

Recommendations on First Nations Access to Indian Moneys



The National Aboriginal Economic Development Board

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MESSAGE FROM THE CHAIRPERSON

The Government of Canada has committed to renewing the relationship between Canada and Indigenous Peoples through the establishment of a nation to nation relationship based on recognition, rights, respect, co-operation, and partnership. As a Board, we recognize that First Nations must have the ability to exercise control and jurisdiction over a broad range of areas. In particular, the current provisions of the *Indian Act* that deal with Indian Moneys are an example of where an appropriate level of control is not currently being exercised by First Nations.

The framework for the administration of Indian Moneys under the *Indian Act* is inherently anachronistic and is a relic of legislation that, at its core was designed to assimilate and colonize First Nations. The effect of this legislative framework has been to put control of First Nations affairs into the hands of the federal departments instead of where it rightly belongs, in the hands of Indigenous people.

In 2016, the Standing Senate Committee on Aboriginal Peoples recommended that the National Aboriginal Economic Development Board and Indigenous and Northern Affairs Canada work together to host a Roundtable on Indian Moneys, which has resulted in the recommendations presented in this report. We would like to extend our sincere thanks to the Chair of the Standing Senate Committee on Aboriginal Peoples, Senator Lillian Eva Dyck and to Committee member Senator Scott Tannas for their leadership and valuable contributions to the Roundtable that occurred on September 22, 2016 at the Tsuut'ina Nation in Alberta. On behalf of the National Aboriginal Economic Development Board, I would like to thank all participants of the Roundtable for providing their unique perspective and to those who provided their written feedback to the Board on First Nations Access to Indian Moneys.



Dawn Madahbee Leach
Interim Chair
National Aboriginal Economic Development Board



EXECUTIVE SUMMARY

In 2013, the Standing Senate Committee on Aboriginal Peoples began hearing from witnesses and visiting First Nations communities to better understand housing and infrastructure challenges on reserve and researching best practices to address these challenges. In its report entitled, *On-Reserve Housing and Infrastructure: Recommendations for Change* (June 2015) the Committee made a total of 13 recommendations to address housing and infrastructure challenges on reserve. Recommendation 12 of this report addressed financing aspects of housing and infrastructure and stated:

“That Aboriginal Affairs and Northern Development Canada take immediate steps to convene a national roundtable with the National Aboriginal Economic Development Board and other First Nations organizations to explore ways to facilitate First Nations access to Indian moneys, whether through amendments to the First Nations Oil and Gas Moneys Management Act (FNOGMMA) or through other appropriate legislative or policy measures.”

In response to this recommendation the National Aboriginal Economic Development Board held the Roundtable on First Nations Access to Indian Moneys on September 22, 2016 at the Tsuut’ina Nation in Alberta. It was attended by thirty-three First Nations and First Nation Organizations participated as well as 15 government officials.

The goal of our report and the recommendations contained within it is to discuss the legislative framework under which Indian Moneys exist, to examine various mechanisms that are currently enabling First Nations access to Indian Moneys through optional legislation, and to make recommendations for improving First Nations access to Indian Moneys. Through our consultations, the Board has heard an overwhelming expression of resentment at the existence of this antiquated system, one that symbolically and economically hinders the growth and development of their communities.

The Board believes strongly and has expressed in the past that moneys management provisions of the *Indian Act* present a significant barrier to economic development for First Nations people



and communities and that First Nations are most successful when they have the statutory authority to make decisions about their own economic development. To address these concerns, the Board, through this report will present the following five recommendations to the Minister of Indigenous and Northern Affairs Canada:

1. The Board recommends INAC should make every effort to work with First Nations and First Nation institutions to overcome internal policy, and legislative barriers that impede First Nation control over Indian moneys, including streamlining processes and removing or changing the assessment of financial capacity and where applications to take over its moneys are made, that First Nations should be afforded this opportunity.
2. The Board recommends that First Nations who pass Financial Administration Laws and obtain financial performance certification under the *First Nations Fiscal Management Act*, be recognized by INAC as a proxy for other “financial capacity tests”, such as those under the FNLMA, FNOGMMMA and relevant INAC policies.
3. The Board recommends INAC extend the *First Nations Land Management Act* to include jurisdiction over the collection of capital moneys.
4. The Board recommends enabling First Nations to include a direction in land designation votes that moneys derived from the designated lands be paid directly to the First Nation.
5. The Board recommends that INAC renew this model in a nation to nation context with the objective of strengthening First Nation jurisdiction and control, including options that would result in First Nations having authority over the collection and expenditure of Indian moneys.

It is our hope that these recommendations will support approaches that will provide First Nations with greater access to and collection of Indian Moneys.



BACKGROUND

"We need institutions born of this century."

WHAT ARE INDIAN MONEYS?

The *Indian Act* defines Indian Moneys as "all moneys collected, received or held by Her Majesty for the use and benefit of Indians or Bands." In other words, moneys that belong to First Nations bands or individuals and are held in trust by Canada. As of August 2016, \$676 million of Indian Moneys was being held in the Consolidated Revenue Fund (CRF). At the time, these funds were held in 1,187 different capital and revenue accounts on behalf of 576 Bands across Canada; the funds are administered by Indigenous and Northern Affairs Canada (INAC). The mechanism for holding funds yields very low interest rates and effectively leaves Indian Moneys sitting idle with little return on investment in comparison to what First Nations might obtain with other investment vehicles. Of the money held in August 2016, three-quarters (\$497 million) were capital funds.

WHAT IS THE LEGISLATIVE FRAMEWORK FOR INDIAN MONIES?

As previously noted, Indian Moneys are defined in the *Indian Act* as "all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands." There are two types of Indian moneys: (1) those held for bands (which consist of capital moneys and revenue moneys) and (2) those held on behalf of certain individuals. The legislative instruments associated with the administration of Indian Moneys are included for reference in Annex B.

Indian Moneys do not include funds paid to First Nations by the federal government to cover the costs of programs, such as housing, education, and infrastructure. They also do not include own-source revenues that are otherwise received by First Nations, such as from band-owned businesses, property taxes or fees charged for services. As such, it is moneys that are derived from reserve land which are payable to the Receiver-General of Canada and placed in the CRF for a First Nation's benefit. Indian Moneys are collected by Canada because reserve land is held by the Crown for the use and benefit of a First Nation. In connection with its fiduciary duty in respect of this land, moneys derived from the land must be paid to the CRF. Canada acts a



trustee in relation to these moneys and administers the moneys on behalf of bands.

The issue of Indian Moneys being collected and held in the CRF is not a new challenge for First Nations and was previously identified in a 2010 internal INAC audit¹ and 2013 INAC evaluation² which presented 16 recommendations on this issue. Two of these recommendations were explored at the Roundtable discussion looking for workable alternatives to collecting Indian moneys. In addition, the Roundtable participants explored options to increase the transparency of Band Moneys expenditures to Band members, to provide easier access to their capital trust moneys for economic development opportunities, and to promote greater self-sufficiency.

Capital and Revenue Moneys

There are two categories of Band moneys, capital moneys and revenue moneys. Capital moneys are derived from the sale of capital assets including land and non-renewable resources such as minerals, oil and gas, sand and gravel. Revenue moneys are defined as moneys that are not capital moneys and are derived from sources such as the rental or leasing of designated land, fines, cottage fees, the sale of renewable resources like farm products and the interest generated by capital and revenue moneys.

Section 64 and 65 of the *Indian Act* govern the expenditure of capital moneys of a First Nation. These sections authorize the Minister to direct the expenditure of capital moneys “with the consent of the council of a band” for several purposes including but not restricted to: construction and maintenance of roads; the purchase of additional reserve land; providing loans; construction and financing of housing; and, most broadly, for “any other purpose that in the opinion of the Minister is for the benefit of the band”.

Section 66 of the *Indian Act* governs the expenditure of revenue moneys that are held by the federal government in the CRF. Section 66(1) states that, with the consent of the band, “the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any

¹ https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/aev_pubs_au_tac_1321546193999_eng.pdf

² http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/ev_ime_1382702109610_eng.pdf



member of the band”.

Under Section 69 of the *Indian Act*, a First Nation may acquire the right to control, manage and expend its revenue moneys through an Order of the Governor in Council. Currently, 419 First Nations have obtained this authority.

Within this framework, INAC performs four functions in relation to Indian moneys:

- Collecting funds from lands and natural resource transactions on reserve (Indian Oil and Gas Canada, a special operating agency within INAC, collects First Nation oil and gas royalties);
- Holding these funds in the CRF and paying interest (at a rate based on Government of Canada bonds having a maturity of 10 years or over, or 1.8177% per year (2016-2017);
- Authorizing expenditures; and
- Auditing Indian Moneys expended by First Nations.

CURRENT MEASURES ENABLING FIRST NATIONS CONTROL OF INDIAN MONEYS:

Currently, there a number of mechanisms in place that allow First Nations to collect their moneys. However, these mechanisms are not automatic for all First Nations and despite their utility, are still workaround and do not put Indian Moneys directly in the hands of First Nations when they are first earned, as they should be.

First Nations Land Management Act

Under the *First Nations Land Management Act* (FNLMA) (enacted in 1999), First Nations are able to exercise jurisdiction over reserve lands, and participating First Nations that have adopted a Land Code gain control over the collection and expenditure of their revenue Indian Moneys (e.g., revenues generated from on reserve land instruments such as leases and permits). To date, 58 First Nations have adopted land codes under the FNLMA and now have control over their revenue moneys³. The Act does not allow any transfer of control with regard to capital moneys.

³ <http://labrc.com/member-communities/>

First Nations Oil and Gas and Moneys Management Act

Under the *First Nations Oil and Gas and Moneys Management Act* (FNOGMMA), enacted on April 1, 2006, First Nations can choose to manage their capital and revenue moneys without the involvement of the Minister. First Nations do not have to be oil-producing to use the Indian Moneys portion of this legislation. They only need to have Indian Moneys held for them in the CRF by Canada. One First Nation is currently exercising moneys management jurisdiction under the Act, and six First Nations have expressed an interest to INAC in participating; one is expected to be formally invited into the process in February 2017. No First Nations are using the oil and gas management part of the Act.

Policy on the Transfer of Capital Moneys Through Paragraph 64(1)(k) of the Indian Act

In April, 2016, INAC formalized a policy allowing First Nations to transfer their current and future capital Indian Moneys to an independent trust using paragraph 64(1)(k) of the *Indian Act*. This provision allows the Minister to authorize and direct the expenditure of capital moneys “for any purpose that in the opinion of the Minister is for the benefit of the band.” The policy addresses a decision of the Supreme Court of Canada on paragraph 64(1)(k) and provides operational guidance to INAC officials. In its decision, the Court interpreted 64(1)(k) to mean that the Minister may authorize the transfer of capital money to an independent trust in favour of a First Nation so long as the Minister is satisfied that the transfer is in the First Nation’s best interests. Based on the Court’s guidance, the Minister transferred all current and future capital moneys of two First Nations, Samson (2006) and Ermineskin Cree Nation (2011), to independent trusts using paragraph 64(1)(k). INAC has since formalized the Court’s guidance into a policy framework to provide a process for First Nations to transfer capital moneys to independent trusts. To date, two First Nations, Tsuut’ina Nation (2015) and Onion Lake Cree Nation (2016) have used the policy framework to transfer their current and future capital moneys to independent trusts, and the Department is working with other interested First Nations towards potential transfers.



First Nations Fiscal Management Act (FNFMA)

The FNFMA was brought into force in 2006 and permits First Nations that opt in to the legislative regime to expand their real property taxing powers beyond what is permitted under section 83 of the *Indian Act*. It also provides a variety of rights to taxpayers and others. Unlike the situation under section 83 where the Minister must approve all reserve taxation by-laws, the laws created through the FNFMA are approved by the First Nations Tax Commission. In addition to replacing the Minister, the Commission provides advice and assistance and monitors the compliance of First Nations with the FNFMA.

The First Nations Finance Authority established under the Act pools the borrowing power of member First Nations with real property taxation powers to obtain capital at interest rates lower than they could get on their own, borrows on their behalf, and issues bonds secured by their property tax or other revenues.

The First Nations Financial Management Board provides technical and capacity-building assistance to member First Nations provides co-management and third party management if necessary and may intervene on behalf of the other two FNFMA institutions in certain situations.

Although the FNFMA does not stipulate provisions on Indian Moneys, it is First Nation operated and has the financial capacity to assist First Nations in a variety of ways that may be of future assistance in accessing capital moneys currently collected by Canada and held in the CRF.



Roundtable Discussions: What We Heard

"Economic development isn't possible without government being able to exercise jurisdiction over lands and resources."

During the roundtable, First Nations overwhelmingly expressed their strong resentment at the process of having to request and to justify the release of their own moneys from the Government of Canada's CRF. This process is viewed as an affront to First Nations inherent dignity, a denial of their financial management capacity, and an implicit repudiation of a nation to nation relationship. While Canada's fiduciary obligation in relation to Indian Moneys is a legal duty under the *Indian Act*, the need for First Nations to go to the extraordinary length of setting up a trust instead of being able to receive their own money directly is seen as paternalistic. The current legal regime forces First Nations leaders to ask for permission before undertaking initiatives, thus reinforcing a colonized mindset that runs counter to Indigenous self-determination.

Working in an environment that requires First Nations to expend considerable time, human, and financial resources to meet government-imposed conditions to access their own moneys is also a very real impediment to economic success. In particular, the need for First Nations that are already capably managing large budgets, including their own source revenues, to prove their financial management capacity, to obtain popular support, and to set up complex third party trust arrangements is not seen as reasonable or cost-effective way of doing business in a modern economy.

During our discussions, criticisms of the difficulties encountered by First Nations with regard to Indian Moneys coalesced into two main issues. The first is **symbolic**: as mentioned, many First Nations strongly resent having both to request and to justify the release of their own moneys from the CRF. When discussions began, some participants stressed the nation to nation aspect of the treaty relationship with the Crown, arguing that "Indian moneys" encompass more than the funds held for them in the CRF, but also include all the revenue derived from the treaty lands surrendered by them since the date of surrender. Some also stated that placing Indian Moneys in the CRF rather than in the hands of First Nations was a breach of treaty, that the



fiduciary obligation was a “sword” used by Canada against First Nations to justify retaining their money at very low rates of interest, and that Canada was in a conflict of interest since it was profiting by treating Indian Moneys as public moneys in the CRF that it used for its own purposes. Another comment was that Canada’s refusal to make capital money more accessible to First Nations was itself a breach of the fiduciary obligation as it required First Nations to borrow money from commercial lenders at high rates of interest.

The second broad and pressing issue raised during Roundtable discussions is **economic**: keeping Indian Moneys in the CRF at low rates of interest results in a lower return for First Nations than might be obtained by other, more aggressive investment vehicles. This, in turn, obliges First Nations to turn to commercial lending agencies and pay high rates of interest to get bridge financing in order to fund community projects and take part in commercial opportunities that cannot wait while the CRF transfer process unfolds.

It also forces First Nations with smaller capital projects such as the purchase of vehicles or smaller tracts of land to wait for extremely long periods of time before being able to access the capital moneys to purchase the assets necessary for community well-being and economic progress.

In their view, requests from Chief and Council should be sufficient to trigger the process to release their moneys from the CRF. In addition, participants criticized what they saw as the overly bureaucratic way that INAC handled their requests and questioned why the release process required so many discrete stages, levels of authorization and overall paperwork - none of which was compatible with the need in the modern economy for fast and easy access to the funding necessary for community development projects and commercial opportunities.



The View of the Board

The Board has expressed its concern in the past regarding the deficiencies of the current legislative framework governing Indian moneys, including through a letter to the Minister in October 2014. In this letter, the Board noted that:

...the moneys management provisions of the Indian Act present a significant barrier to economic development for First Nations people and communities. A necessary precursor to economic development is flexible and responsive institutional arrangements which allow First Nations to use their own moneys and leverage idle capital in a timely fashion....moneys management under the Indian Act is an area in which the Crown's fiduciary obligation to ensure that First Nations assets are protected leads to sub-optimal economic outcomes.

The Crown's Fiduciary Responsibility

The Indian Moneys regime is intimately connected to the reserve lands regime at the heart of the *Indian Act*. Historically, the *Indian Act* evolved from a series of executive actions and colonial laws designed to protect the First Nation reserve land base from loss or exploitation by the growing settler population. Through these protective executive acts and legislative enactments, Royal authorities assumed a wardship role with regard to First Nations that continues in the current version of the *Indian Act*. As such, the Board believes that to this day the Crown's actions in the collection of Indian Moneys are rooted in a risk adverse approach that protects the interests of the Crown rather than that of First Nations.

The courts have held that there is a special relationship between the Crown and Indigenous peoples that gives rise to fiduciary obligations that the Crown incurs in certain situations. In *Ermineskin Indian Band and Nation v. Canada* the Supreme Court of Canada affirmed that the Crown's fiduciary duty applies to the management of the Indian Moneys that INAC collects, receives or holds on behalf of First Nations. While Indian Moneys are in the CRF, the Crown must ensure that those moneys are protected from invasion or destruction, and when the



Minister considers Indian Moneys expenditure requests, she must satisfy herself that the moneys will be used for purposes that are conducive to the welfare of the First Nation.

In *Stoney First Nation v. Canada*, the Federal Court noted that a transfer of capital moneys by the Minister,

"... is a discretionary decision that involves the balancing of many different factors, including the financial goals, levels of risk and other characteristics of the proposed trust, the financial circumstances and track record of the Band, whether the arrangements reflect the informed wishes of the Band membership, and any potential governance issues.."

Three broad factors have been considered relevant by the Government of Canada in developing mechanisms to enable the transfer of Indian Moneys from the Crown to First Nations, given the case law on the fiduciary obligations of the Crown in relation to Indian moneys:

- The financial capacity of a First Nation, for example as demonstrated by the presence of financial system or framework;
- Support among First Nation members for the transfer, given their collective interest in the moneys, as demonstrated, for example, through a ratification vote; and,
- A release of Crown liability arising from the transfer.

While these factors provide general guidance regarding issues to be considered in developing measures to increase First Nation control over Indian Moneys they do not constitute a barrier to action. In the past, INAC's approaches to the management of Indian Moneys have been viewed by First Nations as being for the purpose of protecting the Crown from litigation rather than serving First Nations' best interests. The Board strongly believes that any option for increasing First Nation control over Indian Moneys should start from the premise that these moneys are in fact First Nations' moneys, derived from transactions involving their lands.

The paternalistic overtones both of the fiduciary obligation and of Canada's capital moneys transfer policy emerged as a major theme at the Roundtable discussions. Nonetheless, some



First Nations are reluctant to release Canada from its fiduciary obligations. As was previously outlined in a letter to Minister Bernard Valcourt in 2014, the Board has noted that "...while a trust mechanism managed by a First Nation directly may prove to be less onerous and more flexible than the current approach under the *Indian Act*, it fails to address the core issue of the Government of Canada capturing First Nations moneys in the first place...if a community does wish to manage its moneys through a trust, the decision as to whether a trust is the most suitable or desirable option for an individual community should rest with the band's Chief and Council. As the democratically elected officials representing the interests of the band in question, it is precisely these types of decisions that have been placed in their hands through the election process".

First Nations Control of Indian Moneys

First Nations are most successful when they have the statutory authority to make decisions about their own economic development and the institutional and regulatory support for this decision making authority.

The inability of First Nations to collect their own Indian Moneys resides in the fact that they are collected by Canada because reserve land is held by the Crown for the use and benefit of a First Nation. The exception is where all or part of the *Indian Act* is inoperative in relation to that First Nation, such as where the First Nation operates under a self-government regime or has opted-in to the land management regime set out in the *First Nations Land Management Act*. Under the *Financial Administration Act*, Indian Moneys are treated as "public moneys" which means that they must be held in the CRF, subject to any other legislation (such as the *Indian Act*) which permits their transfer out of the CRF. While the moneys are in the CRF, Canada acts as a trustee in relation to these moneys and manages the moneys on behalf of First Nations.

It is not clear that fiduciary principles would permit a First Nation to collect its own Indian Moneys other than as an agent of the Crown (as in the case of Indian Oil and Gas Canada). This is a complex legal issue that cannot be resolved by the National Aboriginal Economic Development Board. If it were legally possible to do so, however, it is not inconceivable that the



Crown might agree to allow First Nations to collect their Indian Moneys and thereby bypass depositing it in the CRF.

If the Crown were to do so, however, it would at a minimum have to ensure that its fiduciary duty to act in the best interests of the First Nation had been met as is the case under the capital moneys transfer policy. It is arguable that the requirements for direct First Nation collection of its moneys would be more stringent than in the case of the capital moneys transfer policy, given the early stage at which the Crown would be releasing its control.

If that is so, it might raise real obstacles, given that the conditions to be met by First Nations under the current capital moneys transfer policy have already been found in a 2010 INAC evaluation of the *First Nations Oil and Gas and Moneys Management Act* (FNOGMMA) to be onerous and time consuming.

FNOGMMA was enacted in 2006 to facilitate First Nations financial autonomy by allowing them to control their current and future capital and revenue moneys. FNOGMMA, while providing more flexibility, applies similar conditions to those in the capital moneys transfer policy, something the 2010 audit found to be daunting for most First Nations. As of 2017, while only one First Nation is currently operational under FNOGMMA and taken control of its Indian moneys, multiple First Nations have expressed interest.

It is too soon to say whether future developments in the law may lead in directions that mitigate the stringent requirements surrounding the transfer of Indian Moneys from the CRF or even allow direct First Nation collection of its Indian moneys.

What can be said is that the evolving nature of the law in this area makes it difficult for both First Nations and Canada to be confident about how to proceed to support the degree of autonomy that would allow First Nations to participate more freely and efficiently in the modern economy and to exercise the jurisdiction necessary for a nation to nation relationship with Canada.



Recommendations for Change

"There needs to be a new form of thinking on ways to manage Indian Moneys."

The Board affirms that work on a new fiscal relationship must continue. The Prime Minister has stated that: *"It is time for Canada to have a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition, rights, respect, co-operation, and partnership. This is both the right thing to do and a sure path to economic growth"*. Inherent in a government to government relationship is the principle that one government does not control another government's revenues. Fundamentally, the Board believes that First Nations should not have to seek permission from Canada to spend their own moneys – in fact; the government should not be managing First Nations moneys at all.

There are two broad categories of approaches that can be taken to increase First Nation control of Indian moneys. These include approaches that make it easier for First Nations to **access** Indian Moneys that are collected by the Crown and held in the CRF, and approaches that enable First Nations to **collect** moneys themselves so that they do not fall within the *Indian Act* definition of Indian Moneys and are never held in the CRF.

Recommendation #1: Remove Barriers to Access

Although some mechanisms have been put in place recently that provide options for First Nations to access Indian Moneys more easily, more needs to be done to enable First Nations to exercise control of these moneys so they can use them in accordance with their communities needs and interests. When making changes to Indian moneys-related laws and policies, and addressing First Nation proposals to enable First Nation collection of Indian moneys, the Government of Canada should be guided by the principle that Indian Moneys should be in the hands of First Nations, not the Government of Canada.



The Board recommends INAC should make every effort to work with First Nations and First Nation institutions to overcome internal policy, and legislative barriers that impede First Nation control over Indian moneys, including streamlining processes and removing or changing the assessment of financial capacity and where applications to take over its moneys are made, that First Nations should be afforded this opportunity.

Recommendation #2: Explore Additional Approaches to Access

Many First Nations across the country are making use of the *First Nations Fiscal Management Act* (FNFMA) to strengthen their financial management capacity, exercise fiscal jurisdiction, and access private sector capital through the bond markets.

Nearly 200 First Nations have now opted into the Act and about 70 have a compliance approval of their Financial Administration Laws and obtained financial performance certification from the First Nations Financial Management Board. While the First Nations that take these steps have demonstrated, by way of independent third party verification and in a manner that is sufficient in the eyes of capital markets and credit rating agencies, that their financial management capacity and systems meet rigorous standards, the significance of these steps has not yet been recognized by INAC in the way that it deals with these First Nations in relation to funding and fiscal matters. . With respect to Indian Moneys that are collected by Canada and held in the CRF, First Nations may manage access to both capital moneys and revenue moneys under a number of mechanisms including but not limited to the *First Nations Oil and Gas and Moneys Management Act*, capital moneys under paragraph 64(1)(k) of the *Indian Act*, and revenue moneys under paragraph 69(1) of the *Indian Act*. In order to facilitate a broader approach to First Nations management of, and access to, their Indian moneys:



The Board recommends that First Nations who pass Financial Administration Laws and obtain financial performance certification under the *First Nations Fiscal Management Act*, be recognized by INAC as a test for other “financial capacity tests”, such as those under the FNLMA, FNOGMMA and relevant INAC policies.

Recommendation #3: Increase Jurisdiction for the Collection of Capital Moneys

The *First Nations Land Management Act* (FNLMA) is a means whereby jurisdiction for the collection of revenue Indian Moneys rests with the First Nation, consistent with the fact that a First Nation operating under the FNLMA is no longer subject to the lands provisions of the *Indian Act*. There are other mechanisms whereby revenues can be generated that do not fall within the definition of Indian moneys, such as the use of property taxation, fees and other charges under the *First Nations Fiscal Management Act*.

Resource revenue sharing arrangements and Aboriginal resource tax concepts are being explored by many First Nations as mechanisms to enable Indigenous people to obtain a fair share of Canada’s resource wealth on a rights basis. Given that the FNLMA already exists as a comprehensive legislative framework for First Nations to exercise jurisdiction over the collection of revenue moneys:

The Board recommends INAC extend the *First Nations Land Management Act* to include First Nations jurisdiction over the collection of capital moneys.

Recommendation #4: Exploring Additional Mechanisms for Collection

There may be other mechanisms for enabling First Nations to have control over the collection of Indian Moneys such that these moneys would never need to be held by the Crown in the CRF.

The Board recommends enabling First Nations to include a direction in land designation votes that moneys derived from the designated lands be paid directly to the First Nation.



The moneys management provisions of *The First Nations Oil and Gas Moneys Management Act* (FNOGMMA), under which Indian Moneys are transferred to a trust or account controlled by a First Nation, and INAC's new section 64(1)(k) policy whereby Indian Moneys can be transferred to a trust are intended to ease First Nation access to their moneys.

Under both these mechanisms, the Crown still collects the Indian moneys, but they are almost immediately transferred out of the CRF to the First Nation-controlled trust or account.

The bulk of capital Indian Moneys are generated through oil and gas royalty revenues, which are collected by Indian Oil and Gas Canada, deposited in the CRF and then distributed to First Nations under the *Indian Act* regime, including, in a few cases, a section 64(1)(k) trust. The *Indian Oil and Gas Act* was created and has operated based broadly speaking on a co-management model.

The Board recommends that INAC renew this model in a nation to nation context with the objective of strengthening First Nation jurisdiction and control, including options that would result in First Nations having authority over the collection and expenditure of Indian moneys.



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Affairs INAC

Sean Sullivan
Resolution and Individual
Affairs INAC

Cheri Moreau
Lands and Economic
Development
Saskatchewan INAC

Mark Pallister
Lands and Economic
Development Alberta INAC

Douglas Fairbairn
Legal Counsel Department
of Justice

[Secretariat:](#)

Danielle Bélanger
National Aboriginal
Economic Development
Board Secretariat

Andrea Dykstra
National Aboriginal
Economic Development
Board Secretariat

Manon Richard
National Aboriginal
Economic Development
Board Secretariat

Jody Touchette
National Aboriginal
Economic Development
Board Secretariat

[Support:](#)

Beverley O'Neil
Facilitator

O'Neil Marketing &
Consulting

Nancy Hynes
Notetaker

Hal Eagletail
Elder (in training)
Tsuut'ina First Nation

[Absent:](#)

Keith Matthew
First Nations Tax
Commission

Alex Littlechild
Ermineskin First Nation
(Alberta)

Colin Quinney
Frog Lake Indian Reserve
(Alberta)

Chief Ernest Wesley
Stoney Nakoda First Nation
(Alberta)

**Chief Vincent Yellow
Old Woman**
Siksika Nation (Alberta)

Chief Bernadette Sharp
(replaced by Juliette
Noskey and Peter Moore)
Loon River First Nation
(Alberta)

Vice Chief Edward Lerat
Federation of
Saskatchewan Indian
Nations



ANNEX A

Indian Moneys Data

Indigenous and Northern Affairs Canada (INAC) administers 1187 capital and revenue moneys accounts for 576 bands across Canada. As of August 31, 2016, the total balance of capital and revenue Indian Moneys in the CRF was \$676 million, of which three-quarters (\$497 million) was capital moneys. Canada pays interest of about 1.8177% annually on Indian Moneys accounts⁴. Interest rates are based on Government of Canada bonds having a maturity of ten years or over, using the weekly yields published by the Bank of Canada.

The value of these accounts is constantly changing as moneys are collected and distributed. The table below shows the annual opening and closing balance of Indian Moneys capital accounts for the past 10 years. Between the beginning of 2006-2007 and the end of 2015-2016 there was a 32% decrease in the value of the capital accounts. This may account for a decrease in receipts for that time period which may be attributed to lower oil and gas prices.

Year	Opening Balance	Total Receipts and Other Credits (+)	Total Payments and Other Charges (-)	Closing Balance	% change between opening and closing balance
2006-2007	\$779,954,934	\$180,128,740	\$225,967,093	\$734,116,581	-6%
2007-2008	\$734,116,581	\$194,710,348	\$165,559,317	\$763,267,612	4%
2008-2009	\$763,267,612	\$237,856,379	\$161,601,040	\$839,522,951	10%
2009-2010	\$839,522,951	\$115,064,103	\$170,519,564	\$784,067,490	-7%
2010-	\$784,067,490	\$195,890,167	\$132,783,416	\$847,174,241	8%

⁴ Quarterly average of those market yields of the Government of Canada bond issues as published each Wednesday by the Bank of Canada as part of its weekly financial statistics, which have terms to maturity of 10 years or over.

2011					
2011-2012	\$847,174,241	\$196,841,920	\$395,660,030	\$648,356,131	-23%
2012-2013	\$648,356,131	\$146,268,572	\$148,469,674	\$646,155,029	0%
2013-2014	\$646,155,029	\$143,971,326	\$154,877,723	\$635,248,632	-2%
2014-2015	\$635,248,632	\$143,936,236	\$130,550,638	\$648,634,230	2%
2015-2016	\$648,634,230	\$338,395,885	\$458,374,456	\$528,655,659	-18%

The amount of capital Indian Moneys varies significantly across First Nations. One First Nation possesses a third of the total capital Indian Moneys in the CRF while the remaining 529 First Nations have between one cent and tens of millions of dollars. Over 97% of First Nations with capital Indian Moneys accounts have balances below \$2 million. Three-quarters of First Nations with capital Indian Moneys accounts have balances below \$100,000.

\$ Value of Capital Indian Moneys Account⁵	≤ \$1000	≤ \$10,000	≤ \$100,000	≤ \$1,000,000	≥ \$1,000,000
# of First Nations	134	120	150	92	33

While the value of capital accounts has fluctuated dramatically over the last ten years, revenue Indian Moneys balances have been more stable by comparison. The table below shows the annual opening and closing balance of Indian Moneys revenue accounts for the past 10 years.

⁵ TFMS, as of August 31, 2016.

Between the beginning of 2006-2007 and the end of 2015-2016 there was only an 8.89% decrease in the value of the revenue accounts.

Year	Opening Balance	Total Receipts and Other Credits (+)	Total Payments and Other Charges (-)	Closing Balance	% change between opening and closing balance
2006-2007	\$199,376,058	\$73,158,507	\$64,610,468	\$207,924,097	4.29%
2007-2008	\$207,924,097	\$85,639,947	\$75,269,182	\$218,294,862	4.99%
2008-2009	\$218,294,862	\$90,095,701	\$76,104,715	\$232,285,848	6.41%
2009-2010	\$232,285,848	\$90,356,058	\$80,557,736	\$242,084,170	4.22%
2010-2011	\$242,084,170	\$79,322,160	\$76,652,714	\$244,753,616	1.10%
2011-2012	\$244,753,616	\$75,791,146	\$86,797,882	\$233,746,880	-4.50%
2012-2013	\$233,746,880	\$77,915,631	\$97,911,448	\$213,751,063	-8.55%
2013-2014	\$213,751,063	\$65,571,861	\$81,317,345	\$198,005,579	-7.37%
2014-2015	\$198,005,579	\$61,119,213	\$73,061,358	\$186,063,434	-6.03%
2015-2016	\$186,063,434	\$65,467,535	\$69,892,303	\$181,638,666	-2.37%

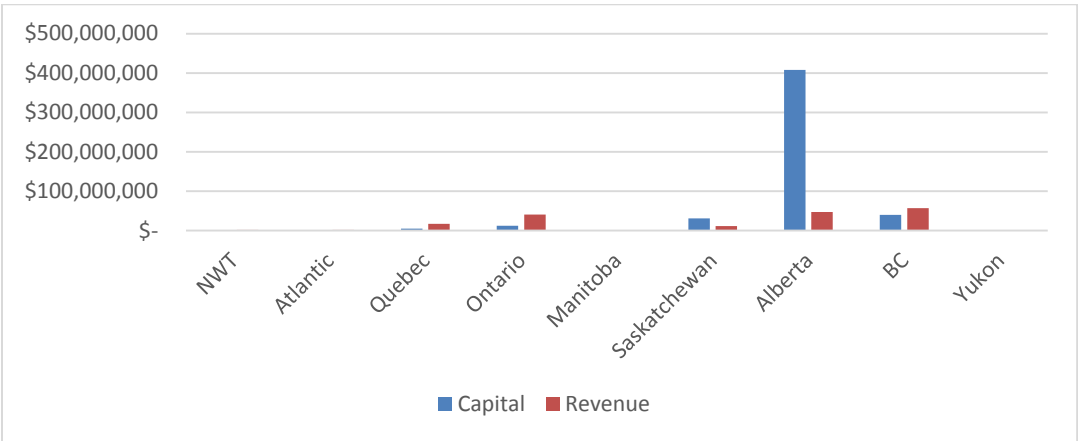


The amount of revenue Indian Moneys also varies significantly across First Nations; however, revenue money balances are less polarizing between First Nations than their capital balances. There are 569 First Nations that have between one cent and millions of revenue moneys held in the CRF, while there are more First Nation accounts in the CRF, those accounts have zero balances. The 34 First Nations with \$1,000,000 or more in their revenue accounts represents 61% of the total amount of revenues held in account within the CRF. 64% of First Nations with revenue Indian Moneys accounts have balances below \$100,000.

\$ Value of Revenue Indian Moneys Account ⁶	≤ \$1000	≤ \$10,000	≤ \$100,000	≤ \$1,000,000	≥ \$1,000,000
# of First Nations	42	100	221	172	34

The table below shows the regional variations of revenue and capital Indian moneys. Capital moneys are generated in part from the sale of non-renewable resources (e.g., oil and gas), which explains why 82% of all capital Indian Moneys belong to First Nations located in Alberta.

Distribution of Revenue and Capital Moneys by Region as of August 31, 2016



⁶ Ibid.

The majority of the Indian Moneys expenditure transactions occur pursuant to the *Indian Act*. Some Indian Moneys expenditure transactions are a result of other legislation, such as, the *First Nations Oil and Gas and Moneys Management Act*, the *First Nations Land Management Act*, and implementing legislation for self-government agreements.

Most expenditure authorities under the *Indian Act* are delegated to officials in the Department's regional offices. Only Indian Moneys expenditure transactions pursuant to paragraph 64(1)(d) (for land purchases), and Indian Moneys expenditure transactions and transfers pursuant to paragraph 64(1)(k) (for any purpose other than that already found in (a) to (j)) require the Minister's signature of approval. With respect to other legislation, the Minister's approval is generally required for initial expenditure transactions, with subsequent transactions delegated to regional departmental officials.

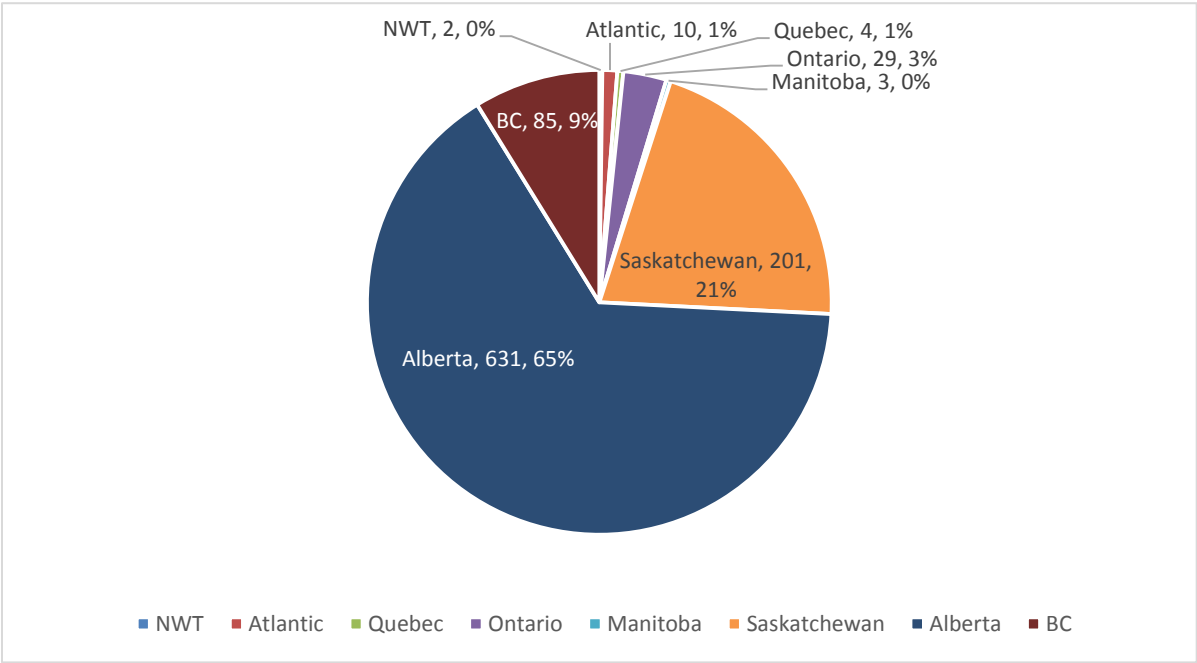
2015-2016 Indian Moneys Expenditure Transactions

Of the 965 approved expenditure transactions in 2015-2016:

- 892 transactions were approved under the *Indian Act* (36 approved by the Minister pursuant to paragraph 64(1)(k) and 856 were approved by delegated regional departmental officials) totaling \$526,327,154.
- 73 transactions were approved under other legislative authorities, such as the *First Nations Oil and Gas and Moneys Management Act*, *First Nations Land Management Act* and self-government agreements totaling \$1,899,657.



The 965 approved expenditure transactions are summarized regionally (based on First Nation location) as follows:



ANNEX B

Legislative Authorities for Indian Moneys

Financial Administration Act (FAA):

S.2 (d) of FAA: definition of 'public moneys', "*all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified or pursuant to that Act, trust, treaty, undertaking or contract*".

S.2 of FAA: the CRF is, "*the aggregate of all public moneys that are on deposit at the credit of the Receiver General*".

S.17 of FAA: all public moneys shall be deposited to the credit of the Receiver General.

S. 21 of FAA: subsection (1) Money referred to in paragraph (d) of the definition "public money" in section 2 that is received by or on behalf of Her Majesty for a special purpose and paid into the Consolidated Revenue Fund may be paid out of the Consolidated Revenue Fund for that purpose, subject to any statute applicable thereto.

Indian Act

2 "*all money collected, received or held for the use and benefit of Indians or Bands*" ...

61 (1) Indian Moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian Moneys are used or are to be used is for the use and benefit of the band.

(2) Interest on Indian Moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council.



62 All Indian Moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian Moneys other than capital moneys shall be deemed to be revenue moneys of the band.

63 Notwithstanding the Financial Administration Act, where moneys to which an Indian is entitled are paid to a superintendent under any lease or agreement made under this Act, the superintendent may pay the moneys to the Indian.

64 (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

(a) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;

(b) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;

(c) to construct and maintain outer boundary fences on reserves;

(d) to purchase land for use by the band as a reserve or as an addition to a reserve;

(e) to purchase for the band the interest of a member of the band in lands on a reserve;

(f) to purchase livestock and farm implements, farm equipment or machinery for the band;

(g) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;

(h) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of



(i) the chattels owned by the borrower, and

(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,

and may charge interest and take security therefor;

(i) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

(j) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and

(k) for any other purpose that in the opinion of the Minister is for the benefit of the band.

(2) The Minister may make expenditures out of the capital moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(p.3) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the capital moneys.

64.1 (1) A person who has received an amount that exceeds one thousand dollars under paragraph 15(1)(a), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, by reason of ceasing to be a member of a band in the circumstances set out in paragraph 6(1)(c), (d) or (e) is not entitled to receive an amount under paragraph 64(1)(a) until such time as the aggregate of all amounts that the person would, but for this subsection, have received under paragraph 64(1)(a) is equal to the amount by which the amount that the person received under paragraph 15(1)(a), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, exceeds one thousand dollars, together with any interest thereon.



(2) Where the council of a band makes a by-law under paragraph 81(1)(p.4) bringing this subsection into effect, a person who has received an amount that exceeds one thousand dollars under paragraph 15(1)(a), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, by reason of ceasing to be a member of the band in the circumstances set out in paragraph 6(1)(c), (d) or (e) is not entitled to receive any benefit afforded to members of the band as individuals as a result of the expenditure of Indian Moneys under paragraphs 64(1)(b) to (k), subsection 66(1) or subsection 69(1) until the amount by which the amount so received exceeds one thousand dollars, together with any interest thereon, has been repaid to the band.

(3) The Governor in Council may make regulations prescribing the manner of determining interest for the purpose of subsections (1) and (2).

65 The Minister may pay from capital moneys

(a) compensation to an Indian in an amount that is determined in accordance with this Act to be payable to him in respect of land compulsorily taken from him for band purposes; and

(b) expenses incurred to prevent or suppress grass or forest fires or to protect the property of Indians in cases of emergency.

66 (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.

(2) The Minister may make expenditures out of the revenue moneys of the band to assist sick, disabled, aged or destitute Indians of the band, to provide for the burial of deceased indigent members of the band and to provide for the payment of contributions under the Employment Insurance Act on behalf of employed persons who are paid in respect of their employment out of moneys of the band.

(2.1) The Minister may make expenditures out of the revenue moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(p.3) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the revenue moneys.



(3) The Minister may authorize the expenditure of revenue moneys of the band for all or any of the following purposes, namely,

(a) for the destruction of noxious weeds and the prevention of the spreading or prevalence of insects, pests or diseases that may destroy or injure vegetation on Indian reserves;

(b) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;

(c) to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof;

(d) to prevent overcrowding of premises on reserves used as dwellings;

(e) to provide for sanitary conditions in private premises on reserves as well as in public places on reserves; and

(f) for the construction and maintenance of boundary fences.



