

OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: September 24, 2019
TO: Mamaweswen, The North Shore Tribal Council (NSTC) Chiefs and First Nations
FROM: Sara Mainville
RE: Legal Review of the "Anishinabek Nation Governance Agreement" for NSTC communities
FILE NO: 74397

The following are the questions and findings of my analysis:

- 1) **Is the Governance Agreement a true form of the Inherent Right to Self-Government?** No, the Governance Agreement is a limited form of recognition through translated rights (mainly contingent rights granted by the settler state).
- 2) **Is this agreement under the Inherent Rights Policy of the Canadian government?** Yes, there are several terms and conditions within the Governance Agreement that describes the central features of the Inherent Rights Policy.
- 3) **Are there other concerns to the exercise of inherent jurisdiction for the Participating First Nations?** Yes, the main concern is that your law-making powers are circumscribed by liberal values throughout the agreement. A smaller concern is that the "fiscal contribution" commitment for funding governance by the First Nation may mean that any settlement of the Robinson Huron annuities claim could be considered revenues that would off-set future federal funding under this Agreement by a more adversarial government.¹
- 4) **How should self-government be better framed for the Robinson-Huron communities?** My advice is to seek recognition of the Aboriginal title rights you continue to hold over your reserves alongside the discussions with the Crown governments about resource revenue sharing in your legally recognized territories. The Governance Agreement is constrained in the subject areas of governance (citizenship, language, governance of internal affairs and enforceability of these laws) as well as protecting the rights of non-member/residents and liberal values within your law and governing systems.

¹ I have reviewed the "Anishinabek Nation Governance Agreement" Draft #14.6 and a plain language version of the Fiscal Agreement. I have not reviewed the important terms such as the "First Nation Fiscal Contribution" in the legal draft of the Fiscal Agreement. Section 8.11 sets out what will not be considered as a source of revenue for purposes of negotiating the transfer payment under this agreement and sub (b) states: amounts received by a First Nation or the Anishinabek Nation from the Crown concerning a settlement, court order or a decision of an adjudicative body, as compensation for past, ongoing or potential infringements of any rights under section 35 of the *Constitution Act, 1982*. Any future settlement with the Crown would need to be clearly set out as a settlement "defined under section 8.11(b)".

The opinion and the ANGA approach to Inherent Jurisdiction

The leading guidance I have retained throughout this document is in the preamble of the Anishinaabe Chi-Naaknigewin:

Debenjiged Kiimiingona dedbinwe wi naagdowendiwin (“Creator gave us sovereignty to govern ourselves”).

This is a first principle I hold of highest value, as an Anishinaabe legal advisor, that is the Creator has given us everything we need as peoples, that is **Miinigoziwin** (“the rules that govern us rightly”).² Canada cannot give us rights; they must, in their law: create the counter-balancing forces to ensure that their institutions, legal system, and society uphold the commitments made in treaties. A Governance Agreement is an approach by the Anishinabek Nation and the Government of Canada to create a path forward towards self-government, but, this framework puts **unnecessary limits and constraints** on your exercise of governing powers.

The practical benefit is that there will be a “seven-fold” increase in funding of Government operations for the First Nations and the Anishinabek Nation; however, there will be far-reaching additional obligations with governing responsibilities, procedural fairness, and record-keeping.

The governance of your reserve lands as Aboriginal Title Holder

The territorial governance rights of Aboriginal title holders were only generally explored by the Supreme Court of Canada in the *Tsilquot’in* decision quoted below:

The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times *can use their land in modern ways*, if that is their choice (emphasis added).³

The court is explaining that once Aboriginal title is recognized, the title-holder is more than just a private land-owner, there are government-like rights including the *governing* “right to control how the land is used.” The understood premise of the Treaty of 1850 was that you agreed to share land, but excluded your reserve lands -- which were for your exclusive use and sole governing control. You maintained your Aboriginal title over those reserve lands and continue to hold that original governing authority.

² My LL.M. thesis, supervised by Darlene Johnston covers my research and understanding in this area, I published a piece that examines how these rules governed our treaty and our treaty relationship in Treaty 3: Sara J. Mainville, “Treaty Councils and Mutual Reconciliation under Section 35” (Fall 2007) *Indigenous Law Journal* 141.

³ *Tsilquot’in Nation v. British Columbia*, [2014] 2 SCR 256 at para. 75.

For your review I have included the following passage from a James Morrison historical report for the Royal Commission on Aboriginal Peoples:

According to the text of both treaties, the Ojibway people surrendered for ever, “all their right, title and interest to and in the whole of the territory”, except for the reservations set out.⁴

My review has included some important legal history as well as framing through the *Restoule v. Canada* decision⁵ about the Robinson Huron treaty relationship. In addition, Aboriginal title expert, Kent McNeil has explained that applicable law is defined by who held practical sovereignty of the territory at the time of treaty.⁶ Indigenous law has a lot to say about what your Aboriginal title interests continue to be within your reserve lands and your treaty lands. Moreover, Indigenous law has much to say about what your actual governing authority is with regard to treaty lands and your reserve lands after the 1850 treaty arrangements were made.

Your First Nations are in a stronger position, in my opinion, because of this evidence of Aboriginal title never being extinguished on your reserve lands generally.

Status Quo (<i>the Indian Act</i>)	ANGA Terms and Conditions	Comment
74 (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.	Section 5.4 of ANGA: Constitution of each First Nation “political and financial accountability of the First Nation Government to its Edbendazijig” “Conflict of Interest rules” Internal “Appeal Mechanisms”	Under s. 74 or the First Nation Elections Act – the appeal and review process are borne by the Minister of Indigenous Services. Already capable of doing your own Election Laws under the Indian Act.
10 (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band’s control of its own membership.	Section 5.12 to 5.20 - maintaining your own List, being accountable to your Edbendazijig - incorporates section 10(4) of the Indian Act - potentially there will be two lists (Edbendazijig and “band members”) - attorn to Canadian citizenship laws for the Edbendazijig under s. 5.18 (U.S. citizens/Edbendazijig may take issue with agreeing to this?)	10 (4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

⁴ James Morrison, “The Robinson Treaties of 1850: A Case Study.” (Ottawa: The Royal Commission on Aboriginal Peoples, 1996).

⁵ *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 (CanLII)

⁶ Kent McNeil, “The Source, Nature and Content of the Crown’s Underlying Title to Aboriginal Title Land,” (2018) 96 (2) Can. Bar. Rev. 273.

Status Quo (<i>the Indian Act</i>)	ANGA Terms and Conditions	Comment
<p>band means a body of Indians</p> <p>(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,</p> <p>(b) for whose use and benefit in common, moneys are held by Her Majesty, or</p> <p>(c) declared by the Governor in Council to be a band for the purposes of this Act; (bande)</p>	<p>Definition of First Nation is one identified on Schedule A.</p> <p>Anishinabek Nation is the collectivity of First Nations on Schedule A.</p> <p>“First Nation” means a “band” under the Indian Act.</p> <p>Section 5.1 sets out a list of matters that recognizes First Nation legal personality as a “distinct legal entity” that is helpful for First Nations.</p>	<p>While it is frustrating that the ANGA must reference the Indian Act there is a lot “legally” about being a “band” under the Indian Act.</p> <ul style="list-style-type: none"> - ties you to your reserve lands - ties you to your trust funds - recognition by Canada <p>Also, in the common law – the inherent rights of a First Nation are recognized under s.2 of the Indian Act.</p> <p>However, the “legal personality” problem of Indian Act bands is also found in the common law under interpretation of “band”.</p>
<p>Other Legislative Powers:</p> <p>https://www.rcaanc-cirnac.gc.ca/eng/1100100032317/1544710152570</p> <p>A long list of Legislation that is as available as the ANGA powers are including:</p> <p>First Nations Elections Act</p> <p>First Nations Fiscal Management Act</p> <p>First Nations Land Management Act</p>	<p>5.10 – “laws with respect to the selection of its First Nation Government representatives”</p> <p>5.12 – “determination of its Edbendazijig and the rights, privileges, and responsibilities associated...”</p> <p>5.21 – “with respect to the preservation, promotion and development of its culture and language”</p> <p>5.24 – “with respect to the management and operation of the First Nation Government”</p> <p>s.15.19 “Future self-government agreements will be approved in accordance with this Agreement, except as otherwise agreed in writing by the Parties.”</p>	<p>More certainty should be created around the delegation of powers between the Anishinabek Nation Government and the First Nation.</p> <p>Once ratified, both the First Nation and the Anishinabek Nation do not need to come back to the citizens to authorize further arrangements.</p> <p>Legislation will also be used to “implement” the agreement in Canada and the s. 15.17 terms requires only consultation with the First Nations about drafts of the legislation.</p>

The main problem that anchors ANGA are the terms and conditions created under the Federal Inherent Rights Policy.

The Inherent Rights Policy Framework:

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

Self-government arrangements will not be implemented exclusively through treaties. Other mechanisms that will play a role in this process include legislation, contracts and non-binding memoranda of understanding. Legislation can be used in the following ways:

- to ratify and give effect to agreements, including treaties;
- to implement particular provisions of agreements, including treaties; and
- to act as a stand-alone mechanism when the parties concerned wish to implement self-government arrangements, but not through a treaty.

Legally enforceable contracts can be used for setting out detailed, technical or time-limited agreements respecting the implementation of self-government arrangements. Finally, memoranda of understanding, which are not legally enforceable, may also be used to set out political commitments on self-government.⁷

One of the most troubling policies in the Federal framework is the self-government agreement being an exchange of additional powers and authorities for a lessening of the "fiduciary duty" of the Crown to the Indigenous Nation exercising those additional powers. This fiduciary duty is a long-held commitment by the Crown to protect and be faithful to the Indigenous allies and family created by treaties prior to Canadian confederation. The Inherent Rights framework makes the following dishonourable statement regarding this "necessary" exchange or transfer:

There is no justifiable basis for the Government to retain fiduciary obligations in relation to subject matters over which it has relinquished its control and over which an Aboriginal government or institution has, correspondingly, assumed control.⁸

The language in the Governance Agreement is that: "[a]s a First Nation exercises law-making power and other authority under this Agreement; fiduciary obligations of Canada to that First Nation will be as determined by jurisprudence respecting fiduciary relationships and fiduciary obligations."⁹ Of course, there are continuing treaty obligations held by the Crown in addition to the fiduciary obligations, and the Governance Agreement does not alter those existing obligations. The framework for Crown obligations would have important to make more certain

⁷ The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, online: www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#lcmou

⁸ The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, online: www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#lcmou

⁹ Section 3.6 of the Governance Agreement.

in the Governance Agreement as opposed to concentrating solely on the obligations of the Anishinabek within this Agreement.

The Governance Agreement also may be too generous in the recognition of Canadian Law, rather than respecting Anishinabek law and jurisdiction over the same subject matters. For example, interpretation is “in accordance with the laws in force in the Province of Ontario” and the Parties have agreed that the Federal Court has the jurisdiction to hear questions in relation to the interpretation or application of this Agreement.¹⁰

The Anishinabek Nation Governance Agreement Preamble (Inherent Rights Policy constructed).

“Whereas Canada recognizes the inherent right of self-government as an existing aboriginal right within section 35 of the Constitution Act, 1982 is based on the view that the aboriginal peoples of Canada have the right to govern **themselves** in relation to matters that are integral to their unique cultures, identities, traditions, languages and institutions and with respect to their special relationship to their land and their resources; and

Whereas the Parties acknowledge that an assertion by one Party is an expression of that Party’s position and does not represent acceptance of that position by the other Parties to the negotiation”.

The following is a detailed review of the Terms of the ANGA:

Anishinabek Nation Governance Agreement	Commentary
Preamble statements are not legally enforceable.	Preambles in legislation give an “interpretative lens” to how sections will be interpreted.
<p>“Anishinaabe Institution” means a government institution established pursuant to a First Nation law or other authority, or an Anishinabek Nation law or other authority under this Agreement;</p> <p>5.1 Each First Nation that ratifies this Agreement shall be a distinct legal entity with the rights, powers and privileges of a natural person, including the legal capacity to:</p> <p>(a) enter into agreements or contracts;</p> <p>(b) acquire, hold, lease or manage property or any interests therein;</p> <p>(c) acquire, hold or dispose of bequests and gifts which are given to that First Nation;</p>	<p>The United Nations Declaration on the Rights of Indigenous Peoples recognizes the inherent authority and self-determining rights of Indigenous peoples.</p> <p>Article 18: Indigenous peoples have the right to participate in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own decision-making institutions.</p> <p>- a benefit for the First Nations is that they may be able to carry on governance beyond the Indian Act as established in 5.1(a) to (h)</p> <p>- Could the Anishinaabe Institution be created by First Nation law in the future, for example, if the</p>

¹⁰ Section 1.2 and 1.3. on page 12.

Anishinabek Nation Governance Agreement	Commentary
<p>(d) sue or be sued and to act on its own behalf in legal proceedings;</p> <p>(e) hold, spend, invest, raise or borrow money, and secure or guarantee the repayment of money borrowed;</p> <p>(f) apply to form corporations or other legal entities in accordance with federal or provincial laws;</p> <p>(g) create, operate, contribute to, or otherwise deal with trusts and act as trustee;</p> <p>(h) do such other things as are ancillary to the exercise of its rights, powers and privileges under this Agreement.</p>	<p>First Nation created various bodies of government, could they also have the powers and authorities outlined in 5.1?</p> <p>Or, would the First Nation be required to create separate legal corporations for each Anishinaabe Institution under s. 5.1 (f)?</p> <p>Contemplated Anishinaabe Institutions:</p> <ul style="list-style-type: none"> • Culture and Languages secretariat(s) • Citizenship office(s) • Appeal Bodies <p>The right of the First Nation to have 5.1(b) rights is also a benefit to the community if this applies to off-reserve property interests (under the Indian Act, a band cannot hold property as an unincorporated association).</p>
<p>“Decision” means a decision made by a First Nation Government, the Anishinabek Nation Government or an Anishinaabe Institution pursuant to an exercise of law-making power or other authority under this Agreement;</p>	<p>For purposes of ANGA:</p> <ul style="list-style-type: none"> - decision (if impacts non-band member resident) there are duties to engage in consultation (see s. 5.38) - decisions in ANGA must have a right to appeal to both citizens and residents/non-citizens
<p>“Edbendazijig” means a person who is a citizen of a First Nation as defined in that First Nation’s Edbendazijig law;</p>	<p>If this is seen by itself, a considerable right and benefit to the community. There are other requirements in ANGA imposed by Canada.</p> <p>- see also s.10 codes under the <i>Indian Act</i>.</p>
<p>“First Nation” means a “band” as defined in the Indian Act;</p> <p>“First Nation” means a First Nation set out in Schedule A of this Agreement;</p>	<p>This is an illustration that the agreement is a contract that will be given “delegated law-making powers” in the federal legislation.</p> <p>Is Inakonigaawin and rules being applied around the Nation-building here?</p>

Anishinabek Nation Governance Agreement	Commentary
<p>“Grand Council” means the law-making body of the Anishinabek Nation and is comprised of a Grand Council Ogiimah, Deputy Grand Council Ogiimak and a representative of each First Nation of the Anishinabek Nation, all of whom must be citizens of the Anishinabek Nation;</p>	<p>This structure mirrors the PTO structure. Why the communities did not chose more robust, Anishinaabe institutional development for the regional body?</p> <p>With all the governance requirements, does 1 representative per community meet the transparency and accountability requirements of the self-governing Nation?</p>
<p>“Implementation and Operations Committee” means the committee established pursuant to Chapter 16 of this Agreement;</p> <p>“Implementation Plan” means the plan described in Chapter 16 of this Agreement;</p>	<p>This is a small committee (which may have operational support) that will resolve disputes between the Parties. Canada will have 1 rep.</p> <p>1 representative from the Nation and 1 from the First Nation (will it be difficult to decide who the FN representative will be?).</p>
<p>“First Nations’ Shared Responsibility” means the amount determined pursuant to the formula set out in the Anishinabek Nation Fiscal Agreement and used in the calculation of the Transfer Payment;</p>	<p>I have not reviewed the Fiscal Agreement and I am very critical of the “plain language” version of the Agreement and it has no transparency regarding the real substance of this agreement.</p> <p>*It is like describing a four-legged animal without giving any features of what it actually is.</p>
<p>Interpretation</p> <p>1.2 This Agreement is governed by, construed and interpreted in accordance with the laws in force in the Province of Ontario.</p> <p>1.3 For greater certainty, the Federal Court has jurisdiction to hear questions in relation to the interpretation or application of this Agreement.</p>	<p>If you have the inherent jurisdiction and governing authority in your own community then your laws should also be used to interpret this agreement – not solely theirs.</p> <p>Communities should be critical about who is appointed to Federal Courts in Canada and their knowledge of First Nations. These are not our courts, while getting better, they misunderstand our original jurisdiction.</p>
<p>3.1 This Agreement is based on the recognition that the inherent right of self-government is an existing aboriginal right within the meaning of section 35 of the Constitution Act, 1982, <u>without the Parties taking any position with respect to how an inherent right of self-government may be ultimately defined at law.</u></p>	<p>Looking at this as a term within a “Governance Agreement” is concerning but, what the “Inherent Rights Policy” of Canada in place today.</p> <p>This might be the foot-hold of the argument that this relationship with Canada is evolutionary, and this agreement may be made stronger once the common law on self-government is settled.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>3.5 The fiduciary relationship between Canada and each First Nation will continue after the Effective Date.</p> <p>3.6 As a First Nation exercises law-making power and other authority under this Agreement, fiduciary obligations of Canada to that First Nation will be as determined by jurisprudence respecting fiduciary relationships and fiduciary obligations.</p>	<p>One of the main criticisms of the inherent rights policy in Canada as that it is trying to bring finality and certainty to the relationship with Indigenous peoples. This is primarily through processes that will lessen the fiduciary obligations that the Crown holds or is obligated to uphold.</p> <p>These sections show that that process of narrowing the fiduciary duty is central to giving authority to First Nations and AN.</p>
<p>3.7 The Canadian Charter of Rights and Freedoms applies to each First Nation Government and the Anishinabek Nation Government in respect of all matters within their authority.</p>	<p>Section 25¹¹ analysis is important in considering whether or not you wish to agree with the blanket statement that the Charter applies to both the First Nation and AN as they exercise governing authority here.</p> <p>This section illustrates that the Federal Inherent Rights Policy was being applied to negotiate this agreement.</p>
<p>3.10 Canada is not liable in respect of anything done or omitted to be done by a First Nation or any person or entity authorized to act on behalf of a First Nation for matters relating to a law-making power or other authority set out in this Agreement after a First Nation has exercised that law-making power or other authority.</p> <p>3.11 Canada is not liable in respect of anything done or omitted to be done by the Anishinabek Nation or any person or entity authorized to act on behalf of the Anishinabek Nation for matters relating to a law-making power or other authority set out in this Agreement after the Anishinabek Nation has exercised that law-making power or other authority.</p>	<p>These two sections are mirrored in regard to anything “done or omitted to be done” by Canada. There is a question if that section does anything for the FN/AN Parties.</p> <p>In these two sections, Canada is relieved of any liability for areas now under the self-governing authority of the Anishinabek Nation and/or the First Nations.</p> <ul style="list-style-type: none"> - Citizenship -Culture and Language -Law making and the operations of Governance

¹¹ Section 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including: any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Anishinabek Nation Governance Agreement	Commentary
<p>3.14 A First Nation will indemnify Canada for any damage, cost, loss or liability suffered by Canada as a result of an act or omission described in section 3.10.</p>	<p>To be clearer, this term of the ANGA requires that the First Nation provides an indemnity, or pays for any costs associated to damages or loss (claims made by others) in the exercise of the First Nation authority (citizenship, language, governance)</p> <p>Indemnity mirrored for the Anishinabek Nation.</p>
<p>3.16 A party that is the subject of a claim, demand, action, or other proceeding that may give rise to a requirement to indemnify pursuant to this Agreement:</p> <p>(a) will vigorously defend the claim, demand, action, or other proceeding; and</p> <p>(b) will not settle or compromise the claim, demand, action, or other proceeding except with the consent of the party that granted the indemnity, which consent will not be arbitrarily or unreasonably withheld or delayed.</p>	<p>This is the requirements of the First Nation, Canada and the Anishinabek Nation if their acts or omissions create a claim against the other Parties.</p> <p>In these claims, Canada would require both (a) and (b) on behalf of the other Parties. Unfortunately, this could result in the AN or FN to be more adversarial than they would like to be in defending claims against them by citizens or non-citizen residents, or others.</p>
<p>3.17 Each First Nation and their Edbendazijig and the Anishinabek Nation will be eligible to participate in and benefit from any federal programs or services in accordance with criteria for such programs or services, to the extent that the First Nation, the Anishinabek Nation or any other entity authorized by the First Nation, has not assumed responsibility for the provision of a similar program or service under the Anishinabek Nation Fiscal Agreement or other agreement with Canada.</p> <p>3.18 The Edbendazijig of the First Nations who are Canadian citizens or permanent residents of Canada continue to be entitled to all the rights and benefits of other Canadian citizens or permanent residents of Canada applicable to them from time to time.</p>	<p>This allows for the status quo, access to existing programs and services in the transition periods between the ANGA applying to citizenship, language, and governance and the downloading of other programs within the agreement.</p> <p>It brings certainty to the transition period.</p> <p>First Nations who live in Canada and have Canadian citizenship will also continue to have entitlements as citizens of Canada. <i>This also brings a risk that your non Canadian citizens may not have special access to citizenship rights because they are members of the Anishinabek Nation/First Nation(s) and will likely be treated similar to any other U.S. (or other) citizen of another country.</i></p>

Anishinabek Nation Governance Agreement	Commentary
<p>3.20 The federal legislation giving effect to this Agreement will provide for judicial notice of the laws of the First Nations and the Anishinabek Nation.</p> <p>3.21 In any proceeding, including judicial proceedings, evidence of a First Nation law or an Anishinabek Nation law may be given by the production of a copy of the law, certified to be a true copy by a person authorized by that First Nation or the Anishinabek Nation respectively, without proof of that person's signature or official title.</p>	<p>Recognition of the ANGA is helpful through the legislation, but the legislation will need to be examined closely as not to circumscribe (or limit) your rights and benefits in addition to what the ANGA already does.</p> <p>This gives certainty to the recognition of your laws in court or other tribunals.</p> <p>This is helpful, but without other resources, a court may still have trouble engaging with your laws.</p>
<p>4.5 The Anishinabek Nation will exercise its law-making powers and other authorities under this Agreement through the Anishinabek Nation Government in a manner consistent with this Agreement.</p> <p>4.7 The Anishinabek Nation laws enacted under this Agreement must be in writing and available to the public.</p> <p>4.8 The Anishinabek Nation will establish and maintain an official registry of its laws in English and, at the discretion of the Anishinabek Nation, in Anishinaabemowin.</p>	<ul style="list-style-type: none"> - Charter analysis of all your laws - Likely must cooperate with existing federal and provincial authorities - Many sections about the status quo and not taking away membership rights, or other rights found in law of your citizens and the residents in your communities. - Requirement that all laws must be in English - only discretionary requirement for the laws to be in Anishinaabemowin - question what kind of resources will be available to culture and language if there are no conditions that laws be in both languages.
<p>4.12 The Anishinabek Nation has the power to enact laws with respect to the selection of the Anishinabek Nation Government representatives.</p> <p>4.13 Except as otherwise set out in this Agreement, in the event of a Conflict between a federal law and an Anishinabek Nation law enacted pursuant to section 4.12 the Anishinabek Nation law will prevail to the extent of the Conflict.</p>	<p>What is the definition of the Anishinabek Nation? A. The collective First Nations on Schedule - Should this say "Anishinabek Nation Government"?</p> <p>This is a section that is important, but also see sections 11.3 and 11.4 regarding federal criminal laws and the application of other laws having primacy over your community and the AN.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>4.14 The Anishinabek Nation has the power to enact laws with respect to the rights, privileges and responsibilities associated with being an Edbendazijig in the Anishinabek Nation.</p> <p>4.15 A person who is an Edbendazijig of a First Nation is deemed to also be an Edbendazijig of the Anishinabek Nation.</p> <p>4.16 The Anishinabek Nation will establish and maintain a list of all of its Edbendazijig.</p> <p>4.17 Nothing in this Agreement confers or denies, or is intended to confer or deny, rights of entry into Canada or grant Canadian citizenship.</p>	<p>Again, is this the proper terminology, should this be the Anishinabek Nation Government and/or the Grand Council?</p> <p>Care should be made about how First Nations transition in and off the schedule because of s. 4.15.</p> <p>Is this the Nation’s government or the collective First Nations that is maintaining this list?</p> <p>There may be a risk to your citizens who live outside of Canada that you are agreeing to attorn/live under settler/citizenship laws in Canada.</p>
<p>4.20 The Anishinabek Nation has the power to enact laws with respect to the preservation, promotion and development of Anishinabek culture and languages.</p>	<p>The Anishinabek Nation is the collective First Nations on the schedule; it is not clear how this entity’s authority is exercised. Should this be changed to the AN Government?</p>
<p>4.23 The Anishinabek Nation has the power to enact laws with respect to the management and operation of the Anishinabek Nation Government, including laws for:</p> <p>(a) the financial administration of the Anishinabek Nation Government;</p> <p>(b) the powers, duties and responsibilities of officers, elected officials and appointees of the Anishinabek Nation Government;</p> <p>(c) the establishment and management and operation of Anishinaabe Institutions;</p> <p>(d) access to information and the protection of privacy; and</p> <p>(e) the examination, publication and scrutiny of regulations and other statutory instruments enacted by the First Nations or the Anishinabek Nation under this Agreement.</p>	<p>Need to change the definition of Anishinabek Nation or change this to “Anishinabek Nation Government” or “Grand Council”</p> <p>- is there a duty to consult the First Nations or seek their consent? Or, is it the “collective” through the Schedule A First Nations that are actually creating these laws?</p> <p>The law-making procedure should have more transparency here.</p> <p>Duties and responsibilities to the First Nation should also be clearer.</p> <p>Duties and responsibilities to the Edbendazijig under s. 4.33.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>4.24 The Anishinabek Nation may, in the exercise of law-making power under this Agreement, make laws with respect to the personal immunity from civil liability of employees, officers, elected officials or appointees of the Anishinabek Nation Government or Anishinaabe Institutions, provided that the Anishinabek Nation Government, as employer, retains vicarious liability for acts or omissions of employees, officers, elected officials or appointees of the Anishinabek Nation Government and Anishinaabe Institutions covered by the immunity.</p>	<p>It is important for any Government to have public official status and not be personally liable for their work.</p> <p>Requirement that the AN Government maintain responsibility for the illegal actions of their officials is a liberal value of settler governments but is helpful for Edbendazijig who may have to make claims against these officials for discrimination/harassment, etc.</p>
<p>4.28 The Anishinabek Nation may delegate any of its authorities, except its law-making powers, under this Agreement to:</p> <p>(a) a department or office of the Anishinabek Nation Government;</p> <p>(b) an official identified in an Anishinabek Nation law;</p> <p>(c) an Anishinaabe Institution; or</p> <p>(d) any legal entity authorized by the Anishinabek Nation Government.</p>	<p>Again, why use the term Anishinabek Nation?</p> <p>Anishinabek Nation Government or Grand Council is the entity making laws?</p> <p>Delegation limited to the four options, with the fourth being a catch-all “any legal entity” which should be clarified to not only mean incorporated bodies.</p>
<p>4.32 The Anishinabek Nation may enter into an agreement to receive a delegation of law-making power or other authority.</p>	<p>First Nations should be cautious, is there a duty to consult First Nations or seek their consent prior to receiving this delegation under s. 4.33?</p>
<p>4.33 The Anishinabek Nation will provide an opportunity to the Edbendazijig, and to any person who resides on a Reserve of a First Nation and who may be directly and significantly affected by any proposed law or Decision of the Anishinabek Nation under this Agreement, to make representations about that law or Decision in accordance with the principles of procedural fairness.</p>	<p>These broad statements could be met by having a single forum or an online consultation page.</p> <p>This also opens up your laws and your Nations self-governance decisions and laws to the non-citizen residents in your communities.</p> <p>“Principles of procedural fairness” allows the Canadian common law standard to the ANGA</p>

Anishinabek Nation Governance Agreement	Commentary
<p>4.34 An Anishinaabe Institution established by the Anishinabek Nation will provide an opportunity to the Edbendazijig, and to any person who resides on a Reserve of a First Nation and who may be directly and significantly affected by a proposed Decision of the Anishinaabe Institution, to make representations about that Decision in accordance with the principles of procedural fairness.</p>	<p>standard for your nation.</p> <p>- could be high threshold as these principles are being applied to provincial and federal governments.</p> <p>The decision-maker will be the Federal Courts and one wonders if these Courts will be capable of making good decisions here.</p>
<p>4.35 Where it establishes an Anishinaabe Institution, the Anishinabek Nation will provide an opportunity for the Edbendazijig, and for persons who reside on the Reserve of a First Nation and who may be directly and significantly affected by that Anishinaabe Institution, to participate in that Anishinaabe Institution. The means of participation will be set out at the time the Anishinaabe Institution is established</p>	<p>This is an over-reach by the Federal Government’s Inherent Rights Policy as it allows non Edbendazijig some authority and say into the self-government processes of your First Nations and the Anishinabek Nation.</p> <p>The Laws “will” allow for this participation.</p>
<p>4.36 Where the Anishinabek Nation makes a Decision it will provide for the appeal or review of that Decision by any person who is directly and significantly affected.</p> <p>4.37 Where an Anishinaabe Institution is established, the Anishinabek Nation law or other authority will also provide for the appeal or review of a Decision of that Anishinaabe Institution by any person who is directly and significantly affected.</p> <p>4.38 The Anishinabek Nation may establish an Anishinaabe Institution to hear the appeal or review of a Decision.</p>	<p>Appeal or review mechanisms within First Nation communities may have all the same issues with Indian Act enforcement.</p> <p>The section also empowers the Appeal or Review – Anishinaabe Institutions which is a benefit in this agreement.</p> <p>Problems could arise in areas and decisions where non Edbendazijig are directly impacted by the appeal/decision.</p>
<p>5.2 Each First Nation that ratifies this Agreement will maintain a written constitution.</p> <p>5.3 Each First Nation will ratify its constitution prior to the date it ratifies this Agreement.</p>	<p>Are there specific requirements about what is needed in the written constitution or could the constitution be written in Anishinaabemowin with clear Anishinaabe Inakonigaawin principles (which are distinct from liberal values)?</p>

Anishinabek Nation Governance Agreement	Commentary
<p>5.5 Each First Nation that ratifies this Agreement will exercise its law-making powers and other authorities under this Agreement through its First Nation Government in a manner consistent with this Agreement.</p> <p>5.6 The exercise of law-making powers and other authorities by a First Nation under this Agreement will evolve over time.</p> <p>5.7 A First Nation law enacted under this Agreement must be in writing and available to the public.</p>	<p>The question is who enforces section 5.5 beyond the Implementation Committee over the first 10 years of the agreement? If a First Nation goes “out of bounds” the dispute resolution mechanisms are important in this agreement.</p> <p>While it is clear that this is an evolutionary process, could this section also mean that the law-making powers will need to conform to the Canadian common law on Charter protections, procedural fairness, and some sections of the Indian Act? (be under constant legal review)</p>
<p>5.12 Each First Nation has the power to enact laws with respect to the determination of its Edbendazijig and the rights, privileges and responsibilities associated with being an Edbendazijig in the First Nation.</p> <p>5.13 Each First Nation will establish and maintain a list of its Edbendazijig.</p>	<p>This is not unlike s.10 powers under the Indian Act.</p> <p>Also, this may be one of two lists (a band list might differ from the Edbendazijig list)</p> <p>The Edbendazijig law must withstand Charter of Rights and Freedoms challenges.</p>
<p>5.14 A person who is a member of a First Nation immediately prior to the coming into force of an Edbendazijig law of a First Nation enacted under this Agreement will become an Edbendazijig of that First Nation after the Edbendazijig law comes into force.</p> <p>5.15 A person who was eligible to become a member of the First Nation according to the membership provisions of the Indian Act or according to the membership code of that First Nation, immediately prior to the enactment of an Edbendazijig law, will be deemed eligible for Edbendazijig in the First Nation, after an Edbendazijig law comes into force.</p> <p>5.16 A First Nation Edbendazijig law enacted under this Agreement may not remove a person whose name is entered on a band list, as defined in the Indian Act, for that Band, by reason only of a situation that existed or action taken before a First Nation Edbendazijig law comes into force.</p>	<p>This is s.10(4) of the Indian Act</p> <p>Again, s.10 of the Indian Act</p> <p>Section 10 of the Indian Act</p>

Anishinabek Nation Governance Agreement	Commentary
<p>5.17 A person entitled to be registered as an Indian under the Indian Act will continue to be entitled to be registered as an Indian under the Indian Act after an Edbendazijig law of a First Nation comes into force.</p>	<p>The problem of having a band list under the Indian Act and an Edbendazijig list for each First Nation could continue.</p>
<p>5.21 Each First Nation has the power to enact laws with respect to the preservation, promotion and development of its culture and language.</p>	<p>This is great as long as the funding to do this also is part of the deal.</p>
<p>5.24 Each First Nation has the power to enact laws with respect to the management and operation of the First Nation Government, including:</p> <p>(a) the financial administration of the First Nation Government, including its financial accountability to its Edbendazijig;</p> <p>(b) the powers, duties and responsibilities of officers, elected officials and appointees of the First Nation Government;</p> <p>(c) the conduct of meetings, including First Nation community meetings and First Nation council meetings;</p> <p>(d) the establishment and management and operation of Anishinaabe Institutions; and</p> <p>(e) access to information and the protection of privacy.</p>	<p>The list from (a) to (e) is both part of the Federal Government Inherent Rights Policy and “concerns” of liberal values.</p> <p>Financial Transparency and Accountability</p> <p>Democracy and minority protections</p> <p>Democracy and Transparency/Accountability</p> <p>This is a benefit, to be empowered to do this as a First Nation under the ANGA.</p> <p>Again, a requirement under federal and provincial law (and funding agreements).</p>
<p>5.29 Each First Nation may delegate, in whole or in part, a law-making power under this Agreement to the Anishinabek Nation.</p> <p>5.30 The terms and conditions associated with a delegation of law-making power by a First Nation under section 5.29 will be set out in writing.</p> <p>5.31 The First Nation will remain accountable to its Edbendazijig for the exercise of any law-making power it delegates.</p>	<p>This could be cause for concern if delegation of self-government powers goes to the Anishinabek Nation.</p> <p>This is important for accountability back to the First Nations and the Edbendazijig that the terms and conditions are set out in writing.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>5.32 The Anishinabek Nation will be accountable to the First Nation for the exercise of a law-making power delegated to it under section 5.29 and may not further delegate that law-making power.</p>	<p>This vague term may cause concern as “remain accountable” can be very liberally interpreted as the federal government standards of accountability.</p>
<p>5.38 Each First Nation will provide an opportunity to its Edbendazijig, and to any person who resides on the Reserve of that First Nation and who may be directly and significantly affected by any proposed law or Decision of that First Nation under this Agreement, to make representations about that law or Decision in accordance with the principles of procedural fairness.</p> <p>5.39 An Anishinaabe Institution will provide an opportunity to Edbendazijig, and to any person who resides on the Reserve of that First Nation and who may be directly and significantly affected by a proposed Decision of the Anishinaabe Institution, to make representations about that Decision in accordance with the principles of procedural fairness.</p>	<p>First Nations are allowed under the Indian Act to be less accountable to their communities.</p> <p>This is a benefit to the Edbendazijig that the First Nations will be more accountable.</p> <p>However, this could cause delays in the business and operations of the First Nations as it will be required for any “proposed law or Decision”</p> <p>Decision is defined as “a decision made...pursuant to an exercise of law-making power or other authority under this Agreement.” It could capture all governance and operations decisions.</p> <p>There are a lot of inefficiencies that could crop up in First Nation/AN Governance because of this requirement.</p>
<p>5.40 Where it establishes an Anishinaabe Institution, a First Nation will provide an opportunity for its Edbendazijig, and for persons who reside on the Reserve of that First Nation and who may be directly and significantly affected by that Anishinaabe Institution, to participate in that Anishinaabe Institution. The means of participation will be set out at the time the Anishinaabe Institution is established.</p>	<p>Requirement that the procedures for participating in decision-making by Anishinaabe Institutions developed under this agreement by Edbendazijig.</p> <p>Careful drafting is required given the inefficiency concerns above.</p>
<p>6.1 Each First Nation and the Anishinabek Nation may provide services, including restorative justice or mediation services, for the voluntary settlement of disputes arising from the exercise of its law-making powers and other authorities under this Agreement.</p>	<p>This will be an additional cost to self-government but it is a benefit to the First Nations and the Edbendazijig that these services will be other ways of resolving disputes.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>6.2 Each First Nation and the Anishinabek Nation may establish traditional Anishinaabe processes, and impose Anishinaabe sanctions as set out in section 6.4, to deal with alleged offences under First Nation or Anishinabek Nation laws under this Agreement.</p>	<p>This will be an additional cost to self-government but it is a benefit to the First Nations and the Edbendazijig that these services will be other ways of resolving disputes.</p>
<p>6.3 Subject to section 6.4, the laws of each First Nation and the Anishinabek Nation under this Agreement, may provide for the creation of offences and for the imposition of sanctions, including fines, penalties and imprisonment for the violation of those laws.</p> <p>6.4 As an alternative to fines, penalties or imprisonment described in section 6.3, the laws of each First Nation and the Anishinabek Nation under this Agreement may provide for Anishinaabe sanctions that are consistent with Anishinaabe customs, culture, traditions and values, provided that such sanctions are proportionate to the seriousness of the offence and are not imposed on an offender without his or her consent.</p>	<p>To be clear, a list of what type of offences is contemplated here?</p> <p>Citizenship or Edbendazijig law – other than application costs, what would need to be enforced here?</p> <p>Culture and Language Law – other than programming and policies – is the law going to enforce against First Nations, persons, organizations who do not comply with requirements (like Official Languages legislation)?</p> <p>Governance and operations – will there be sanctions in the elections/code of conduct?</p>
<p>6.5 Where the law of a First Nation or the Anishinabek Nation provides for the imposition of a fine or a term of imprisonment for the violation of that law, the sanction will not be greater than those imposed under the general penalty provisions of the Criminal Code that apply to offences punishable on summary convictions or \$10,000, whichever is greater.</p>	<p>A clear example of this limit being problematic is in the business licencing areas where there is more money to be made in non-compliance than in compliance (tobacco, cannabis, etc.)</p> <p>See above, it is not really in the subject matters within the ANGA where you would see a lot of compliance/enforcement issues (elections, culture, languages, citizenship)</p>
<p>6.6 Each First Nation and the Anishinabek Nation may provide for the enforcement of its laws under this Agreement and may appoint enforcement officers with powers of enforcement comparable to those provided by the laws of Ontario or Canada for officers enforcing similar laws.</p>	<p>The cost of administering these laws is one barrier to their enforceability.</p> <p>Operationalizing law is the major benefit of the ANGA and the capacity to appoint officers is an achievement that you do not have in the status quo.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>6.7 Each First Nation and the Anishinabek Nation is responsible for the prosecution of violations of its laws and may appoint individuals to conduct such prosecutions in a manner consistent with the principles of prosecutorial independence.</p>	<p>Section 6.7 may be vulnerable to all the problems of enforceability of bylaws under the Indian Act, yes you now have your own capacity to prosecute, but how do you enforce the order? See commentary below re the regime for enforcement.</p>
<p>6.8 Each First Nation and the Anishinabek Nation may adopt procedures for the enforcement of their laws and prosecution of offences.</p> <p>6.9 The procedures adopted pursuant to section 6.8 may include, with necessary modifications:</p> <p>(a) the procedures for the prosecution of offences under the Ontario Provincial Offences Act; or</p> <p>(b) the summary conviction procedures of Part XXVII of the Criminal Code.</p>	<p>Given the subject areas of the ANGA, this is not the major problem for Governance, citizenship and culture and language rights – the main barrier is spending/funding capacity.</p> <p>Commitments and agreements with the Province and the Federal government may be required here to back-stop the ANGA with less friendly governments.</p>
<p>6.10 Every fine or penalty arising out of the adjudication of a law of a First Nation will be remitted to and belong to that First Nation.</p> <p>6.11 Every fine or penalty arising out of the adjudication of an Anishinabek Nation law will be remitted to and belong to the Anishinabek Nation.</p>	<p>This makes sense.</p> <p>Unsure if there is contemplated to be a lot of fines and penalties involved in Governance, citizenship, and culture and languages laws.</p>
<p>6.12 The Federal Court of Canada has jurisdiction with respect to applications for judicial review of a Decision, provided all procedures for appeal or review applicable to that Decision have been exhausted.</p> <p>6.13 The Ontario Court of Justice has jurisdiction to hear prosecutions of offences under the laws of each First Nation and the Anishinabek Nation under this Agreement.</p> <p>6.15 The Ontario Superior Court of Justice has jurisdiction to hear and determine:</p> <p>(a) proceedings for civil matters under the laws of each First Nation and the Anishinabek Nation if those matters are within the jurisdiction of the Superior Court of Justice under federal or provincial law dealing with the same subject matter; and</p> <p>(b) appeals of decisions of the Ontario Court of Justice with respect to matters referred to in section 6.13 and 6.14.</p>	<p>More arrangements need to be made with the Federal Court to ensure that:</p> <p>a) they have capacity to be the decision-makers here, that they understand your laws;</p> <p>b) that the Court has the resources to efficiently review your decisions.</p> <p>The Ontario Court of Justice may be less capable to review your matters as they may have not done the comprehensive Indigenous law judicial training etc.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>7.1 The Parties affirm that they are committed to a new government-to-government relationship based on openness, cooperation and mutual respect.</p> <p>7.2 The Parties will establish the Anishinabek Nation - Canada Intergovernmental Forum to maintain their intergovernmental relationship and to enable cooperation on issues of mutual interest or concern.</p>	<p>Not sure if First Nations wanted language that made the treaty relationship the paramount relationship with Canada/Crown.</p> <p>“openness, cooperation and mutual respect” is language from the Inherent Rights Policy</p> <p>The Intergovernmental Forum could be helpful but the First Nation’s relationship with the Crown needs to be the most important relationship.</p>
<p>8.1 On the Effective Date, the Parties will enter into a government to government financial relationship and fiscal arrangements consistent with this Agreement.</p> <p>8.2 The Parties acknowledge that the financing of the new government to government financial relationship is a shared responsibility of the Anishinabek Nation Government and Canada.</p> <p>8.3 Canada’s recognition of the law-making powers and other authorities under this Agreement does not create or imply any financial obligations for any of the Parties.</p> <p>8.4 The Parties acknowledge that the Anishinabek Nation Fiscal Agreement is a part of the government to government financial relationship and sets out financial obligations applicable to both Parties.</p>	<p>I have not reviewed the Agreement and the section 8 terms and conditions are vague in obligations but <u>quite clear in limitations</u>.</p> <p>“shared responsibility” will mean that the First Nations will be partially responsible to self-finance your self-government.</p> <p>Despite there being an agreement and arrangement to receive “contingent” rights of self-government, that creates no financial obligations on Canada.</p> <p><i>The obligations of the First Nations should be clearly explained to the First Nations under the Fiscal Arrangements prior to ratification.</i></p>
<p>8.5 The Parties will enter into and maintain an Anishinabek Nation Fiscal Agreement that sets out the financial arrangements in support of the exercise of law-making powers and other authorities under this Agreement.</p> <p>8.6 The Anishinabek Nation Fiscal Agreement is a contract between Canada and the Anishinabek Nation on its own behalf and on behalf of the First Nations.</p> <p>8.7 The Anishinabek Nation Fiscal Agreement is not a treaty within the meaning of section 35 of the Constitution Act, 1982 and does not abrogate or derogate from the aboriginal or treaty rights of the aboriginal peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982.</p>	<p>The vague “plain language” document about this Fiscal Agreement is very concerning.</p> <p>Section 8.6 states that this Agreement is also contracted “on behalf of the First Nations” with little procedural rights of the First Nations to consent, be consulted or be engaged directly about the terms in this Agreement.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>8.11 The following types of revenues will be excluded from the First Nations’ Fiscal Contribution formula:</p> <p>(a) amounts received by a First Nation or the Anishinabek Nation as a gift or donation;</p> <p>(b) amounts received by a First Nation or the Anishinabek Nation from the Crown concerning a settlement, court order or a decision of an adjudicative body, as compensation for past, ongoing or potential infringements of any rights under section 35 of the Constitution Act, 1982;</p> <p>(c) proceeds to any First Nation or the Anishinabek Nation from the sale or expropriation of First Nation or Anishinabek Nation lands; and</p> <p>(d) any other revenue sources agreed to in writing.</p>	<p>This list is the ONLY exclusions of First Nation own source revenue, so be careful that it is exhaustive.</p> <p>Gifts or donations to the FN or AN</p> <p>“settlement, court order, or decision of adjudicative body” as compensation...under <u>section 35</u> of the Constitution Act, 1982.”</p> <p>Proceeds from the sale or expropriation of land</p> <p>Any other revenue sources agreed to in writing</p> <p>- Any agreement or settlement regarding the Robinson Annuities claim would need to be clarified as 8.11(b) revenue (should not be difficult unless involving a very adversarial province of Federal government)</p> <p>IBAs and other revenue sharing agreements likely would be seen as 8.11(b) revenues but proceed with caution here.</p> <p>First Nation economic development activity generally – those revenues would be captured.</p>
<p>8.12 For greater certainty, funding received by a First Nation or the Anishinabek Nation for expenditure on programs and services from a federal or provincial source will be excluded from the First Nations’ Fiscal Contribution formula.</p>	<p>This is a good, clear term in the ANGA.</p>
<p>8.13 On the Effective Date, any funding provided by Canada to each First Nation in relevant funding agreements that precede the Anishinabek Nation Fiscal Agreement for programs and services which are similar to the Federally Supported Programs and Services will be replaced by the Transfer Payment.</p>	<p>This is likely not a negotiable term with Canada.</p>
<p>8.14 The Transfer Payment is subject to the appropriation of funds by the Parliament of Canada.</p> <p>8.15 For greater certainty, any unexpended Transfer Payment will not be returned to Canada.</p>	<p>This is always a term required by the Government of Canada.</p> <p>This is a good, clear term within the ANGA.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>8.16 Each First Nation and the Anishinabek Nation will prepare financial statements and reports in accordance with the Anishinabek Nation Fiscal Agreement and Generally Accepted Accounting Principles.</p>	<p>I have not reviewed the fiscal agreement – whether or not these conditions are more or less onerous is something that First Nations should be advised of prior to ratification.</p>
<p>8.18 Canada will give notice to the Anishinabek Nation if, prior to the fifth anniversary of the Effective Date, Canada approves a revised model fiscal chapter for general use in modern treaty and self-government negotiations.</p>	<p>This is the risk and challenge of these contractual agreements. The Government of Canada can only go so far as they agreed with other Indigenous groups. Hopefully, terms will get better, but what if they do not?</p>
<p>9.7 Each First Nation and the Anishinabek Nation will develop and maintain a system to provide Edbendazijig with access to information held by the First Nation Government, the Anishinabek Nation Government and Anishinaabe Institutions.</p> <p>9.8 In developing exemptions to access to information, each First Nation and the Anishinabek Nation will be guided by the exemptions contained in existing access to information and privacy legislation in Canada.</p>	<p>This will be a new cost of administering this agreement and it will require First Nations and the AN Government to do record-keeping and information systems at a higher-level (some already do this).</p> <p>This is a condition that could be Canada over-reaching, but allowing the Access provisions to have exemptions is good here.</p>
<p>10.2 Until First Nation enacts a leadership selection law under this Agreement, the election procedures that apply on the Effective Date will continue to apply.</p> <p>10.3 Until a First Nation enacts an Edbendazijig law under this Agreement, the membership provisions of the Indian Act or the membership code of the First Nation that applies on the Effective Date, will continue to apply.</p>	<p>The status quo applies for all the First Nations in Schedule A until they enact their law. If a First Nation is under the First Nation Elections Act or the Indian Act those rules will apply until they create their own Law.</p> <p>Similarly, the status quo applies to First Nations (who may have their own membership code or who are under the Indian Act) – until they enact their own law.</p>
<p>10.5 Except as otherwise provided in sections 10.6, 10.7 and 10.8, on the Effective Date, the Indian Act will continue to apply to each First Nation, its Edbendazijig and its Reserve.</p>	<p>You need to review the ANGA to see what specific sections of the Indian Act (elections, membership) are opted out of when enacting a law.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>10.12 The First Nations Land Management Act will continue to apply to a First Nation who has a land code in force under the First Nations Land Management Act.</p> <p>10.13 Except as otherwise provided in this Agreement, in the event of a Conflict between the First Nations Land Management Act and this Agreement, this Agreement will prevail to the extent of the Conflict.</p>	<p>This illustrates that the ANGA is a small progression from what is already available under s.10 of the Indian Act and the First Nations Elections Act.</p> <p>First Nations will need to review their Lands Management Authority to ensure that there will be no overriding authority within the ANGA laws (conflicts).</p>
<p>11.4 For greater certainty, the law-making powers of each First Nation and the Anishinabek Nation under this Agreement do not extend to matters not specifically addressed in this Agreement, including:</p> <ul style="list-style-type: none"> (a) criminal law or criminal procedure; (b) labour relations and working conditions; (c) Intellectual Property; (d) aeronautics, navigation and shipping; or (e) the official languages of Canada. 	<p>Federal laws will continue to apply to the ANGA First Nations.</p> <p>Why the official languages act of Canada needs to apply to the First Nations is an over-reach.</p> <p>The risk of creating enclaves where federal jurisdiction may not apply was likely why this section was required.</p>
<p>11.5 Any applicable provincial laws continue to apply to each First Nation, its Government, its Anishinaabe Institutions, its Reserve and all persons on its Reserve, unless otherwise provided in this Agreement.</p>	<p>This may be controversial to leadership and citizens that this was term were allowed in.</p> <p>Provincial Laws of General application should be a matter of negotiations under the ANGA and part of the evolutionary nature of the arrangements.</p>
<p>11.7 Notwithstanding any other provision in this Agreement, a federal law in relation to peace, order and good government, criminal law, the protection of the health and safety of all Canadians, the protection of human rights or other matters of overriding national importance, prevails to the extent of a Conflict with a law of a First Nation or the Anishinabek Nation under this Agreement.</p>	<p>This would mean that a Cannabis Act and other new Acts like it will apply to the First Nations in the future.</p> <p>You cannot oust the Human Rights legislation, or environmental legislation, etc.</p> <p>This gives certainty in grey areas that could exist (such as the Cannabis Act’s enforceability despite lack of consultation/accommodation).</p>

Anishinabek Nation Governance Agreement	Commentary
<p>13.7 The Parties agree that subject matters for future negotiations that may affect areas of provincial jurisdiction may require the participation of Ontario.</p>	<p>This is just a matter of fact.</p>
<p>14.2 This Agreement may only be amended in writing by the Parties.</p> <p>14.3 The consent to any amendment will be effected in the following order:</p> <p>(a) in the case of the First Nations and the Anishinabek Nation, by a Grand Council Resolution passed by a majority of the First Nations; and</p> <p>(b) in the case of Canada, by order of the Governor-in-Council and, if required, the enactment of federal legislation giving effect to the amendment.</p> <p>14.4 An amendment to this Agreement takes effect on a date agreed to in writing by the Parties.</p>	<p>Does the First Nation agree with this amending authority?</p> <p>ANGA can be amended by a Grand Council Resolution passed by a majority of Ogemah in one room?</p>
<p>15.5 Ratification of this Agreement requires a minimum of 25% plus 1 of a First Nation's Eligible Voters vote "YES" and those who vote "YES" represent a majority of those who voted.</p>	<p>This is not a high standard, but it is likely a practical standard for ratification.</p>
<p>15.15 Canada will have ratified this Agreement when the federal legislation giving legal effect to this Agreement comes into force.</p>	<p>Note that the legislation is drafted by Canada and they must consult with the First Nations in the drafting process, but are not required to receive the First Nation's consent here.</p>
<p>15.19 Future self-government agreements will be approved in accordance with this Agreement, except as otherwise agreed in writing by the Parties.</p>	<p>There will be a ratification vote as above for future agreements. Unsure how "as otherwise agreed" could be approved in writing by the Parties.</p> <p>- higher ratification standard could be contemplated?</p>
<p>16.7 On the Effective Date, the Implementation and Operations Committee will be established comprised of three (3) representatives: one (1) for Canada, one (1) for the First Nations and one (1) for the Anishinabek Nation.</p>	<p>This is a very small Group and may not be what is required to actually implement this agreement.</p>

Anishinabek Nation Governance Agreement	Commentary
<p>16.9 Each Party is responsible for its own costs of participation in the Implementation and Operations Committee.</p> <p>16.10 Canada will make the annual update provided for in sub-section 16.8(g) publicly available.</p>	<p>These are terms likely required of each of the parties and are not negotiable terms with Canada.</p>
<p>17.4 Except as otherwise provided in this Agreement and prior to referring a dispute to a court, a dispute will progress through the following stages until resolved:</p> <p>(a) initial written notice of the matter in dispute pursuant to section 17.9;</p> <p>(b) collaborative negotiations pursuant to section 17.10;</p> <p>(c) mediation pursuant to sections 17.11 to 17.14; and (d) arbitration pursuant to sections 17.16 to 17.19.</p>	<p>This is a legally enforceable contract.</p> <p>However, there is not a great deal of enforceable terms and conditions as against Canada in this agreement (more are likely in the Fiscal Agreement).</p> <p>The 17.4 provisions are likely at the cost of the parties and therefore, could become very expensive as Canada is a notoriously expensive adversary.</p>

It is responsible of the NSTC Chiefs to ask for a review of the Governance Agreement as it does afford the Participating First Nations a choice to get out from under the Indian Act in an “evolutionary” manner. There might be better processes out there, including more discussions after the Restoule decision about the implementation of the Robinson Huron Treaty by Canada.

The Court gave important direction to the Crown at paras 538 and 539:

The honour of the Crown requires that the Crown fulfil their treaty promises with honour, diligence, and integrity. The duty of honour also includes a duty to interpret and implement the Treaties purposively and in a liberal or generous manner. The Defendants accept this characterization of their duties. As I have found, there is also an ad hoc fiduciary duty on the part of the Crown.

All parties realize that the implementation of the Treaties’ promise going forward will go a long way in shaping the current and future relationship between the Crown and the Anishinaabe of the upper Great Lakes region.¹²

It is my opinion, given what you have, Miinigoziwin (inherent jurisdiction) and the settler government has only spending power jurisdiction to require you to meet their Inherent Rights Policy. Other considerations are the Robinson Huron Treaty, your Aboriginal title over your reserve lands, and it is from that stand-point that your communities must recognize that the Governance Agreement is a very limited solution for a very large compromise.

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¹² *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 (CanLII)