst they live."[126]

Paradoxically, in urban situations where there are a sufficient number of rights recipients to allow extra-territorial service provision to develop and a fully functioning First Nations legal regime to operate, the alternative fear is that diverse, heterogeneous, and vibrant communities of urban Aboriginals will be fragmented as individual First Nation governments established differing regulatory regimes and servicing agencies.[127] In addition to the socio-cultural loss that critics attribute to this sort of atomization, as Nisga'a legal counsel Jim Aldridge pointed out, this would also lead to servicing inefficiencies. "If everyone is delivering services based upon Aboriginal national origins within a big urban area like this [Vancouver]," argued Aldridge, "then by default you are going to get a multiplicity of, if not redundancy of, administrative support and the attendant costs and inefficiencies that go with that."[128] Speaking to the capacity issue that Chief Commissioner Pierre had noted,[129] Aldridge added rhetorically: "does that automatically give the attendant responsibility for providing the service" should an off-territory member seek it, and what happens when a competing provider offers a better service?[130]

In addition to the inefficiencies that Aldridge noted, without the imposition of a workable funding strategy, such an arrangement would surely do more to expose and accentuate rather than remove inequities as economically disadvantaged First Nations would lack the resources required to provide high quality services to their members.[131] And as Baird was keen to point out, "[i]t is legitimate and reasonable for our members to

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[126] Bauböck, "Territorial or Cultural Autonomy for National Minorities?" pp. 17-18.
[127] Wherrell and Brown, "Self-Government for Aboriginal Peoples Living in Urban Areas: A Discussion Paper Prepared for the Native Council of Canada," pp. 31, 34.
[128] Jim Aldridge, interview by author, 30 January 2013.
[129] Sophie Pierre, interview by author, 14 January 2013
[130] Jim Aldridge, interview by author, 30 January 2013.
[131] Bauböck, "Territorial or Cultural Autonomy for National Minorities?" p. 13.

expect a good service [and]....if we can't compare with that then we shouldn't be in the game."[132] From this perspective, it is clear that despite the radically individualistic nature of citizen-based arrangements, off-territory rights recipients will remain highly dependent on the capacity and spending priorities of the land-based governments established by their communities of origin and this poses a number of concerns.

One such issue that frequently surfaced during the course of data collection pertains to the impact that strengthening the extra-territorial treaty provisions could have on pre-existing tensions between in-territory and off-territory First Nations members. Chief Negotiator Wesley described those tensions as follows:

> in many cases...our members on reserve say that, 'while yes we recognize you, but you are not really one of our people because you don't live here...you're off-reserve' and that is a common statement. And members, on the other hand, that live off of reserve and perhaps weren't even recognized as a status Indian until Bill C31 came along I have heard from time to time people say, 'well you don't even want to talk to me, you don't pay attention to me because I don't live at home.'[133]

Mark Stevenson, Wesley's negotiating partner at the Metlakatla treaty table as well as the Chief Negotiator for the K'ómoks First Nation, drew a sharp distinction between community views regarding extending the reach of First Nations law-making authority extra-territorially, and the provision of services to those off-territory individuals. On the "law-making side, I think there is a lot of support, particularly the largest discussion that we have had are related to adoption and so there is a lot of support on that," noted Stevenson adding that there has "[n]ever been any tensions around resources" but when you "talk about dollars and the extending of services, when you do, if it is diminishing the quality of services, then that is going to raise tensions."[134] Such concerns are a matter of human nature and are by no means endemic to First Nations communities. As such, Kim Baird talked about the unfortunate tendency to view "off-territory members as competing for scarce resources" noting that the in-territory/off-territory distinction can be as "contentious as anything involving scarce resources for a

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[132] Kim Baird, interview by author, 17 December 2012.
[133] Gerald Wesley, interview by author, 10 January 2013.
[134] Mark Stevenson, interview by author, 13 January 2013.

First Nations community," yet in her experience, this "new dimension" of the issue comes down to shifting power balances. "Some worry that it will impact the power balance," she observed since "people who are more locally minded feel threatened by a broader collective that may not be tuned into what is happening" on TSL.[135]

In addition to the in-territory/off-territory tensions discussed here, a further concern related to the extent to which off-territory members would be beholden to their communities of origin was highlighted by the final report of the Royal Commission on Aboriginal Peoples. In its section on urban Aboriginals the RCAP report recognized that some at risk groups, including a disproportionally high number of Aboriginal women and youth, had moved off-territory as a consequence of being "estranged" from their communities of origin.[136] Despite Aldridge's assertion that, "[t]o a greater or lesser extent, the treaty provisions are anchored in the territory,"[137] citizen-based approaches are hailed in the wider literature as a mechanism for reconnecting off-territory members with their nations of origin, but in instances where relations of the sort described above cannot be repaired, this structure of government will only serve to perpetuate the sense of disenfranchisement felt by these at risk groups.

This, by definition, would constitute an example of a Rawlsian equity issue *par excellent*, but it also speaks to the potential for any system of personal law to bring about unacceptable forms of internal repression. Returning to membership issues, critics describing the operation of this system in the European context claim that this is because it is too easy for the ascriptive identifiers that define the membership of rights communities under personal law to become racialized or moralized. As Bauböck explains, "[r]acialization involves the belief that the nation is a distinct community of descent from which exit is impossible; [while] moralization supports the belief that the exit is possible but is an act of treason." Aware as he was of the faulty logic that has allowed these two mutually exclusive ideas to be combined, Bauböck lamented that "nationalist ideologies often do exactly this" in order to prevent members from

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[135] Kim Baird, interview by author, 17 December 2012.
[136] *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Volume 4*, p. 598.
[137] Jim Aldridge, interview by author, 30 January 2013.

assimilating – or "defecting" – into the dominant majority.[138] Steven Lukes calls this the "deviant problem" and believes that personal law regimes should be held to task on how they treat the "non-, ex-, trans- and anti-identifiers" within their midst.[139]

This line of criticism may lend itself to a degree of paranoia on the part of the system's detractors, and it must be made abundantly clear that the First Nations stakeholders interviewed for this study saw the removal of *Indian Act* distinctions as a core component of their decolonization and were adamant in their rejection of any form of coercion being exerted over members or non-members alike, but the public choice issues driving these concerns are real enough. As Peach (following Jill Wherrell and Douglas Brown) has argued, when it comes to providing culturally sensitive services to an off-territory rights community (even where the rights in question are constitutionally protected), numbers matter and they matter in a variety of ways. The salient point here is that, while an off-territory citizen of a Treaty First Nation may be eligible to receive the services provided by their territorial governments, because membership in such a rights community would be strictly voluntary, individuals may freely choose to opt out of First Nation institutions in favour of municipal, provincial, or federal programs and services.[140] Notwithstanding the efficiency and responsiveness that microeconomic principles attach to competition between firms, Chief Negotiator and legal counsel Mark Stevenson acknowledges that "certain requirements or threshold numbers" would be needed to "make it functional"[141] and to absorb the costs associated with establishing off-territory programs or operating resource-draining institutions such as schools, community health centres, or training facilities. First Nations institutions are unlikely to achieve economies of scale in the best of circumstances and, to paraphrase Peach, the migration of citizens away from culturally-sensitive services, programs, and facilities would surely undermine

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[138] Bauböck, "Territorial or Cultural Autonomy for National Minorities?" p. 22.
[139] As cited in Bauböck, "Territorial or Cultural Autonomy for National Minorities?" p. 19.
[140] Wherrell and Brown, "Self-Government for Aboriginal Peoples Living in Urban Areas: A Discussion Paper Prepared for the Native Council of Canada," pp. 34-36; Ian Peach, "Reconciling the Constitutional Order: Positing a New Approach to the Development of Indigenous Self-Government and Indigenous Law," (Master of Laws diss., Queen's University, 2009), pp. 57-62.
[141] Mark Stevenson, interview by author, 13 January 2013.

the economic viability of providing them.[142] As Kim Baird noted, "[e]ven if we had all of the jurisdiction to deliver all of the things we wanted to, not all would want services from us because if there is no economies of scale" and service cost and quality would suffer as a result. "That," she observed, "is when you get into the practical application of it."[143]

Drawing on activities taking place in the Yukon, Gurston Dacks argues that one solution to this problem would be for First Nation governments to "coalesce and pursue joint undertakings in order to gain the efficiencies of scale."[144] For her part, Baird is encouraged by the prospect of what she called "inter-First Nation" endeavours currently emerging in relation to the First Nations Health Authority and where she saw possibilities for future collaboration in areas such as court services or traditional justice. "If enough of us work together there is an economy of scale" noted Baird.[145] But, despite her optimism, as Dacks acknowledged in relation to the Yukon experience, after years of homogenization under the *Indian Act*, Yukon First Nations have been far more likely to guard their autonomy by pursuing unique paths than they are to coalesce.[146]

In keeping with Dacks' observation that TFN governments may prefer to go it alone as service providers, First Nations negotiators for the Metlakatla and Kitsumkalum, treaty tables have offered an alternative solution to the problem of scale. They argue that TFN governments could become regional service providers where geography and circumstances warrant.[147] While this idea did not come from him, the off-territory component of this proposal was largely premised on what Jim Aldridge referred to as the "pretty profound distinctions" between off-territory members that reside in close proximity to the bounded territory of a TFN, and those off-territory members that live farther afield.[148] Being open to TFN governments serving as regional service providers would not only allow those nations to broaden their catchment area to include their own

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[142] Peach, "Reconciling the Constitutional Order: Positing a New Approach to the Development of Indigenous Self-Government and Indigenous Law," pp. 58-59; Gurston Dacks, "Implementing First Nations Self-Government in Yukon: Lessons for Canada," *Canadian Journal of Political Science* 37, no. 3 (2004), p. 683.

[143] Kim Baird, interview by author, 17 December 2012.

[144] Dacks, "Implementing First Nations Self-Government in Yukon: Lessons for Canada," p. 685.

[145] Kim Baird, interview by author, 17 December 2012.

[146] Dacks, "Implementing First Nations Self-Government in Yukon: Lessons for Canada," p. 685.

[147] Gerald Wesley, interview by author, 10 January 2013; Mark Stevenson, interview by author, 13 January 2013.

[148] Jim Aldridge, interview by author, 30 January 2013.

"outside, but inside" citizens, as Aldridge called them, it would also mean greater efficiencies in service provision on account of extending the service to include non-members.

It would "make sense just from an efficiency of service point of view," argued Mark Stevenson, "because those people [non-members as well as "outside, but inside off-territory" citizens] in many cases have to go a long way out of their way in order to get some basic social services."[149] According to Gerald Wesley, Metlakatla and Kitsumkalum have put this idea forward as an option for inclusion in their treaties thinking that it was "realistic and viable, and appropriate because of geographic location and non-member citizens in close proximity" that are interested in receiving services provided by the First Nation. In particular, Wesley's off-the-cuff treaty language envisioned the provision of social assistance or social development services to both "outside, but inside" members and their non-resident non-member counterparts

5.2. Lessons Learned and New Directions

> Minds are off in the stratosphere in respect of what people think they want and that is often driven by a sense of a vision that has not had the opportunity to become pragmatically based. It is no less legitimate a vision, but the problem is as long as one is there they are not figuring out, well, what it is actually we want the treaty to say. What it is we actually want our government to do? [And] why would we want our government to do that?

> — Jim Aldridge[150]

The preliminary sections of this study identified three primary governance problems afflicting off-territory status First Nations. They were (1) the persistence of legal distinctions that are based on residency, (2) jurisdictional, funding, and/or servicing gaps, and (3) the challenges that many experience with respect to remaining connected to their nations of origin. In some jurisdictions extra-territorial solutions to problems such

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[149] Mark Stevenson, interview by author, 13 January 2013.
[150] Jim Aldridge, interview by author, 30 January 2013.

as these have been employed. Many of the lessons learned from citizen-based experiments in pluralistic societies such as Belgium have relevance for the Canadian context; however, the cross-jurisdictional similarities begin to break down as one recognizes the markedly different circumstances in which BC's First Nations operate. To paraphrase Kim Baird, Belgium is not working with populations that typically number in the hundreds, the inefficiencies that go hand in hand with serving small populations, or the multiplicity of diverse rights-bearing nations that are each vying for jurisdiction.[151] In this light, Michele Guerin's observation that it would be hard to imagine a "constitutional nightmare" of the Belgian variety "being accepted at a table" or "Canada agreeing to it" seems entirely apt.[152] Yet, while it is evident that the issues facing off-territory First Nations cannot be haphazardly crammed into a Belgian box, policy options that are more fitting to the Canadian context, and to what BC First Nations "actually want [their] government to do" have emerged from this research.[153]

Judging from the interview data and printed sources, it is overwhelmingly true that First Nations place a high priority on "trying to break down the distinctions that were made over time,"[154] and the stakeholders interviewed for this project saw this as a jurisdictional matter or an issue with jurisdictional overtones.[155] "Battl[ing] on two fronts," as Wesley described, negotiators' need to be able to tell the off-territory citizens (on whose votes they will count) that the treaty package will have something for them, and without jurisdiction this argument becomes immeasurably harder to make. Two decades of research from *Harvard Project* and other indigenous governance researchers has also demonstrated that the expansion of jurisdiction is a key to transforming the TFN government from an *Indian Act* era administrator of someone else's programs, into a "law-maker, dispute-resolver, and vehicle for pursuing collective goals" that First Nations want and require.[156] In this regard, the expansion of *practical sovereignty* through

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[151] Kim Baird, interview by author, 17 December 2012.

[152] Michele Guerin, interview by author, 29 January 2013.

[153] Jim Aldridge, interview by author, 30 January 2013.

[154] Kim Baird, interview by author, 17 December 2012.

[155] Gerald Wesley, interview by author, 10 January 2013; Kim Baird, interview by author, 17 December 2012.

[156] Cornell, Curtis, and Jorgenson, "The Concept of Governance and its Implications for First Nations," p. 14.

personal law mechanism and territorial jurisdiction will remain fundamental First Nations aspirations at the treaty table, but the interview data also indicates that what Aldridge might call the "pragmatically based"[157] vision guiding what it is that First Nations actually want their governments to be able to do with respect to their off-territory citizens is at its essence about removing the constraints that have inhibited service delivery to those scattered populations. As such, Wesley described an overriding desire to "provide for all [their] members in a consistent fashion...if they happen to be off-territory or on reserve," and to "provide the same or similar services to address the needs of those members no matter where they are." As the Chief Negotiator explained, First Nations are looking at treaty-making as the vehicle that will allow them to tell their citizens:

> [y]ou're eligible [for programs and services] because you live in our territory and at home. You're eligible on the other side of the street because you are one of our members and you are both going to be eligible and will receive the same level of assistance that we offer regardless of your geographic location.[158]

Wesley's comments are broadly representative of the views expressed by First Nations interviewees. Jurisdiction is clearly not incidental when it comes to these concerns and it factors into the analysis that will follow,[159] but when one considers what it is that First Nations are actually trying to achieve by expanding their jurisdiction, it becomes clear that this is really a story about providing programs and services wherein jurisdiction and funding are merely the means to achieve this outcome.

Bearing this in mind, three policy alternatives for delivering services and programs to off-territory TFN citizens are presented, analysed, and evaluated in the remaining portions of this study. The existing intergovernmental side agreement approach will serve as the first alternative. Inspired by the Dacks/Baird discussion presented in the previous section, the second option proposes that TFNs consolidate their resources within inter-First Nations institutions that cater to the servicing needs of

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[157] Jim Aldridge, interview by author, 30 January 2013.
[158] Gerald Wesley, interview by author, 10 January 2013.
[159] Cornell, "The Harvard Project Findings on Good Governance," pp. 4-5; Cornell, Curtis, and Jorgenson, "The Concept of Governance and its Implications for First Nations," pp. 10,19.

their off-territory citizens. The final option proposes that First Nations negotiate contracts that will enable them to serve as regional service providers in keeping with the efforts being made by the Tsimshian First Nations Treaty Society. As presented, these options offer varying degrees of jurisdictional expansion and some include aspects of personal law, but none of them offer approaches that are on par with the complex Belgian example. This was found to be incompatible with the small and diverse populations that characterize rights-bearers in the First Nations policy context. It must also be noted that none of the policy options to be evaluated are operational, let alone viable, in the absence of a funding strategy. "[A]ttaining a significant measure of fiscal autonomy is a fundamental prerequisite for effective self-government," observed the RCAP report, adding: "[a] people that does not possess the means to finance its own government will be dependent on the priorities of others."[160] With this in mind, a citizen-based funding tool is presented and evaluated in chapter 9 as a necessary condition of implementing any of the three policy alternatives presented in the chapter that follows.

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[160] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Part One, Volume 2* (Ottawa: The Commission, 1996), p. 290.

6.   Policy Alternatives

In keeping with the priorities First Nations have placed on providing the same or similar services in a consistent fashion to their citizens wherever they may reside, this chapter outlines three alternatives for improving service delivery to off-territory First Nations. These alternatives are derived from a jurisdictional scan of current practices, stakeholder-inspired recommendations, and a review of the literature regarding indigenous governance practices and the protection of minority rights within pluralistic societies. The funding strategy described in chapter 9 will form an essential element of each option.

6.1. Intergovernmental (Off-Territory) Services Agreements

6.1.1.   Description

This policy option proposes that TFN governments use Intergovernmental (Off-Territory) Services Agreements that are specifically tailored to their individual needs as the means through which they extend their jurisdiction for the provision of services and programs to their off-territory members. Forming side agreements with federal and provincial partners serves as an important adjunct to the treaty package and for this reason they are often contemplated within provisions of a Final Agreement and negotiated concurrently. This need not be the case, however, as they could also be entered into on a nation-to-nation bases post-treaty. In either instance, intergovernmental agreements, unlike Final Agreements, do not have constitutional protection. They are also easier to modify or amend than entrenched Final Agreements

making them the preferred option for addressing aspects of the treaty relationship that are dynamic, variable, and that need "continued, evolving dealings."[161]

Modeled after the Tlicho Intergovernmental Services Agreement that was entered into by the Dogrib Treaty 11 Council, Canada, and the Northwest Territories, the primary objective of the Intergovernmental (Off-Territory) Services Agreements contemplated here will be to provide for the management, administration and delivery of specified social programs and services to off-territory members of TFNs. Agreements of this nature will also be the instrument through which First Nations exercise extra-territorial authority over these programs and services and assume responsibility and accountability for their delivery. At a minimum, Intergovernmental (Off-Territory) Services Agreements will require the following elements in order to be effective and for a seamless transition to occur.

- Procedures and protocols governing how the programs and services will be delivered including descriptions of any roles performed by BC, Canada, the First Nation, and by any existing or purposefully established institutions of government;

- provisions specifying how persons affected by the agreement will have the opportunity to participate in its decision-making process with respect to the management and delivery of services and programs covered by it;

- provisions for the periodic review of the agreement, a process for amending and renewing the agreement, and dispute resolution mechanisms;

- procedures and protocols aimed at minimizing duplication and other inefficiencies, providing for administrative harmonization, and data sharing; and

- procedures and protocols governing how and when a TFN gives notice of its intention to assert authority in an area covered by the agreement.[162]

As described in the jurisdictional scan, intergovernmental side agreements are contemplated within existing treaties for the purpose of extending the reach of TFN authority off-territory in a limited number of discrete policy areas. Funding shortfalls and related capacity issues have constrained TFNs from asserting the extra-territorial

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[161] Timothy Dickson, "Self-Government by Side Agreement?" *McGill Law Journal* 49 (2004), p. 432.

[162] *Tlicho Intergovernmental Services Agreement*, http://www.tlicho.ca/sites/tlicho/files/isa.pdf (last accessed 10 March 2013), pp. 1-16.

dimensions of the powers they currently have but, accompanied by the funding strategy set out in chapter 9, intergovernmental side agreements become a viable option for addressing servicing gaps affecting off-territory First Nations.

6.2. Inter-First Nations Partnerships

6.2.1. Description

This policy alternative proposes that self-governing First Nations coalesce forming inter-First Nation agencies for the purpose of lowering costs and improving efficiency when delivering programs and services to their off-territory members. The Royal Commission on Aboriginal Peoples envisioned that the emergence of single or multi-function institutions could be used as a vehicle for addressing the self-government/self-administration desires of urban and other off-territory First Nations. In its discussion, the Royal Commission's urban panel suggested institutional mandates that included anything from program and service delivery, to political advocacy and intergovernmental relations.[163] K-12 educational assistance, elder-care, satellite referral offices, and health-related transportation were among the priority services mentioned by First Nations stakeholders,[164] but there are many others. Whatever would be the focus of these institutions, partnering in this fashion presents opportunities for TFN governments to pool their financial and human resources, while aggregating small populations of off-territory clients in pursuit of the economies of scale.

The RCAP report focuses primarily on "community of interest" organizational models that deemphasize linkages between off-territory individuals and their nations of origin.[165] Michele Guerin's assertion that "[t]o me, you belong to a nation" was a common refrain among the First Nations interviewees that participated in this study and this finding suggests that there will be stakeholder acceptability issues with organizational

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[163] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Part One, Volume 2* (Ottawa: The Commission, 1996), pp. 264-265.
[164] Gerald Wesley, interview by author, 10 January 2013; Mark Stevenson, interview by author, 13 January 2013; Kim Baird, interview by author, 17 December 2012.
[165] *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Volume 4* (Ottawa: The Commission, 1996), pp. 584-587.

structures that submerge nationhood.[166] With that said, the community of interest model need not prevail in this instance as inter-First Nations Partnerships delivering services to their off-territory citizens could easily be built from the coalescence of self-governing TFNs that have incorporated themselves as societies under the BC *Society Act*. While its membership is not limited to TFNs, the emerging First Nations Health Authority is so constituted,[167] as are the Urban Locals that the Nisga'a First Nation has created in order to provide representation to its clustered off-territory members.[168]

Voluntary associations incorporated under the BC *Society Act* are legal persons by virtue of provincial law of general application with all of the rights, powers, and privileges of same.[169] An inter-First Nation servicing institution constituted in this fashion would exist at arm's-length from the partner governments that created it, but it would also have the capacity to enter into contracts and agreements with those self-governing First Nations.[170] This would permit funds to flow to the institution from partnering TFNs for the provision of services, while allowing the institution to raise, dispense, invest, and borrow money in order to carry out its mandate.[171]   A further advantage of constituting the institution in this fashion is that doing so would not require changes to the current treaty-making framework, and a partnership of this sort could be entered into at the discretion of First Nation governments whenever it suited them to do so.[172]

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[166] Michele Guerin, interview by author, 29 January 2013.

[167] First Nations Health Council, http://www.fnhc.ca/index.php/about/iFNHA/ (last accessed on 17 February 2013).

[168] Jim Aldridge, interview by author, 30 January 2013.

[169] BC *Society Act*, http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96433_01#section1 42 (last accessed on 17 February 2013).

[170] Describing the Nisga'a Urban Locals, Jim Aldridge, interview by author, 30 January 2013.

[171] BC *Society Act*, http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96433_01#section1 42 (last accessed on 17 February 2013).

[172] This was an important point of consideration for Tom Happynook, See Tom Happynook, interview by author, 8 January 2013.

6.3. Regional Services Providers

6.3.1. Description

This policy alternative proposes that, where it makes sense to do so, BC and Canada open the door to allowing TFN governments to offer services and programs to non-resident non-members as well as off-territory citizens living in close proximity to TSL. The phrase *where it makes sense to do so* betrays the highly context-specific element of this policy option, and the key determinants in question are primarily a function of geography. First Nations negotiators representing many remote communities have presented treaty provisions seeking the ability to contract the services they will provide on-TSL post-treaty to neighbouring off-territory communities of their "outside, but inside" citizens, and non-resident non-members alike.[173] The rationale that underlies this policy option suggests that contracting service provision to a TFN would make for more efficient and more responsive service delivery than would otherwise be the case if parallel First Nations and non-First Nations providers both operated within the remote catchment areas of the province.

In terms of the types of services that could be provided, negotiators for the Metlakatla and Kitsumkalum tables have referred to family and social services, and specifically the provision of social assistance and social development services.[174] The well-respected on-reserve child and family services developed by the Ktunaxa/Kinbasket Tribal Council provides a much different example of the types of services that a First Nations could offer to neighbouring communities. The point being that the scope and nature of the services that could be provided would be as varied as the remote geography that rationalized contracting these services to a TFN government.

This policy option is proposed as a time-certain contract negotiated and entered into by the First Nation and the corresponding order of government – federal, provincial, or local depending on the service provided – outside of the treaty relationship, as opposed to an entrenched treaty provision. In terms of their content, the agreements

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[173] Gerald Wesley, interview by author, 10 January 2013; BC Government Stakeholder D, interview by author, 31 February 2013.
[174] Gerald Wesley, interview by author, 10 January 2013.

establishing TFNs as Regional Service Providers will require the inclusion of a similar set of procedures and protocols that were set out in the description of Intergovernmental (Off-Territory Services) Agreements.

7.   Multiple-Criteria Analysis

7.1. Assessment Criteria

This chapter describes the multiple-criteria analysis that is used to assess the policy alternatives that were identified and explained in the previous chapter. In order to determine the optimal option for addressing the governance needs of off-territory members of Treaty First Nations, each of the three policy alternatives are weighed against four key criteria. The assessment criteria were derived from considerations that emerged from the academic literature and stakeholder interviews. These are: effectiveness, stakeholder acceptability, efficiency, and positive externalities. Each criterion is defined and described in the subsections to follow, and Table 1 summarizes this information.   Although they may be important considerations, following Jessica Davies' approach,[175] certain other criteria that do not discriminate between options have not been included in this analysis.

7.1.1.   Effectiveness

Effectiveness is the key criterion in any analysis as it measures how well each policy alternative achieves its desired outcome. Efficacy in this instance denotes that a policy option will facilitate an equitable distribution of programs and services for all TFN citizens no matter where they reside within the province. As such, off-territory status First Nation *citizens*, as opposed to TFN *governments*, are the unit of analysis for this evaluative tool. Policies that achieve the desired outcome with few or no qualifications or caveats are given a high score. Where the policy is likely to improve the consistency of service delivery for TFN citizens irrespective of their geographic location, but where

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[175] Jessica Davies, "Alternatives to Treaty: Evaluating BC's Approach to Accommodation Agreements," (MPP Capstone, Simon Fraser University, 2012), p. 62.

certain gaps will remain, the policy is given a moderate rating. And policies that have little potential to facilitate consistent service delivery or those that do so with many or significant qualifications are given a low score.

7.1.2.   Acceptability

Fallout from dissatisfied stakeholders can endanger the successfulness of any policy proposal and this criterion assesses the likelihood that the key stakeholders will find a policy option acceptable. In this instance, the key stakeholders are the treaty partners: the provincial government, the federal government, and First Nations. In each case, policies are rated as either highly acceptable or generally acceptable to each stakeholder. In accordance with the value First Nations and *Harvard Project* scholars place on practical sovereignty, policies that provide for a formal extension of jurisdiction are rated higher under First Nations acceptability than those that are generally acceptable with few or no qualifications. By contrast, federal and provincial government interviewees have made it abundantly clear that the senior governments will not accept alternatives that entrench aspects of service delivery in treaty.[176] This, for BC and Canada, becomes the minimum standard for the general acceptance of a policy option beyond which concerns over mandate changes become mitigating factors in determining whether or not a policy is considered highly acceptable.

7.1.3.   Efficiency

Making the best use of scarce resources is a key ingredient in successful service design and delivery.[177] The small populations of First Nation citizens residing on and off First Nation-controlled territory lead to inefficiencies associated with the diseconomies of scale that constrain and inhibit TFNs' ability to provide for their members. This criterion assesses the extent to which each policy option promotes administrative efficiencies in a general sense but it places particular emphasis on efforts to produce the efficiencies of

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[176] BC Government Stakeholder B, follow up email communication with the author, 15 February 2013.

[177] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Part One, Volume 2* (Ottawa: The Commission, 1996), p 282.

scale by aggregating populations and pooling resources. Policies that will improve efficiency and which specifically address inefficiencies caused by the diseconomies of scale are given a high score. Policies that are likely to improve efficiencies but do not target diseconomies of scale are rated as moderate, and polices that are unlikely to improve efficiency are given a low score.

7.1.4.   Positive Externalities

This criterion places weight to the ability of a policy alternative to produce positive consequences that go beyond addressing the servicing gaps experienced by off-territory First Nations. Specifically, this criterion gives preference to policies that (1) contribute to First Nations' governing capacity, (2) offer TFN governments the freedom to pursue culturally sensitive service design and delivery, and (3) encourage communication and meaningful interactions between TFN governments and their federal, provincial, and municipal partners as well as non-member populations, where applicable.

7.2. Criterion Weighing

The criteria explained above are each weighted equally on a 6-point scale. Effectiveness and efficiency are evaluated based on a single measurement index, but stakeholder acceptability and positive externalities are each divided into three sub-sections reflecting the distinctive components of those measures. Table 1 summarizes the qualitative meanings and measurement indexes used for evaluation, and it also specifies the weights given to each criterion.

Table 1: Assessment Criteria and Measures

CRITERIA	POLICY OBJECTIVE	MEASUREMENT INDEX & QUALITATIVE MEANING
Effectiveness	Policy facilitates an equitable distribution of services.	**High=5-6** (policy facilitates consistent service delivery with few/no qualifications). **Moderate=3-4** (policy improves service delivery but gaps remain). **Low=1-2** (policy is unlikely to impair consistent service delivery).
Stakeholder Acceptability	Policy is acceptable to FNs.	**Highly acceptable=2** (provides formal extension of jurisdiction and is otherwise acceptable with few/no qualifications). **Generally acceptable=1** (acceptable to FNs with qualifications).
	Policy is acceptable to BC.	**Highly acceptable=2** (policy meets the generally acceptable terms and does not require mandate changes). **Generally acceptable=1** (does not entrench off-territory service delivery in treaty and is otherwise acceptable with few/no qualifications).
	Policy is acceptable to CA.	**Highly acceptable** and **generally acceptable** as above.
Efficiency	Policy addresses known or expected inefficiencies. Policy addresses inefficiencies caused by the diseconomies of scale.	**High=5-6** (policy improves efficiency and specifically pursues economies of scale). **Moderate=3-4** (policy has potential to improve efficiency but does not specifically target diseconomies of scale). **Low=1-2** (policy is unlikely to impair efficiency).
Positive Externalities	Policy contributes to building governing capacity. Policy enables culturally sensitive service design and delivery. Policy encourages interactions with partner governments.	**High=5-6** (policy contributes to building governing capacity, enables culturally sensitive service design and delivery, and encourages communication and interactions with partner governments and/or non-member populations). **Moderate=3-4** (policy achieves 2 of the 3 objectives of this criterion). **Low=1-2** (policy achieves 1 of the 3 objectives of this criterion).

8. Analysis of Assessment Criteria

Using information gleaned from stakeholder interview data and the literature as it relates to off-territory First Nations, indigenous governance and citizen-based approaches, this chapter evaluates each policy alternative in relation to the criteria that was set out in the previous section. The criteria are: effectiveness, stakeholder acceptability, efficiency, and positive externalities. The evaluation begins with the Intergovernmental (Off-Territory) Services Agreements before turning to the inter-First Nations Partnership option, and finally, the Regional Service Provider option.

8.1. Intergovernmental (Off-Territory) Services Agreements

8.1.1. Effectiveness

Funding shortfalls have provided little incentive for current TFNs to experiment with Intergovernmental (Off-Territory) Services Agreements to date, but the imposition of a funding strategy (described in chapter 9) changes the game to the point where this cannot be seen as a status quo option. Under this alternative, individual TFNs will determine the extent of the services provided to their off-territory members based on the spending and policy priorities established at the nation level. There are no institutional barriers preventing them from pursuing an equitable distribution of servicing outcomes and, with a funding strategy in place, the decision to provide consistent services actually becomes a matter of choice. Moreover, because decision-making occurs at the nation level, rather than within a larger TFN collective, self-governing First Nations will be free to make decisions that balance the needs of their citizens as a whole. The bottom line is that sufficiently funded Intergovernmental (Off-Territory) Services Agreements become a viable alternative for delivering equitable and consistent services across the in-territory/off-territory divide, and this option has the potential to be very effective. As such, the option is given a high efficacy score.

8.1.2. Acceptability

As noted in the jurisdictional scan, intergovernmental side agreements are the only mechanism through which current mandates permit First Nations to extend their jurisdiction off-territory. Like many other aspects of the nation-to-nation relationship established by the treaty package, Canada and BC regard service delivery as a dynamic policy area that they do not want frozen in a Final Agreement.[178] From the First Nations perspective, Gerald Wesley spoke at length about jurisdiction, side agreements, and constitutional entrenchment in relation to this issue. According to the Chief Negotiator, the Tsimshian First Nations that he represents would be "comfortable" with intergovernmental agreements that extend the *de facto* jurisdiction of TFN governments, but he (and they) have raised concerns about the "uncertainty" of this approach to service delivery, and the views of the Tsimshian First Nations are not unique.[179] For Wesley, "the whole premise of the treaty-making" and the nation-to-nation relationship it produces is that First Nations "find or secure constitutional protection," without which, he explained, they are left "at the whim of a particular government that" may then say "it has a shift in [its] national objectives and economic objectives" and is no longer prepared to uphold the agreement or negotiate its replacement.[180] As Timothy Dickson's research into the limits of self-government by side agreement indicates, the relationship they produce "remains stubbornly vertical with First Nations yet again on the bottom,"[181] and this speaks to a basic point of contrast between First Nations and their federal and provincial counterparts with regards to entrenching any aspect of program delivery. As one provincial stakeholder has explained BC's position, "we do not want to make a commitment or bind ministries to an obligation to enter into negotiations for service provision off-TSL, or for non-members going on-TSL, into the indefinite future." Beyond the complex fiscal issues that this entails, noted the interviewee, "it's the binding nature of the commitment combined with the uncertainty of what the scene will look like 25, 50

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[178] Dickson, "Self-Government by Side Agreement?" p. 432.
[179] Gerald Wesley, interview by author, 10 January 2013.
[180] Gerald Wesley, interview by author, 10 January 2013.
[181] Dickson, "Self-Government by Side Agreement?" p. 432.

or 100 years down the road that makes the Province unwilling to place these commitments in the treaty."[182]

When it comes to this policy option, the question of stakeholder acceptability has less to do with the on the ground service providing activities that First Nations are seeking to perform, and everything to do with the source of authority that grants them the power to do so. Satisfying a core requirement identified by federal and provincial stakeholders, intergovernmental side agreements lack constitutional entrenchment. This also means that they do not entail the unfettered jurisdiction that First Nations advocate, but in practical terms this option's nation-to-nation structure does establish a formal extension of TFN authority resembling the *Harvard Project's* notion of "practical sovereignty" that includes aspects of personal jurisdiction. Given these considerations it is expected that this policy instrument will be regarded as highly acceptable to government stakeholders as it does not entrench service delivery in treaty or require mandate changes even as it alters the practical limits of TFN jurisdiction. By contrast, First Nations are likely to find it generally acceptable in the absence of the constitutional entrenchment they desire.

8.1.3. Efficiency

It has been recommended that the Intergovernmental (Off-Territory) Services Agreements specifically include procedures and protocols aimed at minimizing duplication and providing for administrative harmonization, but this nation-based approach has no foreseeable mechanisms for addressing the diseconomies of scale that act as a barrier to successful service provision for most TFN governments. This policy alternative is given an efficiency score on the low scale reflecting both its general attempt to identify and remove inefficiencies, as well as its inability to directly address the problems associated with scale.

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[182] BC Government Stakeholder B, follow up email communication with the author, 15 February 2013.

8.1.4.   *Positive Externalities*

This policy alternative requires open communication and meaningful interactions between self-governing First Nations and their federal and provincial partners as they seek to ensure effective service delivery, harmonization with existing standards, and seamless transition periods. As decision-making will occur at the nation level this policy alternative presents First Nations with a free hand to design and deliver culturally sensitive programs and services if they so choose, and it will help to build governing capacity as First Nations engage in decision-making that has consequential outcomes for which they will be held accountable. This option is given a high score for positive externalities.

8.2. Inter-First Nation Partnerships

8.2.1.   *Effectiveness*

This policy option will improve service delivery for off-territory First Nations and may be highly beneficial to TFN citizens residing in certain areas. It will be up to the partner TFN governments to decide how their collective resources are used and there are no institutional barriers that will prevent inter-First Nations Partnerships from dispensing services to off-territory citizens at levels consistent with what they would be receiving on TSL. Yet, the reality is that numbers matter and it would make sense for a newly emerging or fledgling organization to put down roots and concentrate their efforts on delivering services in urban areas, where numbers warranted.[183] This was the premise upon which RCAP's urban panel operated;[184] it reflects the Nisga'a pattern of establishing Urban Locals, and it would clearly be the case with what Kim Baird called "satellite offices" that might offer referral services.[185] Under this likely scenario, TFN

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[183] Ian Peach, "Reconciling the Constitutional Order: Positing a New Approach to the Development of Indigenous Self-Government and Indigenous Law," (Master of Laws diss., Queen's University, 2009), pp. 57-62; *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Volume 4* (Ottawa: The Commission, 1996), pp. 586; and Mark Stevenson, interview by author, 13 January 2013.
[184] *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Volume 4* (Ottawa: The Commission, 1996), pp. 584-587.
[185] Kim Baird, interview by author, 17 December 2012.

citizens that do not live in close proximity of TSL (or in urban areas where TFN populations can be aggregated) may not have the same level of services made available to them as would be the case if they lived elsewhere. In final analysis, this option has the potential to improve service delivery for off-territory TFN citizens, but gaps in the equitable distribution of servicing outcomes are likely to remain at least in the short term. This policy alternative is given an efficacy score on the moderate scale in accordance with these concerns and caveats.

8.2.2. Acceptability

By constituting themselves as a public society pursuant to the BC *Society Act*, inter-First Nations Partnerships will provide their TFN members with a means through which they can design and deliver services off-territory. However, this option does not alter jurisdiction over service provision, nor does it involve aspects of personal law. The emergence of the First Nations Health Authority provides evidence that there is an appetite among First Nations for joint undertaking but, as Dacks argues, some First Nations will willingly prefer to sacrifice the efficiencies that come with size and joint undertakings in order "to safeguard new-won autonomy,"[186] and this poses challenges where First Nation acceptability is concerned. With respect to the senior orders of government, the fact that existing Final Agreements expressly entitle TFN governments to delegate their authority to inter-First Nations public institutions is indicative of the encouragement that federal and provincial partners place on pooling resources in order to pursue joint undertakings and the related efficiencies.[187] Government stakeholders interviewed for this project were supportive of this completely non-treaty and non-mandate changing approach to service delivery and in some cases suggested First Nation coalescence as an option without prompting.[188] For these reasons, it is anticipated that BC and Canada will find this option highly acceptable, while First Nations will regard it as generally acceptable on account of its inability to transform the government-to-government relationship and alter jurisdiction.

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[186] Dacks, "Implementing First Nations Self-Government in Yukon: Lessons for Canada," p. 685.
[187] For example, see Chapter 16, clause 39 of the *Tsawwassen First Nation Final Agreement*, http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/tsawwassen_final_agreement_english _mar_20_2009.pdf (last accessed 17 February 2013).
[188] BC Government Stakeholder F, interview by author, 12 February 2013.

8.2.3. *Efficiency*

There is a general acknowledgement of the efficiencies to be had by cooperating as was reflected in Kim Baird's concerns over the economies of scale, and her assertion that where "common needs" are concerned, there are "benefits to working together."[189] As such, it is to be expected that consolidating resources for the provision of services will produce efficiencies of scale as they negate what Jim Aldridge called the "multiplicity of, if not redundancy of, administrative support" that will emerge if numerous First Nations attempted to develop their own unique services.[190] However, with only three Final Agreements in the implementation stage, there are but a hand-full of treaty signatories in a position to contribute to such an institution as it stands, and these TFNs are expending most of their efforts on internal matters associated with getting their core jurisdiction in place.[191] This is not a servicing solution that would come together quickly and the efficiencies that are associated with the economies of scale are likely to be delayed, but in the long run this option has the potential to promote efficiencies in a very substantial way. Accordingly, this option is given a score on the high scale for efficiency.

8.2.4. *Positive Externalities*

This policy alternative establishes partnerships among self-governing First Nations for the purpose of service provision. In so doing, it creates a working relationship that will act as a springboard for creating partnerships in unrelated areas such as economic development, job-creation, and capacity-building initiatives. When otherwise diverse stakeholders form partnerships they enhance their influence in dealing with outside forces – be they Canada, British Columbia, NGOs or others – while providing a centralized body through which senior governments can focus their engagement efforts. There is value in this form of intergovernmental cooperation, but partnering comes at a cost where building governance capacity is concerned. As individual First Nations will essentially be delegating responsibility and accountability to a supra-national entity, they will forgo the capacity-building benefits to be had by making decisions that have consequences at the nation level. From a different perspective, critics of the community

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[189] Kim Baird, interview by author, 17 December 2012.
[190] Jim Aldridge, interview by author, 30 January 2013.
[191] Kim Baird, interview by author, 17 December 2012.

of interest model for urban governance and self-administration have suggested that coalescing in this way would draw culturally-diverse First Nation members together in the same servicing institution resulting in a perpetuation of an *Indian Act*-like form of homogenization.[192] Where culturally-sensitive services are concerned, First Nations design, development, and delivery of the services provided would differentiate this project from anything that came before and this would certainly mitigate these concerns,[193] but there is a trade-off here nonetheless. For these reasons, this option is given a moderate rating.

8.3. Regional Service Providers

8.3.1. *Effectiveness*

This policy alternative will improve service delivery for certain off-territory First Nations, but it cannot provide for an equitable distribution of servicing outcomes irrespective of geography. As a Regional Service Provider, TFN governments would be contractually responsible for providing a consistent level of services to their "outside, but inside" citizens that reside in close proximity to TSL and those citizens and non-members alike that live within a recognized catchment area. However, this policy will not address the servicing needs of those TFN citizens that reside farther afield. While meeting the servicing needs of geographically remote populations of TFN citizens and their non-member counterparts is itself a worthy objective, with respect to the equitable distribution of outcomes, consistent levels of service delivery is lost as this option will only enhance the capabilities of *some* TFNs to deliver services and programs to *some* of their off-territory members. For these reasons, this alternative is given a rating on the moderate scale.

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[192] *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Volume 4* (Ottawa: The Commission, 1996), pp. 586.
[193] Kim Baird, interview by author, 17 December 2012.

8.3.2. Acceptability

This policy alternative establishes a formal, albeit not constitutionalized, extension of TFN jurisdiction, however its application is territorial rather than citizen-based. First Nations negotiating teams from different areas of the province are currently seeking to negotiate the ability to act as Regional Service Providers and First Nations interested in this idea are proposing to constitutionalize it as a treaty provision rather than a discussion outside treaty. BC government stakeholders have indicated the "the Province would be willing to engage in discussions with First Nations outside treaty to develop mutually acceptable protocols and agreements" that would in effect permit TFNs to act as Regional Service Providers.[194] As already noted, First Nations stakeholders have expressed a willingness to pursue nation-to-nation contracts and agreements that are not entrenched, but concerns that the effects would not be "long lasting" and could be "interrupted through a normal course of politics or management"[195] have produced a level of skepticism on their part. This, in conjunction with their unsuccessful attempt to constitutionalize these arrangements through treaty provisions, has left First Nations with the impression that Canada and BC "aren't willing to connect the dots" and that their efforts will be met with "consistent rejection."[196]As this policy option has been formulated as an un-entrenched agreement outside of treaty, BC and Canada are likely to find it acceptable but not ideal. This mixed evaluation reflects the broader concerns government stakeholders have over contracting services affecting non-members to TFN governments. For their part, the formal, albeit territorial, extension of TFN jurisdiction will be welcomed by First Nations, but negotiating the terms of service provision as a time certain contracts lacking constitutional protection will cause concerns. It is anticipated that First Nations will find this option generally acceptable.

8.3.3. Efficiency

Aggregating small client populations within remote catchment areas of the province is a central feature of this policy option as it was motivated by the desire to

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[194] BC Government Stakeholder B, follow up email communication with the author, 15 February 2013.
[195] Gerald Wesley, interview by author, 10 January 2013.
[196] Gerald Wesley, interview by author, 10 January 2013.

facilitate the efficiencies of scale. It has also been recommended that the intergovernmental contracts establishing TFNs as Regional Service Providers specifically include procedures and protocols aimed at minimizing duplication and providing for administrative harmonization. This option is given a high efficiency rating.

8.3.4.   Positive Externalities

This policy option has the potential to improve relations between TFN governments and non-member communities living on and off TSL. And, as was the case with Intergovernmental (Off-Territory) Services Agreements, it encourages effective communication and meaningful interactions between self-governing First Nations and the governments that enter into contracts with them as they seek to ensure effective, responsive, and seamless service delivery. As decision-making will occur at the nation level, this policy alternative will require significant governing capacity, but it will also help to build capacity as First Nations engage in decision-making that has consequences. However, taking on the role of a Regional Service Provider implies catering to the needs of diverse Aboriginal and non-Aboriginal populations. There will be instances where cultural content can be devised as an add-on to otherwise generic programs and services, but casting a wider population net in this fashion provides challenges with respect to designing and delivering culturally sensitive services.   Accordingly, this alternative is given a moderate rating with regards to positive externalities.

Table 2: Multiple-Criteria Scoring Summary

	Effectiveness 6	Acceptability 6			Efficiency 6	Externalities 6	Score 24
		FN	BC	CA			
Agreements	5	1	2	2	2	5	17
Partnerships	4	1	2	2	5	4	18
Providers	3	1	1	1	5	4	15

9.   Recommendation and Implementation

9.1. Recommendation

The policy distinctions that separate in-territory from off-territory First Nations are damaging to the BC Treaty Process. They reinforce *Indian Act* era inequities that discourage off-territory First Nations from participating in a process that needs their support. Bridging policy gaps and blurring distinctions in pursuit of equitable servicing outcomes is in the interest of all those who want to see the treaty process succeed and the three policy options presented in the preceding pages each contribute to solving this policy problem. This study ultimately recommends that the principals to the BC Treaty Process pursue and more broadly use Intergovernmental (Off-Territory) Services Agreements for the purpose of extending TFN jurisdiction off-TSL and providing an equitable distribution of servicing outcomes to their scattered citizens.

While the multiple-criteria analysis revealed a veritable dead-heat between the recommended option and Inter-First Nations Partnerships, this study favours the modified Intergovernmental (Off-Territory) Services Agreements approach on account of the familiarity that the principles to the BC Treaty Process have with that policy instrument and their acceptance of it. However, the fact that this nation-centered approach facilitates both capacity building, and the design and delivery of culturally-appropriate services and programs was also a motivating factor.

In one sense, this study has told a story about the treaty-making relationship that has kept participating BC First Nations, BC, and Canada in protracted negotiations for the last two decades. The pace of these talks has been slow; Final Agreements have been few and, as with any negotiations, what can be achieved at the table has been a function of political will and stakeholder acceptability. Cognisant of the minimum requirements set out by BC and Canada, none of the available policy options presented here are able to provide the constitutional entrenchment of service delivery that First

Nations consider ideal. Yet the selected option does provide a mechanism through which TFNs can design and deliver programs off-territory in keeping with the policy and spending priorities they set as a nation. From an operational standpoint, intergovernmental side agreements succeed at expanding the decision-making powers of TFN government's off-territory, and the financial tools upon which this recommendation is premised effectively removes the funding barrier that has left the mechanism underutilized in the current policy context. As an established part of the furniture of treaty-making that First Nations and their partners are prepared to accept, intergovernmental side agreements of this nature will not require mandate changes, nor will this policy option require any of the principles to adopt hitherto unthinkable positions.

As decisions about program design and delivery will be made at the nation level, First Nations will be free to develop services that meet their cultural needs thereby reinforcing connections that off-territory citizens have to the land and the people whence they came, as TFNs build capacity by making real decisions that have consequences. When put together, these reasons provide sufficient cause to endorse the extended use of adequately funded Intergovernmental (Off-Territory) Services Agreements as the means through which to TFN governments can tell their in-territory and off-territory citizens "you are both going to be eligible and will receive the same level of assistance that we offer regardless of your geographic location."[197]

9.2. Next Steps

This report provides justification for the use of side agreements as the mechanism through which servicing occurs off territory, but these findings should not be considered cause for complacency on the part of the senior levels of government, and BC in particular. Rather it would be in the interest of MARR's Strategic Policy Branch to proactively engage with the Ministries of Education, Health, Social Development, and especially Child and Family Development for the purpose of determining what these core line ministries would require in an Intergovernmental (Off-Territory) Services Agreement

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[197] Gerald Wesley, interview by author, 10 January 2013.

in order to protect provincial interests. As it stands, the line ministries typically are not interested in pursuing one-off discussions at individual treaty tables and this perspective contributes to the First Nation view that the province does not take the issue seriously, and is unwilling to "connect the dots," as Gerald Wesley noted.[198] Proactively engaging with the ministries is by no means to suggest that a template could or should be created for such purposes as each First Nation will have differing concerns and interests when negotiating these agreements that belie the value of cookie-cutter solutions. But having answers to some of the questions likely to emerge will facilitate "pragmatically based"[199] discourse on what the First Nation actually wants to be able to accomplish and the tools they will need to fulfill such a vision. There is little evidence to suggest this is happening in a comprehensive fashion at the current juncture.

9.3. Funding as a Condition of Implementation

As noted, Treaty First Nations governments have not taken full advantage of the existing mechanism they have for extending their jurisdiction and service-providing capacities off-territory, and funding shortfalls are a significant reason why this has been the case. In this section a citizen-based funding strategy is presented, analysed, and recommended as an alternative to funding off-territory programs and services through increased transfers. This financial tool will be applied as an essential element of each of the three policy options proposed in the previous chapters.

9.3.1.   Towards a Citizen-Based Funding Strategy

The basic premise driving this funding strategy originated with Mark Stevenson – a former Chief Negotiator for the BC government who now represents First Nations in various capacities. Stevenson proposed a citizen-based approach to income tax collection that would see the senior levels of government vacate tax space with respect to off-territory TFN citizens in favour of First Nations taxation authorities."If a First Nation

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[198] Gerald Wesley, interview by author, 10 January 2013.
[199] Jim Aldridge, interview by author, 30 January 2013.

has jurisdiction over income tax laws," asked Stevenson, "why wouldn't they be able to collect income tax from their members who aren't living on reserve?"[200] Focusing in on the general funding issues that derive from the small tax base available to TFN governments, the primary objective of this citizen-based approach is to provide a source of discretionary revenue to TFN governments for the purpose of designing, administering, and delivering programs and services to their citizens that reside off-territory.

Working from Stevenson's initial observations, the funding strategy presented here proposes that a portion of the income tax that the Canada Revenue Agency (CRA) collects on behalf of BC and the federal government from off-territory First Nations be remitted to their respective TFN governments. Because financial and taxation matters are not entrenched within Final Agreements, this tax sharing arrangement will be formalized within an intergovernmental side agreement in keeping with the   Fiscal Financing Agreements (FFA) and Real Property Tax Coordination Agreements (RPTCA) that support constitutionally entrenched Final Agreements under the BC Treaty Process. In this case, the side agreement will specify that the abatement of federal and provincial income tax space will occur pursuant to the enactment of a corresponding First Nation income tax law that is fully harmonized with the tax authority that it replaces.

Off-territory First Nations in BC who wish to have their tax dollars remitted to their nation of origin will simply opt into the scheme by completing a section on their income tax return self-identifying as a member of a TFN.[201] This tax collection structure has been used by self-governing Yukon First Nations since 1999 (and will soon be used by the Nisga'a) to collect income tax from both in-territory citizens and non-citizens living on their Settlement Lands. For Yukon First Nations the YT432 Yukon First Nations Tax form instructs the taxpayer to write the name and identification number of the

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[200] Mark Stevenson, interview by author, 13 January 2013.
[201] Federal Government Stakeholder A, interview by author, 17 January 2013; Federal Government Stakeholder C, interview by author, 14 February 2013; and BC Government Stakeholder F, interview by author, 12 February 2013.

appropriate First Nation in a box on their tax return; to make some simple calculations on the YT432 form itself, and to attach it to their return for processing by CRA.[202]

While this procedure is territorial rather than citizen-based, it could easily be modified for the purpose of collecting taxes from off-territory TFN citizens. CRA has already demonstrated that it has the capacity to sort tax forms submitted through a voluntary process of self-identification such as this, after which the requisite amount of revenue – calculated based on total dollars collected from off-territory First Nations and the percentage shared by BC and Canada – will then be distributed to the TFN in question. From an operational standpoint, stakeholders with the federal government have indicated that, with the addition of a form similar to the YT432 used in the Yukon Territory, Revenue Canada would have all of the data and technical capacity required to make the calculations necessary to share revenue in this fashion.[203] The Yukon model also provides guidance with regards to dealing with the confidentiality of information where aligning taxation with service provision is concerned.[204]

9.3.2. Considerations

For a whole host of public choice and human rights reasons, enlarging the tax base in this way will need to be a matter of choice for off-territory members.[205] Knowing this will provide an incentive for TFN governments to seek ways of addressing the needs

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[202] YT432 Yukon First Nations Tax, http://www.cra-arc.gc.ca/E/pbg/tf/5011-c1/5011-c1-fill-12e.pdf (last accessed 14 April 2013).

[203] Federal Government Stakeholder A, interview by author, 17 January 2013.

[204] For instance, see section 21 of the Champagne and Aishihik First Nations *Income Tax Act* which stipulates that information directly or indirectly indentifying persons is acceptable if it is necessary "for the purposes of enforcing th[e] Act" under subsection (a), and "to any person engaged in the tax administration of the Champagne and Aishihik First Nations who is authorized by the Council to have access to the information, for the purposes of formulating or implementing the fiscal policy of the Champagne and Aishihik First Nations" under subsection (e), and to Canada and the Territorial governments for the same purposes in accordance with subsection (f). Champagne and Aishihik First Nations *Income Tax Act,* http://www.cafn.ca/pdfs/laws/IncomeTaxAct.pdf (last accessed on 14 April 2013).

[205] Wherrell and Brown, "Self-Government for Aboriginal Peoples Living in Urban Areas: A Discussion Paper Prepared for the Native Council of Canada," pp. 32-36; Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts*, p. 38; Jans, "Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What it Could Mean in Abkhazia," p. 220.

of their off-territory members rather than routinely directing this added revenue exclusively to in-territory uses. The fact remains, however, that off-territory citizens will be beholden to the spending and policy priorities of their nations of origin. For a TFN with significant off-territory populations,[206] introducing this funding solution may also produce unrealistic expectations among those off-territory citizens regarding what their nation of origin will be able to provide for them, while encouraging governments to take on more responsibilities than they have the capacity or the funds to deliver since, as Tsawwassen's Kim Baird warned, First Nations "could easily go bankrupt trying to provide services."[207] Recognizing the rights of individuals to essentially opt-out of the strategy will also produce a level of uncertainty over the revenue stream but,[208] as described by Peach, these concerns could be mitigated and forum shopping reduced if the taxing First Nation required time-certain contracts from would-be service users.[209]

There are challenges associated with implementing this funding tool, but it also presents beneficial side effects pertaining to community cohesion and nation-building that go beyond providing revenue. As a matter of principle, First Nations have been eager to remove *Indian Act* distinctions that differentiate in-territory from off-territory members and a host of other arbitrary designations. But, with limited funds to work with, the efforts of First Nations governments to provide for their off-territory members has been known to exacerbate existing tensions between in-territory and off-territory members, reinforcing – rather than removing – the distinctions that have left many of those living away from home feeling disconnected from the nation-building that takes place on TSL. In addition to increasing the tax base and the funds available for the design and delivery of services and programs for off-territory First Nations, taking this citizen-based approach to taxation would also provide a real and meaningful link between TFN governments and their off-territory members. Off-territory members who

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[206] The Huu-ay-aht First Nation might serve as an example. An estimated 80% of the Huu-ay-aht population "lives away from home." Information provided by Tom Happynook, interview by author, 8 January 2013.

[207] Kim Baird, interview by author, 17 December 2012.

[208] Peach, "Reconciling the Constitutional Order: Positing a New Approach to the Development of Indigenous Self-Government and Indigenous Law," p. 60; and BC Government Stakeholder F, interview by author, 12 February 2013.

[209] Peach, "Reconciling the Constitutional Order: Positing a New Approach to the Development of Indigenous Self-Government and Indigenous Law," pp. 58-60.

self-declare and choose to direct their taxes to their nations of origin will know that they are contributing to the financial well-being of their nation, and so too will those that live in-territory.

9.3.3. Government Acceptability

Neither Canada nor British Columbia currently have agreements to share taxes collected from off-territory members, but both senior governments do share taxes collected in-territory including income taxes collected from non-members living on TSL. Under these arrangements, Canada has agreed to share as much as 95% of income tax, and BC 50% of the income tax and/or sales tax, collected from non-members. The province has also negotiated agreements for sharing property taxes collected from resident non-members, and Canada is willing to vacate GST space, allowing the First Nation to collect the revenue, when TFNs pass laws establishing a First Nations Goods and Services Tax (FNGST) applicable on TSL.[210]

From Canada's perspective, exercising tax power is conducive to fiscal accountability and good governance,[211] and this explains the willingness of federal and provincial governments to forgo revenue in favour of First Nations, yet they do so while remaining committed to protecting federal and provincial interests in such matters. As such, the concurrent law model allows senior levels of government to preserve the "integrity of the Canadian tax system" by vacating tax space without surrendering their underlying tax authority,[212] and by requiring that the First Nation tax be fully harmonized with the existing tax system as far as tax rates and methods of collection are concerned. As illustrated by the relevant Nisga'a legislation, with respect to the FNGST, this means that the First Nation essentially recognizes the Minister of National Revenue as the

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[210] Federal Government Stakeholder A, interview by author, 17 January 2013; Federal Government Stakeholder C, interview by author, 14 February 2013; and BC Government Stakeholder F, interview by author, 12 February 2013.

[211] AANDC, "Fact Sheet – Taxation by Aboriginal Governments," http://www.aadnc-aandc.gc.ca/eng/1100100016434/1100100016435 (last accessed 14 April 2013); John Graham and Jodi Bruhn, "In Praise of Taxes: The Link between Taxation and Good Governance in a First Nations Context," *Institute on Governance* (March 2008), p. 6.

[212] Graham and Bruhn, "In Praise of Taxes: The Link between Taxation and Good Governance in a First Nations Context," p. 6.

"administrative authority" in respect to the tax by assigning the Minister the ability to exercise First Nation tax powers on its behalf for the purpose of administering the tax (including the setting of rates), and enforcement.[213] Thus, in cases when the federal government is able ensure harmonization with existing taxes and to maintain its underlying tax authority, stakeholders from different departments have indicated that Canada is not philosophically opposed, and is generally willing to consider, creative tax solutions as a sweetener when negotiating the end of existing tax exemptions. As such, tax sharing arrangements have become a common feature of treaty-making,[214] even if Canadian tax structures and the basic tenets of fiscal federalism are territorial rather than citizen-based.[215]

In many ways echoing Bauböck's worry that treating rights-bearing communities differently reinforces the notion that they "don't belong to the community in whose midst they live," provincial stakeholders expressed concern that applying a citizen-based approach to TFN tax authority could aggravate an already challenging relationship with local government, as well fuelling speculation that the ideas underpinning this policy option were motivated by a desire to circumvent terms of the FFA.[216] While both of these issues reflect the general uneasiness that BC government stakeholders had regarding this funding strategy, it might be noted that the latter issue could be mitigated by treating this infusion of capital as Own Source Revenue with the expectation that a portion of it would be clawed back pursuant to calculations set out in an FFA.[217]

As hinted at above, cost to government is always a significant factor. Federal stakeholders have indicated that Canada would be unlikely to share anything approaching the 95% that they currently remit from in-territory taxation but, even at the 50% level that BC uses, the federal and provincial government would still be vacating

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[213] Tax Administration Agreement Between the Government of Canada Acting Through and Represented by the Minister of Finance and Nisga'a Nation, as Represented by the Nisga'a Lisims Government Executive, http://www.fin.gc.ca/activty/firstnations/fngst-tpspn-06-eng.asp (last accessed on 14 April 2013).

[214] Federal Government Stakeholder A, interview by author, 17 January 2013.

[215] Federal Government Stakeholder C, interview by author, 14 February 2013.

[216] BC Government Stakeholder A, interview by author, 31 January 2013; and BC Government Stakeholder C, interview by author, 31 January 2013.

[217] Federal Government Stakeholder A, interview by author, 17 January 2013.

significant tax space corresponding to appreciable losses in their own revenue sources. Moreover, as Canada is unlikely to make agreements in BC that would not be taken nationally, the potential loss of revenue from federal coffers would be far greater. It is also apparent that issues having to do with membership and self-reportage would make it difficult to monitor the system which would mean that employing this financial tool will require partner governments to be satisfied with a tax design that has vulnerabilities.

Notwithstanding the concerns noted here, as a *quid pro quo* for ending tax exemptions, this citizen-based financial tool is operable. While the non-territorial structure may be unique, it is philosophically aligned and not a radical departure from current practices with respect to tax sharing, and it presents a viable option for providing the additional revenue that First Nations will need to design and deliver programs and services to their off-territory citizens.

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Appendices

Appendix A.

Interviewees

Interviewees	
Federal Government Stakeholder A	Confidential Informant
Federal Government Stakeholder B	Confidential Informant
Federal Government Stakeholder C	Confidential Informant
BC Government Stakeholder A	Confidential Informant
BC Government Stakeholder B	Confidential Informant
BC Government Stakeholder C	Confidential Informant
BC Government Stakeholder D	Confidential Informant
BC Government Stakeholder E	Confidential Informant
BC Government Stakeholder F	Confidential Informant
BC Government Stakeholder G	Confidential Informant
First Nations Stakeholder A	Confidential Informant
Jim Aldridge	Aldridge & Rosling, Legal Counsel for the Nisga'a Nation
Kim Baird	Former Chief of the Tsawwassen First Nation
Michele Guerin	Guerin Tetreault & Associates Inc.
Tom Happynook	Hereditary Chief, Huu-ay-aht First Nation
Gwen Phillips	Director, Governance Transition, Ktunaxa Nation
Sophie Pierre	Chief Commissioner, BCTC; Former Chief of the St. Mary's Indian Band; Administrator for the Ktunaxa/Kinbasket Tribal Council
Mark Stevenson	Chief Negotiator of the K'ómoks First Nation; Legal Counsel for the Metlakatla First Nation; former Chief Negotiator for British Columbia
Gerald Wesley	Chief Negotiator, Tsimshian First Nations Treaty Society; Hereditary Chief of the Kitsumkalum First Nation; Wes-Can Advisory Services