

REPORT 4:
FIRST NATIONS' GOVERNANCE
AND CLIMATE CHANGE

KEY ISSUES

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1.0 BACKGROUND

This report is the fourth in a series of position papers commissioned by the Assembly of First Nations (AFN) focusing on climate change and its effects on First Nations in Canada. This paper is intended to provide insight into the key governance challenges facing First Nations should they be interested in, or attempt to respond as governments to the challenges and opportunities presented as a result of a changing climate.

1.1 ASSUMPTIONS

This paper assumes that the reader is familiar with the four other papers presented in the “Climate Change and First Nations” series. Further, this paper is predicated upon the assumption that there is a consensus among the scientific community that climate change is a real and generally undisputed phenomenon, and that there will be impacts upon First Nations as a result of climate changes; impacts to which First Nations desire to respond as governments.

This is neither a legal review nor a legal opinion, but is meant as a general canvassing of potential challenges and issues regarding First Nations’ ability operate as governments and demonstrate effective governance leading to meaningful responses and decisions to minimise climate change impacts on First Nations people. Governance is thus defined in this paper as the ability to engage in and implement effective decision-making; it is “what human beings engage in so they can get more things done”.¹

¹ Stephen Cornell et al. “The Concept of Governance and its Implications for First Nations”, NNI/Harvard Project Joint Papers, 2004-02.

2.0 FIRST NATIONS' GOVERNANCE CONTEXT

The goal of most First Nations is to be self-governing, a goal that First Nations, in most cases, in Canada have not yet attained. In order to engage in effective environment-related governance First Nations must have at least three components in place: the legal authority to enable them to enact environmental laws, policies and other measures; a short, medium, and long-term vision of their Nation's sustainability; and the capacity to effectively translate their authority and vision into meaningful and sustained action.²

There are many barriers to achieving these components of effective First Nation governance, most of which are systemic and long-standing. First Nations have been disposed of their lands and rights since Canada was first colonized. They have had to expend precious time and resources in sometimes decades long negotiations and court battles in order to achieve the just settlement of land and other promises made by the Crown in the last two centuries. For many years, cultural eradication was the primary policy thrust of the federal and provincial governments. Only recently has the federal government acknowledged some of the devastating effects of its paternalistic and racist approach to First Nations; finally, it has agreed to compensate victims of residential schools. Despite this, First Nations' cultures have, in many cases, been left in disarray, with First Nations left to rebuild their histories, re-establish their governance structures, and resist the further loss of their languages and cultural practices with little or no support from the governments who occasioned the loss.

While First Nations have made much progress in reclaiming both their past and a future of First Nation sustainability, it has generally not been with the support of federal or provincial governments. The Crown has a fiduciary obligation to First Nations because it holds ultimate title to First Nation lands; this places it in a trust relationship with First Nations and requires it to deal with First Nations in a way that is in the best interests of the First Nation. The plethora of decisions of the Supreme Court of Canada dealing with instances of Crown failure to discharge their fiduciary obligations indicate that this obligation has been observed more in the breach than anything else.

It often appears that the Crown tends to view the fiduciary obligation it has towards First Nations as a burden to be discharged rather than an opportunity to work in partnership with First Nations. Most decision-making, even that related directly to the lives of First Nation peoples or

² CIER, Environmental Excellence Vision Report, 2006.

regarding their lands and waters, continues to occur without First Nation involvement. Governments do not acknowledge First Nations as true equal governments; First Nations are regularly treated as “stakeholders” to be consulted with at later stages of Crown decision-making.

This lack of First Nation involvement is particularly apparent regarding decision-making in the environmental realm. As environmental jurisdictions are shared between multiple levels of government, and tend to deal with physical matters (land or water-related issues such as resource allocation, wildlife conservation, etc.), the realities noted above have resulted in the exclusion of First Nations in environmental decision-making.³ In terms of determining and implementing the best means (i.e. of impact prediction, or mitigation or adaptation measure identification and implementation) to address climate change, there are extraordinary coordination challenges that exist. All orders of government have critical roles to play, each of which requires some degree of harmonisation with the other in order to achieve meaningful progress. This, overlaid with First Nations’ issues, concerns, and needs discussed above, has resulted in significant decisions being made without First Nation involvement. Canada’s plan for honouring its Kyoto commitment, “*Project Green - Moving Forward on Climate Change*”, was developed without First Nation involvement and does not include First Nation governments in its commitment to working with all orders of government in Canada to meet Kyoto commitments. Both climate changes, and the measures adopted by governments to address climate changes, have the potential to negatively affect the constitutionally recognised and protected rights of First Nations peoples, yet First Nations are not meaningfully involved in decisions.

Without an implemented commitment, particularly a financial commitment, from the federal and provincial governments to meaningfully involve First Nations in creating and implementing climate change solutions, First Nations have very limited ability to respond effectively to predicted climate changes. This is due to a number of factors, but most notably, the lack of clearly defined roles and jurisdictions vis-à-vis First Nations regarding climate change (discussed in greater detail in section 3.2 below), and the inability of First Nation governments to generate significant levels of their own income (for example, through a meaningful scale of economic development) that could be used for mitigation or adaptation measures.

³ There are some exceptions. For example, First Nations are more involved than is usually the case in some of the deliberations and decisions being taken under the *Species at Risk Act* (such as through participation in the albeit advisory functions of the National Aboriginal Committee on Species at Risk).

These are but a few of the challenges requiring attention in order for First Nations to be meaningfully engaged in climate change mitigation and adaptation at the local, national and international levels.

2.1 CLIMATE CHANGE IMPACTS AND FIRST NATIONS' GOVERNANCE

“First Nations have inherent rights that are constitutionally recognized and protected, including the right to hunt, fish, and gathering in our traditional territories. Our ability to pursue and enjoy our rights will be undermined by climate change. A failure to address the causes of climate change constitutes a failure to protect our rights.”

- AFN National Chief, Phil Fontaine

Given the realities described in the above section, the impact of uncontrollable and largely unpredictable environmental changes on the ability of First Nations to govern themselves effectively will be challenged, in some cases quite dramatically. Sea level rises that may force a First Nation to relocate their community will challenge every governance system within the community. From the ability of the First Nation to reach a consensus decision of its members regarding the selection of new, appropriate land, to the capacity of the First Nation administration to process the legal, financial and reporting requirements associated with compensation, all systems will be challenged.

All of the following examples describe other changes in ecosystems that create or exacerbate existing First Nation governance challenges:

- Decreased availability of traditional foods resulting in increased reliance upon store-bought foods with the attendant health care, shipping, and garbage disposal considerations;
- Decreased availability or predictability of access to energy resulting in the need to find, secure and pay for alternative energy supplies;
- Decreases in water quality or quantity resulting in the need for changes to health care scope and delivery, water and sewage delivery and treatment infrastructure, housing construction and maintenance;
- Increasing temperatures resulting in reduced access to winter roads creates the need for governments to find and pay for alternative methods transporting goods and materials,

increased focus on emergency response planning given uncertain environmental conditions;

- Decreases in availability of species hunted, fished, or trapped through the exercise of Treaty and Aboriginal rights resulting in the need for the First Nation to negotiate mitigation or compensation measures and engage in protection activities to maintain the level of exercise of the right.

Already over-burdened First Nations could spend an inordinate amount of time addressing climate changes only to find adaptation insurmountable. This could result the loss of rights and other critical elements of First Nation existence. The capacity of First Nation governments to address these impacts without total reliance upon non-First Nation governments could allow them to define and implement responses that are more meaningful and effective given the unique circumstances faced by First Nations. The need for effective First Nation governance is critical to addressing climate changes facing First Nations.

2.2 GOVERNANCE FRAMEWORK

Stephen Cornell, of the Native Nations Institute for Leadership, Management and Policy (NNI) and the Harvard Project on American Indian Economic Development (Harvard Project), and his co-authors have written that the most reliable indicators of development success on American Indian reservations were most related to the powers, organisation, and quality of the Indigenous government. In particular, the following were crucial requirements to effective governance:

- Indigenous nations must possess real decision-making (“practical sovereignty”);
- There must be functioning institutions that encourage the investment of time, ideas, energy and money into the nation’s future (“capable governing institutions”);
- There exists a ‘goodness of fit’ between the way that governing institutions exercise authority and the culture of the indigenous peoples being governed (“cultural match”)
- The First Nation must possess the ability to think, plan, and act with a long-term vision of the nation’s future (“strategic orientation”);
- Persons who consistently act, and persuade others to act, in the First Nation’s interest instead of their own must exist (“leadership”).⁴

⁴ *Ibid*, page 7.

CIER has chosen to analyse each aspect of effective governance as proposed by Cornell in terms of First Nations current state of readiness to respond to climate change impacts. While there are other models or approaches to describing and analysing governance, all of which may be useful or valid for further review or study, the Cornell analysis was chosen because of its cogent, well-researched and straight-forward treatment of governance issues. It is based upon the realities of First Nation communities in both Canada and the United States and has been the subject of critical review. Despite this, it is merely one analytical framework among a number of important analyses of First Nations' governance realities, and others could (and should) be studied and applied in the climate change context.

2.3 PRACTICAL SOVEREIGNTY

While progress in defining and implementing environment-related governance authorities is being made, most existing authorities do not allow First Nations to do the things that as governments they need to do in order to address climate change impacts and benefit from any opportunities that may result. Major decisions are usually made elsewhere and the First Nation essentially implements or administers the decision. This is the case regarding policy level environment-related decisions, and particularly so regarding climate change policy initiatives, which tend to be made in Ottawa.

2.3.1 *Indian Act* Authority

In terms of climate change, First Nations do not have many of Cornell's above-noted indicators of development success currently in place. Their ability to engage in real decision-making, what Cornell calls "practical sovereignty" is limited because they do not have the authority, or have not directed the authority they have towards environmental governance, and in particular, to addressing climate change issues. Most First Nations operate under the authority of the *Indian Act* ("the Act"), a federal law that does not reflect the capabilities or needs of First Nations communities or governments. Under this legislation, First Nations have minimal authorities, even regarding internal matters or those of a purely local nature. The Act certainly does not give First Nations governments the comprehensive tools they need to exercise effective governance, to foster economic growth and development, or to discharge their environmental stewardship responsibilities.

2.3.2 Self-Government Agreement Authority

Some First Nations have or are negotiating self-government agreements, and while they are much more expansive in their recognition of First Nation authority to develop and implement

laws and other measures to protect the environment, they have crucial limitations if being contemplated to assist in addressing climate change. First, the environmental authorities tend to be project-focussed, for example they address the authority to develop or implement an environmental assessment process. While this is helpful, it does not allow for the consideration of high level policy issues that arise before project decisions are made, nor does it recognise that climate change impacts tend to be small when considered on a project-by-project basis. Regarding climate changes, it is the accumulation of the impacts of numerous projects that discharge greenhouse gases over decades that creates a measurable impact. Project-by-project environmental assessment tends not to capture these long-term far-reaching climate effects.

Second, environmental authorities, even broad based authorities like the Nisga'a authority to make laws in respect of environmental protection⁵, have limitations that constrain Indigenous governments to respond effectively to climate change. In the Nisga'a example, their authorities are limited to being applicable on their First Nation lands only. But, given that First Nations' contributions to greenhouse gas (GHG) production is negligible⁶, most mitigation efforts (such as regulating / limiting GHG discharges) need to be directed at activities that are not occurring on Nisga'a lands; yet, Nisga'a authority does not extend to those regulate those activities. In fact, in most of these situations, the legal or policy position in support of the development (for example, an economic development goal in the region) would be in conflict with a Nisga'a goal of mitigating climate change (through regulating GHG production activities occurring off their land). And, federal and provincial laws are paramount over conflicting Nisga'a laws⁷ at any rate, which further limits the ability of the Nisga'a to respond to situations involving broad climate changes.

⁵ Section 11 of the Nisga'a Final Agreement (1999) provides:

Except as otherwise set out in this Agreement, Nisga'a Lisims Government may make laws in respect of environmental protection on Nisga'a Lands, including discharges into streams within Nisga'a Lands.

⁶ NRCAN cite

⁷ Section 11 of the Nisga'a Final Agreement (1999) provides:

In the event of a conflict between a Nisga'a law under this paragraph and a federal or provincial law, the federal or provincial law will prevail to the extent of the conflict.

2.3.3 Other Legislated Regimes

Some First Nations are choosing alternative regimes to enable them to manage their land and resources. For example, authorities available to First Nations under the *First Nations Land Management Act*⁸ allow them to, among other things, enact laws for “the development, conservation, protection, management, use and possession of First Nation land”⁹. This authority could include creating and implementing laws regulating and enforcing greenhouse gas emissions reductions or other mitigation measures on First Nation lands. But, these initiatives face many of the same challenges and limitations regarding climate change measures as land claim agreement authorities face.

The proposed *First Nations Commercial and Industrial Development Act* (FNCIDA) is another relevant initiative that is aimed at closing the component of the regulatory gap that exists on reserve that serves to limit industrial and commercial development. Through this legislation, qualifying First Nations will be able to incorporate provincial regulations into an on-reserve regime to regulate commercial and industrial development. At the project level, if a province has climate change-related regulatory structures, then a First Nation could choose to incorporate those into their on-reserve legal regime given that many large-scale industrial or commercial activities are heavy producers of GHGs. But, given that the goal of the FNCIDA is to address the shortcomings of the *Indian Act* that limit large-scale commercial and industrial development¹⁰, it is uncertain and unlikely that FNCIDA will be used to restrict or limit GHG producing activities, even if there were adequate provincial regulations that could be used in this regard.

2.3.4 Effects of Limited Climate Change-related Authorities

As noted above, First Nations ability to engage in real decision-making regarding climate change is limited. This reality has the potential to have disastrous effects on First Nations when considering the predicted impacts of climate change. Few First Nation governments in Canada could currently agree with most or all of the following statements:

- We elected our leadership based upon (or at least partly based upon) their stated commitment to dealing with climate change;

⁸ *First Nations Land Management Act*, 1999, c.24.

⁹ *Ibid*, section 20(b).

¹⁰ First Nations Commercial and Industrial Development Act website, as of March 23, 2006.

<http://www.fncidi.ca/regulatory.html>.

- We have a law that addresses our authority to implement and enforce measures to mitigate or adapt to climate changes;
- There is a law that clearly requires us to be involved in outside (non-First Nation government or community) decisions aimed at mitigating or adapting to climate changes;
- We have the necessary institutions in place in our community to engage in research needed to understand how climate change may impact our community;
- We routinely educate all of our members about climate change;
- We allocate financial and human resources each year to mitigating or adapting to climate change;
- Our long-term planning integrates climate change considerations and responses, for example:
 - Our community plan or infrastructure plan indicates that possible climate changes have been factored into projections regarding infrastructure renewal times and costs;
 - Our community plan or health plan indicates that possible climate changes have been factored into the provision of our community health services, etc.

Cornell indicates that one of the key tasks for First Nations in moving towards genuine self-governance is to “advance their inherent governing powers by building up and expanding their own jurisdictional reach”, rather than just accepting the jurisdictional powers allowed by other governments.¹¹ First Nation inherent right-based authorities may be asserted to begin to address climate change. But, because there has been an almost complete lack of recognition of climate change as a rights issue, First Nation climate change responses to date have not included clarification of the rights that may be impacted by climate changes, nor the rights that may be relied upon to assert climate change-related authority. As well, governance authorities may be threatened by the loss of rights themselves, such as through losses of traditional territories submerged as sea levels rise.¹²

In addition to directly impacting the ability of First Nations to exercise their rights to govern themselves (through, for example, decreases in economic opportunities hampering the ability to

¹¹ Cornell (2004-02) page 14.

¹² See Report 1 – An Introduction to the Science of Climate Change, pages 18 – 19.

sustain the community, level of attention that must be directed at dealing with emergency events, etc.), climate changes may also impact other rights as set out in Table 2-1 below.

Table 2-1: Examples of Potential Climate Change Impacts on Aboriginal or Treaty Rights

<i>Example of Potential Climate Change Impact¹³</i>	<i>Rights Potentially Impacted</i>
Changing water levels and flows resulting in regional competition for water resources	Water ownership and use
Changing temperatures resulting in changes in availability and accessibility of transportation routes	Transportation and navigation Trade
Changing temperatures and rainfall resulting in ecosystem alterations that impact species distribution and availability	Environmental management Hunting, fishing, trapping, gathering, harvesting
Changes in ecosystems or transportation affecting availability of healthy food or traditional medicines	Health

It is important for First Nations to articulate not only rights that may be impacted or relied upon for jurisdiction to address climate change, but also what the Supreme Court of Canada has referred to as “incidental rights”.¹⁴ Many treaty and Aboriginal rights require the protection of activities, places, structures, tools that are utilised when implementing the right, such as protection of the cabin structure constructed and utilised by a trapper or hunter. For example, adequate water flows could be characterised as necessarily incidental to the implementation of fishing rights. Effective First Nation climate change-related governance could be based upon the right to ensure the maintenance of adequate water flows.

2.3.5 Expanding Jurisdictions

Expanding jurisdictional reach may be accomplished through engaging in litigation aimed at proving the existence of climate change-related authorities. Litigation could address the following impacts experienced by First Nations:

¹³ See generally Report 1 – An Introduction to the Science of Climate Change for detailed information on these and other predicted climate changes.

¹⁴ cite

- The systemic neglect of treaty and Aboriginal rights issues in climate change policy deliberations and the articulation of causes, impacts, and mitigation and adaptation measures and alternatives;
- The systemic failure to consider and protect First Nation lands through persistent lack of clarification regarding responsibility for key areas affected by climate change (for example, water and water management, especially at the watershed level), and a further refusal to harmonise responsibilities between First Nations and governments in order to address climate change matters;
- The lack of consultation and accommodation regarding numerous initiatives that have resulted in significant additions of GHG to the atmosphere which have impacted treaty and Aboriginal rights in an unjustified manner;
- Climate change impacts have resulted in compensable damage for impacts to treaty and Aboriginal rights;
- The lack of articulation of the linkages between government-approved development activities and climate change impacts on First Nation rights; and,
- The failure of the Crown to discharge its fiduciary duties to First Nation people regarding the protection of their rights and interests that may be impacted by predicted climate changes.

One of the challenges is that “climate change jurisdictions” are usually just the exercise of existing jurisdictional powers applied with the view to addressing climate change issues. The following are some authorities that First Nations currently lack, resulting in either limited or no ability to respond to predicted climate changes:

- The power to limit GHG production and require and enforce mitigation measures on a project basis (project licensing authority);
- The authority to require the completion of regional environmental assessments identifying and addressing cumulative climate change-related impacts of development (project licensing authority);
- The authority to require the production of regional strategic environmental assessments identifying the predicted climate change impacts from proposed policies, plans or programs (environmental policy-making authority)

- The authority to require the payment and use of taxes or fees for climate change adaptation measures (financial authority);
- The ability to own and trade carbon credits (property rights); and,
- The authority to require identify and enforce measures to protect those areas of the natural or human environment that will be, or may be, impacted by climate changes such as water resources allocations, emergency response measures, natural resources management measures (planning, permitting and enforcement authority).

First Nations are limited in ways to enlarge or expand the authority the First Nation currently exercises, even if necessary to address climate changes. A First Nation could interpret existing set of health, natural resources, education or other responsibilities it has (whether currently policy or legislation-based) as including responsibilities to ensure climate change mitigation and adaptation measures relevant to their First Nation are carried out. It would be important for the First Nation to articulate those thoughts and work on developing the more comprehensive definition of it's responsibilities.

A negotiated or cooperative approach may be used to expand authorities. Further to this, in May 2005, the AFN and the federal government signed the "*First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nations' Governments*" ("the RIFNG Accord").¹⁵ A consensus of a vision of a relationship between First Nations and Canada based on recognition of rights was affirmed in the Accord. The purpose and intent of the RIFNG Accord is:

...to commit the Parties to work jointly to promote meaningful processes for reconciliation and implementation of section 35 rights, with First Nation governments to achieve an improved quality of life, and to support policy transformation in other areas of common interest...

The RIFNG Accord affirms and relies upon a number of principles, and in terms of climate change, the following are particularly instrumental:

- Recognition that the Inherent Right of Self-Government and Aboriginal Title are rights recognised by the Constitution Act, 1982;

¹⁵ "A First Nations - Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments" available as of March 24, 2006 at <http://www.afn.ca/cmslib/general/PolAcc.pdf>.

- Strong First Nation governance is key to improved quality of life for First Nations;
- Traditional forms of government, First Nation languages and traditional teachings¹⁶ are key to implementing effective First Nation governments;
- First Nations have a special economic, social, cultural and spiritual relationship¹⁷ with the land, which includes responsibility for environmental stewardship.¹⁸

This move towards cooperative implementation of section 35 rights is a positive and long overdue development. If the above principles are relied upon and considered in the context of their relationship to climate change authorities and needs, then many of the current decision-making challenges faced by First Nations can be mitigated and real environment-related governance progress can be made.

2.4 CAPABLE GOVERNING INSTITUTIONS

Sound First Nation governance and strong institutional capacity are important to establishing stable and accountable First Nation governments that are reflective of and responsive to their citizen's needs and values.¹⁹ Sound governance serves as the foundation for making progress in improving the quality of life of First Nations. As a result, a key commitment of the federal government is to encourage sound governance in First Nations by supporting institutional capacity and clarifying respective roles and relationships.²⁰

2.4.1 Bureaucratic Capacity

While implementation of the RIFNG Accord will be key to clarifying responsibilities, it will lack real meaning without the existence of capable supporting institutions that can ensure the effective implementation of those responsibilities. Indeed, a competent bureaucracy is necessary in order for First Nations to implement the decisions of their governments. This includes institutions with responsibilities related to climate change research and impact identification, mitigation and adaptation that are able to:

¹⁶ The importance of traditional teachings are further discussed in Report 2, sections 3.2 and 3.3.

¹⁷ See Reports 2 and 3 of this series for greater discussion of this concept.

¹⁸ *Ibid.*

¹⁹ Canada's Performance, "Annual Report to Parliament: Report of the President of Treasury Board, 2005". Available as of March 23, 2005 at http://www.tbs-sct.gc.ca/report/govrev/05/cp-rc10_e.asp.

²⁰ *Ibid.*

- Attract, develop and retain skilled personnel;
- Protect an effective civil service from political interference;
- Establish bureaucratic processes and policies that ensure decisions are implemented.

Currently, many First Nations do not have institutions that are capable of implementing most climate change-related measures. There are no national or regional First Nation institutions dedicated solely, or even primarily to climate change impact identification and research.²¹

Current staff positions in First Nations are directed primarily at the administrative discharge of INAC or Health Canada responsibilities, and as such, have little or no responsibility to address any aspect of climate change.²²

At the Special Chiefs' Assembly in May 2005, the Assembly of First Nations presented "A Proposed Framework to Advance the Recognition and Implementation of First Nation Governments", identifying that the following six areas may require capacity development in order to be able to implement First Nations' governance visions: legislation, judicial, management and administration, program governance, capital and facilities management, and accountability.²³ Climate change considerations will need to be reviewed in each of these areas in order for First Nation governments to be able to respond meaningfully to climate change governance challenges.

2.4.2 Information and Skills

Information is key to effective decision-making; it is required to properly inform key decisions, in particular day-to-day decisions. In terms of climate change, there are at least the following key information needs:

- Identification of climate change impacts, including environmental, social, economic, cultural, legal, and governance impacts, on First Nations in all parts of the Canada is

²¹ As discussed in previous reports in this series, there is also little reference to First Nations and climate change in the key government departments charged with addressing climate change i.e. Environment Canada and Natural Resources Canada.

²² For example, there are no climate change-dedicated offices on-reserve, FNLMA communities are not yet dealing with this issue. Environmental Health Officers (Health Canada-funded position) and Environment Officers (INAC-funded position) do not deal with climate change issues (even as far as administrative discharge of federal responsibilities to First Nations regarding climate change).

²³ Assembly of First Nations powerpoint presentation entitled "A Proposed Framework to Advance the Recognition and Implementation of First Nation Governments", Special Chief Assembly, March 19 – 21, 2005.

needed. There is an ad-hoc approach to government programming aimed at identifying climate change issues facing First Nations, and there are no First Nation-driven, climate change-focussed research strategies or comprehensive initiatives. There is a need for information regarding:

- Identifying and monitoring short, medium and long-term climate change impacts;
 - Articulating mitigation measures that have the primary purpose of minimizing future climate changes on First Nations;
 - Developing a range of alternative scenarios of possible adaptation measures for First Nations;
 - Monitoring, follow-up, and reporting regarding the effectiveness of mitigation and adaptation measures;
 - Management tools that can be used or modified, or new tools that can be developed, by First Nations to assist them adapt to climate change (such as environmental management systems frameworks, emergency response plans, integrated community plans);
 - Economic development related measures and strategies needed by First Nations to benefit from or address climate change (taxation structures, carbon credit ownership or benefits-sharing mechanisms, legal regimes);
 - Innovation and technological advances are required to mitigate and adapt to climate change, and it is feasible that First Nation situations may require specialised responses. Information and solutions are needed.
- Participation: First Nations have a right to participate in climate change policy development arenas, but despite this, national and international involvement is limited and inconsistent. In order to ensure meaningful First Nation mobilisation, networking, and information-sharing, a national integrated approach to First Nation involvement in climate change policy deliberations is needed. Through this approach, deliberations regarding cross-cutting issues (that is, issues that each have a relation to climate change in some fashion) such as endangered species protection, project level environmental assessment, and pollution prevention could be dealt with in an integrated fashion. There remains a barrier at the First Nation community level in that climate change policy development tools are currently somewhat limited at grassroots level, but an integrated approach to

addressing climate change policy issues would ensure continuous development, and the minimisation of ad-hoc approaches to engaging First Nations in climate change deliberations. Sharing of information on climate change policy discussions is key to this kind of involvement, and increased federal and provincial transparency is critical to achieving this.

- Indigenous Knowledge (IK): IK is a key information source that informs First Nation decisions, articulates values, makes environmental and other forms of predictions, determines processes, and provides context. IK is crucial in terms of identifying climate change impacts, developing mitigation and adaptation strategies, and engaging in monitoring and follow-up efforts regarding implementation of these strategies.

In addition to adequate information, First Nation governments require employees with appropriate education, training, and skills in order to be able to implement governance decisions. In 2004-2006, over 400 First Nations people, organisations and communities took part in over 100 dialogue sessions focussed upon defining their environmental needs and priorities. In terms of governance-related needs, First Nations reported their top nine needs as listed in Table 2-2, below. The number one priority was stated as the need research, education, and information regarding integrated comprehensive community planning directed at setting out a long-term vision for their First Nation sustainability.²⁴

²⁴ CIER, 2006.

Table 2-2: Governance Needs of First Nations (CIER, 2006)

1: Comprehensive community planning	6: Emergency preparedness and response
2: Environmental Management Systems	7: Environmental impact assessments
3: Approaches to public consultation	8: Environmental site assessments
4: Assessment of risks and alternatives	9: Biophysical inventories
5: Legislative and policy gap options	

In these dialogue sessions, First Nations also indicated that to make significant and meaningful progress towards achieving sustainability, they need research, education, and information regarding the priorities areas listed in Table 2-3, below.

Table 2-3: Sustainability Needs of First Nations (CIER, 2006)

1: Sustainable resource use	6: Climate change
2: Pollution prevention	7: Sustainable land use
3: Environmental health	8: Alternative energy
4: Sustainable water use	9: Sustainable development
5: Conservation and protection	10: Housing and green building

In the face of these needs, there are too few First Nation people with the necessary environment-related education and training to engage in a meaningful research, planning, or monitoring response to climate change. The percentage of Aboriginal people graduating from science and environment-based programs is about 6 percent in the trades and non-university certificate programs and about 9 percent in the university certificate and degree programs.²⁵ Similarly, regarding environmental training, inadequate training (i.e. required skills and

²⁵ Building Environmental Aboriginal Human Resources, “Round Table Discussion Paper” <http://www.beahr.com/documents/roundtablediscussionpaper.pdf>, page 6.

knowledge) was identified by the environment industry as a key barrier to employing Aboriginal people.²⁶

While some First Nations have environmental personnel, there is no First Nation civil service operating at the regional or national level that is charged with comprehensively implementing or coordinating environment-related governance decisions. Some First Nations that work in tribal councils or treaty offices have personnel that have responsibility for certain environment-related tasks or duties, but these people do not deal comprehensively, if at all, with climate change and they tend not to be integrated with similar focussed positions in other regions or at the national level.²⁷ While this situation may be sufficient to address the purely local nature of certain aspects of climate change (for example, issues regarding on-reserve project approvals), this is not adequate other key elements required to respond to climate changes. Given the geographical scale of the issue, its linkages with other large-scale environmental issues (such as watershed management, air quality, etc.), and the complex inter-jurisdictional nature of climate change management needs, a comprehensive, coordinated approach is needed. This lack of qualified personnel, responsible at numerous levels for key aspects of First Nation climate change responses, results in:

- Limited communication of, and therefore awareness of, climate change issues and concerns in common at the regional or national level;
- Lack of opportunities to share experiences and information dealing with, and more importantly responding to climate change;
- Loss of opportunity to create and implement coordinated, more broadly-based climate mitigation and adaptation initiatives;
- Loss of opportunity to create harmonised, or at minimum non-conflicting, regional policy responses to climate changes.

2.4.3 Resources and Technology

First Nations require a massive influx of financial resources in order to:

²⁶ *Ibid*, page 6.

²⁷ The Aboriginal and Northern Community Action Program (ANCAP) funds one “energy pathfinder” position in each province, plus one at the national level. While this is a welcome development, it is not a governance-focussed fund, but deals more with on-the-ground alternative energy initiatives. It could be easily coordinated with or supportive of, governance-focussed climate change initiatives.

- Address their jurisdictional, bureaucratic capacity, and information and skills needs;
- Develop and use innovative technologies, particularly those that would be necessary to creatively and effectively:
 - Identify climate change impacts as they uniquely affect First Nations (for example, through the creation of technologies, methods, processes that are specialised for First Nation remote application or that concretely use Indigenous Knowledge)
 - Mitigate the creation of future climate changes, particularly in a fashion that creates economic opportunities for First Nations (for example, through promotion of research and development of renewable energy technologies by First Nations)
 - Adapt to climate changes, especially in a fashion that allows for the greatest retaining of traditional lifestyles and First Nation cultures.
- Ensuring compliance, enforcement, and monitoring of climate change initiatives and measures regulated by First Nations; and,
- Resources to build relationships and, where appropriate, harmonize communication, regulatory approaches, research agendas, and education and outreach initiatives with governments and organisations located or having jurisdiction beyond First Nation reserve lands.

2.5 CULTURAL MATCH

Cornell identified that the most effective First Nation governance was characterised by a high level of “cultural match”, meaning the First Nation governance institutions and people within them were seen by those being governed as exercising their authority in a way that was culturally-appropriate. As a result, these First Nation governments were accepted as legitimate, and initiatives, rules, and decisions they made received the support of their communities (even if those initiatives, rules, and decisions were controversial where elements of the community disagreed with the action of the government).²⁸

First Nations governments may be required to make a number of difficult decisions in order to meet the long-term best interests of their communities in the face of even the least significant of predicted climate change impacts. These types of decisions could include:

²⁸ Cornell, 2004.

- Limiting or prescribing the form that economic development may take in the First Nation to ensure that it minimises, to the greatest extent possible, the creation of climate change impacts (i.e. the creation of GHGs);
- Promoting the development of economic opportunities aimed at alternative energies rather than GHG-producing energies;
- Implementation of a taxation regime in order to fund effective responses to climate changes, including:
 - Participation in national and regional policy dialogue;
 - The creation of adaptation mechanisms and technologies;
 - Negotiation of mitigation measures with non-First Nations GHG producers;
- Asserting legal strategies to protect treaty and Aboriginal rights that may be impacted by climate changes;
- Imposing compliance, enforcement and penalties regimes to ensure critical adaptation measures are implemented (i.e. implementation of protected areas and species legislation etc.);
- Implementation of mechanisms for resolution of disputes²⁹ related to climate change, including:
 - Carbon credits ownership and distribution of benefits;
 - Financial and other responsibility for climate change impacts and mitigation measures;
 - Competition regarding land uses that have potentially different levels of impact on climate change (i.e. oil and gas extraction vs. forestry);
 - Most appropriate choice of alternatives (regarding mitigation or adaptation); and,
 - Prediction of impacts and risks.

These decisions are potentially controversial because at their heart lies the potential for conflict resulting from competing value systems. The most predictable conflict relates to the difference in perspectives regarding the sanctity of natural resources and the use of the natural

²⁹ *Ibid*, page 13. Cornell states “The most effective dispute resolution mechanisms are well insulated from other functions of government and from other elected officials such as legislators”.

environment to generate wealth. This conflict can be exacerbated if the wealth that is produced flows primarily to individuals or groups within the community rather than the community as a whole.

Related to this is a potential difference in viewpoint in the relative importance of environmental stewardship responsibilities as compared to economic development and employment needs within the First Nation. This difference, where it exists, is usually seen between First Nation Elders and the elected community leaders charged with ensuring the economic prosperity of the First Nation and its members. This difference is usually evidenced in a lack of common definitions of key decision-making terms (especially when these terms are English language based). Terms such as “significance”, “sustainability”, “impact”, “threshold”, “sustainable development” must be clearly articulated to ensure that they clarify alternative choices and options rather than mask competing values within the community.

Further, the existence of a vibrant non-government, citizen-based voice within the community could be the source of cultural mismatch. It can depend on if the governing bodies accept and even encourage the role of these groups within the community, and if the First Nation sees them as a legitimate voice in a democratic process or a disrespectful challenge to a representative leader entrusted to make decisions for the people.

Ensuring a cultural match in First Nation governance is critical in terms of mitigating and adapting to climate change given the long-term nature of the issue. Without this consideration at the forefront of governance discussions the likelihood of conflict over competing values and approaches increases, and the chances of meaningful changes in behaviour decreases.

2.6 STRATEGIC ORIENTATION

Cornell describes strategic orientation as the ability to think, plan, and act with a long-term vision of the First Nation’s future existence. First Nations have struggled for many years to be able to determine their destinies through development and implementation of long-term visions of sustainability for their peoples and lands. Since colonization, this struggle has been almost continually undermined or impeded by governments at the federal and provincial levels, industrial and resource developments, the courts, and the weight of a largely ignorant public opinion. The list of impediments faced by First Nations wishing to think, plan, and act with a long-term view is extensive and includes at least the following:

- Lack of fulfillment of many treaty promises, particularly those related to land entitlement, resulting in limited access to the land needed to implement most visions of economic development;
- Implementation of disempowering legislation, such as the *Indian Act*, which severely limits First Nations recognised authority to engage in self-directed sustainability efforts, and imposes short-term timeframes on the terms of office of First Nation elected leadership;
- Assimilation policies which redirect the focus of the First Nation away from its community vision and remove the cultural foundation for its future;
- Systemic refusal of non-First Nation governments to recognise and protect treaty and Aboriginal rights (despite the constitutional status of these rights);
- Government created financial mechanisms, such as capital funding formulas and agreements, which force the First Nation to continually operate on a short-term planning, implementing, and reporting schedule;
- Lack of resources for First Nation to engage in the foundational work necessary to engage in long-term planning, and the monitoring necessary to implement, review and adapt plans over time (in order to ensure their effectiveness); and,
- Lack of resources, information, and the skilled personnel necessary to implement most decisions (particularly those decisions related to environmental management).

Despite a cultural and spiritual traditional viewpoint held by many First Nations that requires them to make-decisions that take into account the needs of seven generations³⁰, the above factors make it very difficult for many First Nations to discharge those decision-making responsibilities in the manner required by their cultures.

Regarding climate change specifically, First Nations are further plagued by a refusal of most governments (in some cases, even their own) to view or recognise climate change as a governance issue. Therefore, climate change considerations, even those directly related to the ability of the First Nation to govern itself (such as loss of land base due to flooding, sea level rises, or erosion), do not become an integral part of most decision-making processes. Certainly, non-First Nation governments have not articulated climate change as a governance issue.

³⁰ Seven generations is comprised of the three generations currently alive and four future generations, which could mean conservative planning horizons of over 100 years.

Despite this, a comprehensive definition of “governance” should include climate change considerations, including the ability to mitigate and the ability to adapt to climate changes.

The inclusion of climate change considerations into governance discussions would require, at minimum, the coordination of First Nation and non-First Nation government responses to climate change. Governments should begin by developing strategically-coordinated policies, programs and initiatives prior to the design and implementation of those initiatives. Had this been done in the past, the linkages between, for example, environmental assessment (through the *Canadian Environmental Assessment Act*), climate change policy, and treaty and Aboriginal rights protection, or between endangered species protection and climate change policy would have been proactively rather than reactively defined. Further, the federal governments responsibility to engage in the strategic environmental assessment of policies, plans, and programs³¹ could provide the opportunity for substantive First Nation involvement in federal policy-setting in all areas, but particularly in the area of climate change.³²

While there are numerous needs that have been already identified in previous sections of this report³³ that, once met, would dramatically increase the strategic orientation of many First Nations, the most fundamental need facing First Nations is the ability to create and implement a comprehensive, integrated community plan addressing the vision for both reserve and traditional lands, waters, resources, and the needs of the people that depend upon and utilize them.³⁴ The systemic lack of plans at community level that are truly comprehensive in nature³⁵, that identify climate change as a likely threat and possible benefit to the community,

³¹ Government of Canada, “Cabinet Directive on the Strategic Environmental Assessment of Policies, Plans, and Programs 2004”.

³² Note that the Crown’s fiduciary responsibilities towards First Nations, plus their obligations to consult and accommodate where proposed Crown decisions might impact treaty or Aboriginal rights, would also mandate First Nation involvement in policy-setting activities at all levels.

³³ Such as the need for education, resources and information towards climate change decision-making.

³⁴ See section 2.2.2, Table 1: Governance Needs of First Nations, where First Nations identified “comprehensive community planning” as their primary governance-related education, research, and information need.

³⁵ Most plans are sectoral, focussing typically upon one element of need within the First Nation (such as the Housing Plan). Rarely are all areas of need within the community subject to some form of planning tool, nor are the plans that exist integrated to address cross-cutting issues such as climate change.

and that integrate climate change considerations in a meaningful fashion do not currently exist.³⁶

2.7 LEADERSHIP

Strong committed leadership is required at numerous levels in order to effectively govern in the face of predicted climate changes. Persons who consistently act, and persuade others to act, in the First Nation's interest instead of their own must exist. Further, they must have a commitment to integrating and addressing climate changes impacts at all levels, and across all necessary timeframes at which both they, and predicted climate changes, operate. This leadership can exist in many forms, for example through Elders, youth, women or First Nation non-governmental organisations, but must exist within the elected leadership at a minimum.

Actions are required to foster the growth of leaders. First Nations must see role models that speak about, care about, and engage in activities that are directed at climate change. These role models must operate at all levels, from the national level to the First Nation government and community level, and must be present in not only the political arena, but also the education, health, environmental, legal and other arenas. The key is that First Nations see their own people make decisions that integrate climate change considerations, and that choose the best interests of the First Nation over their personal self-interest. This is particularly critical if youth are to be engaged in creating solutions for problems that will impact them the greatest (as predicted climate changes will).

Regarding political leadership, many First Nations Chiefs and Councils are restricted in accomplishing a long-term community vision because the First Nation has likely never had the opportunity to comprehensively define their own long-term vision. This is coupled with the limitations and restrictions imposed by the two-year *Indian Act* election cycles, which can create a constantly shifting, short-term, politically driven vision for the community.

The role of comprehensive community planning is instrumental in overcoming these challenges, as the existence of a long-term integrated plan allows the First Nation to:

- Avoid the pitfalls associated with two-year *Indian Act* election cycles;

³⁶ Note that CIER is currently engaging in a project funded by INAC to determine how to integrate climate change considerations in comprehensive community planning (CCP). It is scheduled for completion March 2007.

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- Continue to focus, even with a change in leadership, on the goals set out in the community plan which allows the First Nation to continually be making progress on addressing their short, medium, and long-term needs (which is particularly important regarding climate change issues as they tend to arise along all planning timeframes).

There is a critical role for national leaders: creating the necessary focus and commitment in First Nation leadership to address climate change issues. This is necessary given the extensive policy basis of most climate change discussions (i.e. the current deliberations regarding the Offsets Program of the federal government are policy level discussions); these discussions tend to occur without the involvement of First Nations, particularly those at the First Nation community level. A national voice that advances a consistent, strong policy voice is critical to set the tone for other First Nation leaders, and the leaders of tomorrow.

3.0 CONCLUSION

While there is no doubt that First Nations will be impacted by predicted climate changes, numerous critical questions remain: in what way will they be impacted, how severely, and will they be able to adapt quickly? In some sense, these are the questions being faced by all human beings around the globe, but in Canada, First Nations will experience unique impacts as a result of their unique situations. First Nations currently have limited financial resources and expertise to design or implement adaptation measures for their people. They have little or no control over most of the activities that require mitigation measures as these GHG-producing activities almost always occur off First Nation reserve land. Even regarding controlling, promoting, or regulating development occurring on reserve lands, First Nations do not have the necessary recognised authority. For example, most governments have the authority to require payments, fees, taxes, or royalties from developers; these revenues are often used to support measures needed to remedy the negative impacts of the developer's economic activities. Social programs (i.e. addictions programs) and environmental regulation and enforcement (i.e. to limit the production or release of GHGs) are the kinds of initiatives that taxpayer's revenues fund. First Nations, however, do not generally have the power to implement taxation mechanisms, leaving them reliant upon government funding to meet these types of needs. But government funding in all areas is already woefully inadequate, and the additional resources required to address climate change impacts would only add to current extreme funding shortfalls.

In addition to all this, scientists and policy-makers have not considered predicted climate changes in the context of First Nations lands and waters, peoples, social and cultural systems, and governance and legal issues and constraints. This leaves First Nations with little or no information; it remains undetermined how the range and variability of predicted climate changes could affect the viability of First Nation's economies, social and political structures, and health care and other social services. Even First Nations' constitutionally recognised and protected rights could be in jeopardy, yet governments at all levels continue to focus their efforts on what they obviously consider to be higher priority matters.

For First Nations peoples, cultures, and societies to be able to cope with, and even thrive, as predicted climate changes become a reality, their system foundations must be strong and stable. This includes vigorous and diverse economies, responsive and effective social structures, and an environment that is healthy and resilient. First Nations can only achieve these requirements if they have strong governments making and implementing meaningful decisions.

To achieve this, key changes are necessary. First, the legal roles and responsibilities of the federal, provincial, and First Nation governments regarding addressing climate change impacts, mitigation, and adaptation needs for First Nations must be defined. This must include recognition of a number of critical First Nation authorities, such as the authority to regulate GHG emissions produced on their lands and territories. First Nation rights may be impacted by predicted climate changes and therefore climate change must be viewed as a rights issue, but it must not stop there: a national First Nation dialogue regarding climate change impacts, mitigation needs, and adaptation strategies regarding Aboriginal and treaty rights and the fiduciary obligation of the Crown is critical.

Second, First Nations must be resourced to develop integrated, comprehensive community plans that assist the community in articulating the vision it has for itself over the short, medium and long-term, that identify the relative priority of potentially competing values or goals, and that clearly integrate climate change mitigation and adaptation goals, activities, and follow-up mechanisms. As well, they must be resourced to be able to implement these plans through effective institutions, possessing the required bureaucratic capacity and skills and technological resources to effectively respond to predicted climate changes.

Finally, effective governance requires a strong and diverse First Nation leadership, and environmental non-governmental sector that has the legitimate right to challenge, review, critique, and present alternative considerations regarding proposed decisions within First Nations that may impact Aboriginal or treaty rights, the environment (including through possible climate changes), or human health.

Without these governance-related capacities, First Nations peoples, cultures, lands, and waters may be severely threatened by anticipated climate changes but without the ability to adapt. But with these governance-related transformations, First Nations can improve the capacity of their governments to proactively deal with predicted climate changes and respond to those changes that are already upon them.