The Anishinabek Nation Governance and Fiscal Agreements

Chippewas of the Thames First Nation Presentation
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1) **Is the Governance Agreement a true form of the Inherent Right to Self-Government?** No, the Governance Agreement is a limited form of recognition through translated rights (mainly contingent rights granted by the settler state).

2) **Is this agreement under the Inherent Rights Policy of the Canadian government?** Yes, there are several terms and conditions within the Governance Agreement that describes the central features of the Inherent Rights Policy.

3) **Are there other concerns to the exercise of inherent jurisdiction for the Participating First Nations?** Yes, the main concern is that your law-making powers are circumscribed by liberal values throughout the agreement. The federal government can only give you powers that it has and the division of powers has given considerable powers to the provincial governments. Like Bill C-92, you will need to negotiate with the province to ensure your self-determined civil/political rights are recognized by Ontario.

4) **How should self-government be better framed for the Pre-Confederation Treaty Beneficiaries?** My advice is to seek recognition of the Aboriginal title rights you continue to hold alongside the discussions with the Crown governments about resource revenue sharing in your legally recognized territories.
Question:

Why sign ANGA – aren’t there other Acts and authorities that my First Nation can opt into?
**GETTING OUT FROM UNDER THE INDIAN ACT AND FEDERAL LEGISLATION?**

<table>
<thead>
<tr>
<th>Language</th>
<th>Membership</th>
<th>UNDRIP</th>
<th>An Act to give effect to the Anishinabek Nation Education Agreement (Bill C-61)</th>
<th>An Act respecting First Nations, Inuit and Métis children, youth and families</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indigenous Languages Act</td>
<td>Indian Act (Bill S-3)</td>
<td>Bill C-262 An Act to ensure that the laws of Canada are in harmony with UN Declaration (UNDRIP)</td>
<td>A participating First Nation may, make laws respecting education that are applicable on its reserve...</td>
<td>Federal Rules, requirement to negotiate</td>
</tr>
<tr>
<td>providing adequate, sustainable and long-term funding for the reclamation, revitalization, maintenance and strengthening of Indigenous languages.</td>
<td>Amending presumptions and other provisions of status 6(1)(2)</td>
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**Anishinaabemowin** | **Edbendazijig** | **Governance** | **Education** | **Child Welfare** |

**ANGA’s First Nation Law-Making Powers**

- “preservation, promotion and development of culture and languages.”
- “rights, privileges and responsibilities associated with being Edbendazijig...”
- Written constitution
- Institutions
- Fiscal agreement
- The Charter
- Education agrm will be harmonized with the ANGA terms and fiscal chapter
- Must see how the AN law for child well-being works with Bill C-92 etc.
The Commission believes that the spirit and intent of the treaties requires the Crown to respect the inherent right of treaty nations to govern their own affairs and territories. Implicit in this principle, of course, is the right of treaty nations to enter into intergovernmental relations with the Crown to acquire the benefit of such agreements, and to incur their own burdens voluntarily.

RCAP, Volume 2 at p. 48
Example of a better fiscal agreement...

Chapter 18 OTHER PROVISIONS

18.1 – Own Source Revenues Contributions

18.2 Discussions between Canada and Crees re “expenditure base” for purpose of contribution

Schedule C

OSR should not create a disincentive for the Crees to generate revenue;

Not to be used to reduce Canada’s treaty obligations;

Shall not be deducted from the expenditure base....
The Anishinabek Nation
Entering the Anishinabek Nation

- The Anishinabek Chi-Naaknigewin is proclaimed by the Peoples identifying as the Anishinabek Nation, who in exercising their Sovereign, Inherent, and Treaty Rights, now establish and empower the Anishinabek Nation Government as their Traditional Government; [CN]
- Schedule A of the Anishinabek Nation Governance Agreement will list those First Nations that have ratified the ANGA.
- 4.3: Each First Nation will approve the Anishinaabe Chi-Naakinigewin no later than the date it ratifies this Agreement (Term of the ANGA).
Chi-Naaknigewin

• The Anishinabek Nation has the inherent right bestowed by the Creator to enact any laws necessary in order to protect and preserve Anishinaabe culture, languages, customs, traditions, and practices for the betterment of the Anishinabek (section 5.1).
• If the Grand Council decides to proceed and submit the proposed [Constitutional] amendment to each Anishinabek First Nation for approval, the Grand Council must obtain at least a majority approval by First Nation Council Resolution from the Anishinabek First Nations, in consultation with their citizens (section 9.3)
Leaving the Anishinabek Nation

10.1 A First Nation may be admitted to the Anishinabek Nation by a decision of the Grand Council confirming the addition. (Chi Naaknigewin)

Article 11 – Withdrawing of First Nations from the Anishinabek Nation

11.1 A First Nation may withdraw from the Anishinabek Nation by way of a First Nation Resolution notifying Grand Council of the withdrawal. (Chi Naaknigewin)

The ANGA is silent on withdrawal after ratifying it and being listed on Schedule A after the agreement is ratified by Canada. There are dispute resolution mechanisms that likely would be the tools required to leave the Nation.
11.7 Notwithstanding any other provision in this Agreement, a federal law in relation to peace, order and good government, criminal law, the protection of the health and safety of all Canadians, the protection of human rights or other matters of overriding national importance, prevails to the extent of a Conflict with a law of a First Nation or the Anishinabek Nation under this Agreement.

An Act to give effect to the Anishinabek Nation Education Agreement 7 A participating First Nation may, to the extent provided by the Agreement, make laws respecting education that are applicable on its reserve, as defined in subsection 2(1) of the Indian Act. (Bill C-61)
Powers and Authority
Enforcement Limitations

• Enforcement of “offences” under your laws can not have sanctions that are larger than “summary offence” sanctions: (s.787 cc or fine of $10,000, 6 months imprisonment...whichever is greater). (6.4)
• As an Alternative: “Anishinaabe sanctions that are consistent with Anishinaabe customs, culture, traditions and values, provided that such sanctions are proportionate to the seriousness of the offence and are not imposed on an offender without his or her consent.” (6.3)
• Not that much of concern with language, citizenship, governance laws but if you have more substantive (regulatory power) – this limitation is a big issue.
Federal Law continues

• Section 11.4 makes it clear that the following subject areas are of exclusive federal jurisdiction over the Anishinabek Nation:
  (a) Criminal law and criminal procedure
  (b) Labour relations and working conditions
  (c) Intellectual property
  (d) Aeronautics, navigation and shipping
  (e) The official languages of Canada

And provincial law may continue to apply (11.5/11.6)
Why the Division of Powers matters

- S.91(24) powers have been restricted through such tests as the “core” of Indianness protecting federal enclaves to refuting the doctrine of interjurisdictional immunity that once protected First Nation rights from provincial infringements; (see *Tsilhqot’n Nation* and *Delgamuukw* to see important contradictions in the purpose of this section)
- Canada and the Anishinabek are the parties to this agreement and the provinces (and their section 92 powers) are missing...
1993 Inherent Rights Policy

• Under the Inherent Right Policy, the Government of Canada’s recognition of the inherent right of self-government is based on the view that the Indigenous people of Canada have a right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and resources.

• Legally enforceable contracts can be used for setting out detailed, technical or time-limited agreements respecting the implementation of self-government arrangements. Finally, memoranda of understanding, which are not legally enforceable, may also be used to set out political commitments on self-government.
The Laws of the Anishinabek Nation

- Will exercise powers “in a manner consistent” with the Agreement (section 4.5)
- The powers will “evolve over time” (section 4.6)
- Law must be in writing and publicly available (4.7)
- English official registry with a discretionary Anishinabemowin registry (4.8)
- A defect will not void, invalidate or render a law unenforceable or a person no longer liable because of a mere defect in law (4.9)
First Nations Law

• There must be a written constitution that sets out: institutions and structures of government, exercise of law-making, various authority(ies) of the institutions of government; also must set out accountability between government and Edbendazijig; any delegation of law-making authority; appeals and other remedies re the application of FN laws; amendment procedures and conflict of interest procedures;

• Laws related to leadership selection, Edbendazijig; and culture and language may be enacted;
liberal values in the ANGA

• No present members under the Indian Act may lose Edbendazijig citizenship (5.14 & 5.15);
• All First Nations must maintain both an Edbendazijig list and Canada will likely maintain an Indian Act membership list if the membership/citizenship does not match (see 5.17);
• Anishinabek Nation and First Nations will now be governments that must comply with the Charter of Rights and Freedoms (Part I of the Constitution Act, 1982)
### Key Terminology (and some concerns)

| “**Grand Council**” means the law-making body of the Anishinabek Nation and is comprised of a Grand Council Ogiimah, Deputy Grand Council Ogiimak and a representative of each First Nation of the Anishinabek Nation, all of whom must be citizens of the Anishinabek Nation; |
| “**Anishinabek Nation**” means the collectivity of First Nations set out in Schedule A of this Agreement; |
| “**Anishinabek Nation Government**” means the government of the Anishinabek Nation represented by the Grand Council. |
| 4.1 The **Anishinabek Nation** is a distinct legal entity with the rights, powers and privileges of a natural person, including the legal capacity to…. |
| 4.14 The **Anishinabek Nation** has the power to enact laws with respect to the rights, privileges and responsibilities associated with being an Edbendazijig in the Anishinabek Nation. |
| 4.20 The **Anishinabek Nation** has the power to enact laws with respect to the preservation, promotion and development of Anishinabek culture and languages. |
| 5.29 Each First Nation may delegate, in whole or in part, a law-making power under this Agreement to the **Anishinabek Nation**. |
Specific Review of Terms
“Anishinaabe Institution” means a government institution established pursuant to a First Nation law or other authority, or an Anishinabek Nation law or other authority under this Agreement;

5.1 Each First Nation that ratifies this Agreement shall be a distinct legal entity with the rights, powers and privileges of a natural person, including the legal capacity to:

(a) enter into agreements or contracts;
(b) acquire, hold, lease or manage property or any interests therein;
(c) acquire, hold or dispose of bequests and gifts which are given to that First Nation;
(d) sue or be sued and to act on its own behalf in legal proceedings;
(e) hold, spend, invest, raise or borrow money, and secure or guarantee the repayment of money borrowed;
(f) apply to form corporations or other legal entities in accordance with federal or provincial laws;
(g) create, operate, contribute to, or otherwise deal with trusts and act as trustee;
(h) do such other things as are ancillary to the exercise of its rights, powers and privileges under this Agreement.
“First Nations’ Shared Responsibility” means the amount determined pursuant to the formula set out in the Anishinabek Nation Fiscal Agreement and used in the calculation of the Transfer Payment;

Interpretation

1.2 This Agreement is governed by, construed and interpreted in accordance with the laws in force in the Province of Ontario.

1.3 For greater certainty, the Federal Court has jurisdiction to hear questions in relation to the interpretation or application of this Agreement.
3.5 The fiduciary relationship between Canada and each First Nation will continue after the Effective Date.

3.6 As a First Nation exercises law-making power and other authority under this Agreement, fiduciary obligations of Canada to that First Nation will be as determined by jurisprudence respecting fiduciary relationships and fiduciary obligations.

3.7 The Canadian Charter of Rights and Freedoms applies to each First Nation Government and the Anishinabek Nation Government in respect of all matters within their authority.
14.2 This Agreement may only be amended in writing by the Parties.

14.3 The consent to any amendment will be effected in the following order:

(a) in the case of the First Nations and the Anishinabek Nation, by a Grand Council Resolution passed by a majority of the First Nations; and

(b) in the case of Canada, by order of the Governor-in-Council and, if required, the enactment of federal legislation giving effect to the amendment.

14.4 An amendment to this Agreement takes effect on a date agreed to in writing by the Parties.

15.5 Ratification of this Agreement requires a minimum of 25% plus 1 of a First Nation's Eligible Voters vote "YES" and those who vote "YES" represent a majority of those who voted.
<table>
<thead>
<tr>
<th>Miinigoziwin / “Inherent Jurisdiction”</th>
<th>Federal Inherent Rights Policy</th>
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<tbody>
<tr>
<td>Aboriginal title based governance</td>
<td>Indian Act powers and Reserves</td>
</tr>
<tr>
<td>Anishinabek Way of Life – principles, practice, customs and traditions</td>
<td>Subject based negotiations (language, governance, citizenship)</td>
</tr>
<tr>
<td>Established relationships in treaties</td>
<td>Binding terms of a contract will be interpreted by each Party;</td>
</tr>
<tr>
<td>The right to control territory</td>
<td>Rights restricted to reserves and citizenship (&quot;local matters&quot;)</td>
</tr>
<tr>
<td>The limits of the Indian Act need to be removed</td>
<td>We need something in place to protect interests in the status quo</td>
</tr>
<tr>
<td>The individual is self-actualizing source of rights (planted as Anishinabek by Creator)</td>
<td>The state and the Monarch are the source of rights – liberalism prevails</td>
</tr>
<tr>
<td>The people decide alongside ceremony</td>
<td>Consultation is limited, power/control</td>
</tr>
<tr>
<td>We have Creator’s principles Inakonigaawin</td>
<td>Charter or Rights and Freedoms</td>
</tr>
<tr>
<td>Sanctioned by Creator, treaties are sacred</td>
<td>Our courts, our Governments rule</td>
</tr>
<tr>
<td>Example: Edbendazijig teachings</td>
<td>Rights rather than responsibilities</td>
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