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The New Governance Agenda: Aligning Power and Responsibility for Effective Responses to Priority Issues

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The IRPP's *Canadian Priorities Agenda* project is the inspiration for the capstone seminar in the master's in public policy program of the School of Public Policy and Governance at the University of Toronto. The course is offered in an intensive format as a core requirement in the final semester of the two-year program. *A Canadian Priorities Agenda: Policy Choices to Improve Economic and Social Well-Being* is the basic text for the course. It is supplemented by readings chosen by the instructors and guest presenters. The students take the role of judges, and for their final assignment they write a 5,000-word paper modelled on the judges' reports in the original project, in which they have to make the case for an agenda comprising five policies selected from options presented in the course. Every year the instructor selects the best student paper, and the IRPP posts it on its website.

The New Governance Agenda Aligning Power and Responsibility for Effective Responses to Priority Issues

Ben Hanff

The allocation of power and responsibility among Canadian governmental actors and institutions can be traced back to Confederation and the approval of the *Constitution Act, 1867*.¹ Since then, what it means to exercise power has shifted due to globalized economic and social forces, and because of changed demands on the state driven by “new social divisions,” more demanding citizens and “seemingly more intractable policy challenges.”² Making and implementing policy increasingly depends on “the active involvement of the governed.”³ Power and responsibility become scattered among networks of actors in the public and private sectors, but the state continues to play a crucial role by strategically choosing governance frameworks.⁴

Populism threatens this governance paradigm. It puts first the interests of a “silent majority” by reviving hierarchical institutions and pointing to networks and compromise as evincing corruption and “elite” interests.⁵ It denies the legitimacy of opponents and the existence of social divisions,⁶ fans cultural and economic insecurities⁷ and — most significantly — espouses policy that, if actually implemented, could have severe economic and social impacts.⁸

The New Governance Agenda proposes to counter populism through *effective* responses to priority issues. Effectiveness requires that power and responsibility be aligned in the actor or institution best situated to respond. Alternatively, there must be mechanisms to ensure collaboration if power and responsibility are distributed across a network. Power means the ability to act;⁹ it depends on legal authority, financial means, problem knowledge and political legitimacy. Responsibility means answerability for outcomes; it may entail a legal duty or political accountability to voters. In realigning power and responsibility, the actors and institutions best situated to respond to priority issues are those that are already competent and politically legitimate due to the difficulty of reallocating these components of power (table 1).¹⁰

¹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

² Stoker, “When Governance Meets Populism,” 2.

³ Michalski, Miller, and Stevens, “Governance in the 21st Century,” 7.

⁴ Bevir and Rhodes, *Rethinking Governance*, 13; Bevir, *Governance*, 117; Bell and Hindmoor, *Rethinking Governance*, 10-16.

⁵ Stoker, “When Governance Meets Populism,” 9, 14.

⁶ Stoker, “When Governance Meets Populism,” 8.

⁷ Inglehart and Norris, “Trump, Brexit, and the Rise of Populism,” 4.

⁸ Rode and Revuelta, “The Wild Bunch,” 74.

⁹ Parsons, “On the Concept of Political Power,” 232.

¹⁰ Rhodes, “Local Knowledge,” 202; Albrow, “Society as Social Diversity,” 154-57.

Table 1: Components of power and responsibility

Power	Responsibility
<ul style="list-style-type: none"> • Legal (authority) • Financial (revenue) • Knowledge (competence) • Political (legitimacy) 	<ul style="list-style-type: none"> • Legal duty • Political accountability

Selection Criteria

This agenda identifies and responds to three priority issues where governance reforms are sorely needed:

1. reconciliation with Indigenous peoples,
2. adapting to the global knowledge economy, and
3. balancing environmental protection with economic growth.

Table 2 sets out selection criteria related to both policy objectives and instrument design.

Table 2: Selection criteria: objectives and design

	Selection criteria	
Objectives	Social equity	<ul style="list-style-type: none"> • Improves outcomes for vulnerable populations
	Economic efficiency	<ul style="list-style-type: none"> • Prepares Canada for emerging economy; OR • Corrects market failure
	Governance	<ul style="list-style-type: none"> • Aligns/coordinates power and responsibility to enable provision of state programs or manage market risk
Design	Fiscal	<ul style="list-style-type: none"> • Revenue neutral for government; OR • Requires one-time expenditure
	Political	<ul style="list-style-type: none"> • Feasible in current political climate even if controversial
	Technical	<ul style="list-style-type: none"> • Policy can be designed and implemented in a manner that mitigates risks

Policy Proposals

The New Governance Agenda proposes three policies to respond to the identified priority issues and improve Canadians' social and economic well-being: a comprehensive land claims tribunal; statutory reform of municipal finance and governance; and mandatory corporate environmental insurance (table 3). The fact there are three policies reflects the fact that there is no one-size-fits-all approach to effective governance in the twenty-first century.

Table 3: Assessment of policies against selection criteria

Options	Selection criteria					
	Objectives			Design		
	Social equity	Economic efficiency	Governance	Fiscal	Political	Technical
Comprehensive land claims tribunal	✓		✓	✓	✓	✓
Reform of municipal finance and governance		✓	✓	✓	✓	✓
Mandatory corporate environmental insurance		✓	✓	✓	✓	✓

Policy 1: Comprehensive Claims Tribunal

Governance background

Section 91(24) of the *Constitution Act, 1867* assigns the federal government jurisdiction over “Indians and Lands reserved for the Indians.”¹¹ The *Indian Act*, passed in 1876, imposed federal control over almost all aspects of the lives and lands of Status Indians, hollowed out traditional Indigenous governance structures and created dependency on the state.¹² Although section 91(24) gives the federal government both legal and financial power, this government lacks the necessary knowledge to govern Indigenous affairs due to “radical cultural differences.”¹³ The Royal Commission on Aboriginal Peoples (RCAP) stated in 1996, “Aboriginal people know best how to define and promote their own interests.”¹⁴ The federal government also lacks political legitimacy due to the legacy of assimilative policies and the weak justification for Canadian sovereignty (i.e., *terra nullius* and the doctrine of discovery).¹⁵

Federal responsibility is also lacking. Historically, it was conceived as a paternalistic obligation to protect “Indians” and their interests from settler populations, provincial governments and themselves.¹⁶ In terms of political accountability, Status Indians were not allowed to vote in Canada until 1960, and, since then, Indigenous peoples have voted at comparatively low rates.¹⁷ The judiciary rarely imposed legal duties on the state until the entrenchment of

¹¹ *Constitution Act 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, at s 91(24).

¹² Andrusiczeko, “First Nations’ Self-Government,” 10.

¹³ Borrows, *The Right Relationship*, 33. See also Valadez, “Deliberation,” 62-65.

¹⁴ Royal Commission on Aboriginal Peoples, *Report*, vol. 1, 8.

¹⁵ Assembly of First Nations, *Dismantling the Doctrine of Discovery*, 3-4.

¹⁶ Royal Commission on Aboriginal Peoples, *Report*, vol. 1, 8.

¹⁷ Elections Canada, “Electoral Participation,” 15-16.

Aboriginal rights in the *Constitution Act, 1982*.¹⁸ The judiciary then attempted to reconcile “federal power” with “federal duty” by implying a fiduciary duty owed to Indigenous peoples, by requiring the justification of rights infringements and by devising the legal concept of “the honour of the Crown” to delimit state action.¹⁹

Federal failure is undeniable, and Indigenous distrust of Canadians is strong in the wake of “policies of cultural genocide and assimilation.”²⁰ Indigenous individuals tend to have lower incomes than individuals of British origin; earnings gaps are 10 to 20 percent for women and 20 to 50 percent for men.²¹ Indigenous children experience relatively high rates of poverty,²² and Indigenous adults have low life expectancies relative to the rest of the population.²³ According to RCAP, Indigenous peoples rank at the bottom of “almost every available index of socio-economic well-being.”²⁴

Current policy landscape

Comprehensive agreements (also referred to as “modern treaties”) settle disputes over land with Indigenous peoples who did not sign a historic treaty.²⁵ They are signed between an Indigenous group, the federal government and the implicated province or territory. They support the right of Indigenous self-government by setting out rules governing lands and resources in traditional territories, governmental jurisdiction, financial arrangements and other matters such as education, health care and taxation powers.²⁶ Comprehensive agreements are preferable to other instruments of Indigenous self-government because they are the most comprehensive: they transfer significant land management authority over traditional territories, not just reserves, to Indigenous peoples; they create culturally appropriate governance institutions; and the rights set out in modern agreements receive permanent, quasi-constitutional protection (table 4).²⁷

¹⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1).

¹⁹ *Guerin v The Queen*, [1984] 2 SCR 335 at 336; *R v Sparrow*, [1990] 1 SCR 1075 at 1077; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16-25.

²⁰ Truth and Reconciliation Commission of Canada, *Final Report*, 183.

²¹ Aboriginal Affairs and Northern Development Canada, “Aboriginal Income Disparity.”

²² National Collaborating Centre for Aboriginal Health, “Poverty as a Social Determinant.”

²³ Public Health Agency of Canada, *Health Status of Canadians 2016*, 8.

²⁴ Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 42.

<http://data2.archives.ca/rcap/pdf/rcap-464.pdf>.

²⁵ Eyford, *A New Direction*, 17-24.

²⁶ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 75.

²⁷ Alcantara, “To Treaty or Not to Treaty,” 357-61.

Table 4: Characteristics of Indigenous self-government instruments

	Transfer land management authority	Apply to traditional territory	Create Indigenous governance institutions	Protect rights permanently	Protect rights quasi-constitutionally
Comprehensive agreements	✓	✓	✓	✓	✓
Self-government agreements	✓		✓	✓	
<i>First Nations Land Management Act (opt-in)</i>	✓				
Bilateral agreements	✓	✓			

Canada has signed only 26 modern treaties since negotiations began in 1973, and there are approximately 100 ongoing negotiation tables.²⁸ Negotiations take an average of 15 years, and some take up to 30 years.²⁹ They proceed slowly for several reasons including limited federal negotiating capacity and the political approvals process.³⁰ The most important cause of delay, however, is asymmetry in bargaining power.³¹ Governments have become rights-granting entities whereas Indigenous “petitioners” must prove the validity of their claims.³² This represents a conflict of interest. In judging the validity of claims against themselves through the use of shifting sets of criteria set out in policy rather than statute, governments often do not bargain in good faith or try to “reach a speedy and just resolution of the issues.”³³

Proposal

The federal government will create an independent and interjurisdictional tribunal to facilitate and accelerate the settlement of comprehensive claim negotiations. The ministers of justice and Crown-Indigenous relations will appoint nominees presented by an impartial and representative screening committee to ensure the tribunal’s independence.³⁴ Provinces and territories will be encouraged to opt in to the tribunal process and delegate limited constitutional power to the tribunal.

²⁸ Indigenous and Northern Affairs Canada, “Comprehensive Claims.”

²⁹ Eyford, *A New Direction*, 6.

³⁰ Eyford, *A New Direction*, 49-51.

³¹ Alcantara, *Deal? Or No Deal?*, 10.

³² Alcantara, “To Treaty or Not to Treaty,” 354.

³³ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 567; Macklem, *Indigenous Difference*, 270-72.

³⁴ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 584-85.

Modern treaties involve public policy decisions that must be made by “persons accountable to those they represent.”³⁵ Therefore, the tribunal will not be able to impose a final agreement on the parties. Instead, the tribunal will have three main functions. First, it will monitor the negotiation process to ensure the parties negotiate in good faith.³⁶ Second, it will have the power to arbitrate any issue mutually referred to it by the parties.³⁷ Arbitration could resolve sticking points in negotiations, and requiring mutual referral is a way to safeguard political accountability. Third, the tribunal will have the power to adjudicate justiciable rights issues if either party unilaterally requests.³⁸

Justification

Social equity

Modern treaties are correlated with improved socio-economic outcomes.³⁹ Between 1981 and 2006, the well-being of Indigenous peoples who signed modern treaties improved twice as quickly as the well-being of those that signed historic treaties, according to Indigenous Services Canada’s Community Well-Being Index.⁴⁰ This index accounts for educational attainment, labour force participation rates, income levels and housing conditions.⁴¹ A C.D. Howe Institute report argues that modern treaties increase real income in Indigenous communities by approximately 17 percent.⁴² By restricting its sample to similarly treated and control groups, the report demonstrates that modern treaties cause the increase in income rather than other factors such as resource potential for extractive industries.⁴³ According to PricewaterhouseCoopers, accelerating the pace of settlements results in greater net benefits due to speedier investments, job creation and economic development.⁴⁴ If 60 treaties in British Columbia were concluded in an accelerated time frame of 15 years (rather than 30 years), wage increases would be \$2.7 billion higher over 40 years.⁴⁵ Modern treaties also clarify Aboriginal rights in line with the United Nations Declaration on the Rights of Indigenous Peoples⁴⁶ and protect Indigenous cultural and traditional practices.⁴⁷

Good governance

Modern treaties foster Indigenous self-government, shifting legal and financial power as well as political accountability to Indigenous peoples. In terms of legal power, modern treaties establish culturally relevant political institutions for Indigenous peoples and intergovernmental

³⁵ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 566.

³⁶ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 566.

³⁷ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 574.

³⁸ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 88.

³⁹ Deloitte, *Socio-economic Benefits*, 4.

⁴⁰ Aboriginal Affairs and Northern Development Canada, “Community Well-Being and Treaties.”

⁴¹ Aboriginal Affairs and Northern Development Canada, “Community Well-Being and Treaties.”

⁴² Aragón, *First Nations Modern Treaties*, 1.

⁴³ Aragón, *First Nations Modern Treaties*, 3-4.

⁴⁴ PricewaterhouseCoopers, *Financial and Economic Impacts*, ii, 4, 16.

⁴⁵ PricewaterhouseCoopers, *Financial and Economic Impacts*, 8-9.

⁴⁶ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR, 2008, Supp No 53, UN Doc A/61/53 arts 18, 21, 23, 26, 28.

⁴⁷ Deloitte, *Socio-economic Benefits*, 8-9.

frameworks that give Indigenous governments autonomy over various policy areas and influence over the development of their traditional territories.⁴⁸ In terms of financial power, approximately 95 percent of modern treaties' financial benefits are generated through cash compensation and resource revenue sharing.⁴⁹ Financial autonomy is progressively transferred to Indigenous governments, enabling them to fund their operations, implement culturally appropriate services and build infrastructure.⁵⁰ Indigenous, federal and provincial/territorial governments share responsibility for financing self-government; federal transfers are partially offset by a capped amount of Indigenous own-source revenue.⁵¹

Modern treaties reallocate political accountability to Indigenous governments while strengthening administrative capacity.⁵² The federal government insists in negotiations that legal mechanisms, such as constitutions, be in place to ensure that Indigenous governments are politically and financially accountable to their members.⁵³ Indigenous governments must establish clear, open and transparent law-making and decision-making processes.⁵⁴ Budgetary commitments further support capacity building. For 2017-18, Indigenous and Northern Affairs Canada (INAC) allocated \$414 million to its Governance and Institutions of Government program to support administrative and fiscal capacity building.⁵⁵ Budget 2018 provided an additional \$127.4 million over two years.⁵⁶

Fiscal sustainability

The tribunal will be revenue neutral. The Specific Claims Tribunal, which governs historical treaty disputes, had net expenses of only \$3.3 million in 2011-12.⁵⁷ Assuming the proposed comprehensive claims tribunal has comparable expenses, funds can be reallocated from within the Governance and Institutions of Government program.⁵⁸ Accelerating negotiations will eventually reduce negotiation costs. The federal government spends \$22.9 million annually on negotiating comprehensive land claims and self-government agreements.⁵⁹ Budget 2018 also committed to reimburse Indigenous claimants for their negotiating costs.⁶⁰ Not addressing land claims also causes expensive litigation.⁶¹ In 2016-17, INAC spent \$33 million on litigation.⁶²

⁴⁸ Deloitte, *Socio-economic Benefits*, 8.

⁴⁹ Deloitte, *Socio-economic Benefits*, 4.

⁵⁰ Deloitte, *Socio-economic Benefits*, 8.

⁵¹ Aboriginal Affairs and Northern Development Canada, *Canada's Fiscal Approach*, 3.

⁵² Missens, *Sovereignty, Good Governance*, 6.

⁵³ Indigenous and Northern Affairs Canada, *Government of Canada's Approach*.

⁵⁴ Indigenous and Northern Affairs Canada, *Government of Canada's Approach*.

⁵⁵ Indigenous and Northern Affairs Canada, *2017-18 Departmental Plan*, 18.

⁵⁶ Department of Finance Canada, *Equality & Growth*, 142.

⁵⁷ Specific Claims Tribunal, "Financial Statements for 2011-12."

⁵⁸ Indigenous and Northern Affairs Canada, *2017-18 Departmental Plan*; Department of Finance Canada, *Equality & Growth*, 341.

⁵⁹ Eyford, *A New Direction*, 5.

⁶⁰ Eyford, *A New Direction*, 5.

⁶¹ Eyford, *A New Direction*, 29.

⁶² Indigenous and Northern Affairs Canada, "INAC Legal Fees."

Modern treaties will cumulatively cost Canada and the provinces billions of dollars in both capital contributions and land ownership rights. The 26 concluded modern treaties provided capital transfers of \$3.2 billion as well as Indigenous land ownership of over 600,000 square kilometres.⁶³ There is no publicly available estimate of the cost of concluding additional agreements. Based on the average capital cost of \$123 million per agreement, concluding agreements with the remaining 100 claimants will cost roughly \$12.3 billion. This estimate is imprecise because it is likely that not all 100 claimants would conclude agreements; additional groups may assert claims; and outstanding negotiations may involve more expensive claims. However, the tribunal will not be creating new costs, simply validating existing costs that Canada has already committed to paying. The Department of Justice Canada has stated that Canada's relationship with Indigenous peoples requires the recognition of Indigenous rights and the "negotiation and implementation" of modern treaties.⁶⁴ These expenditures will be deficit-financed because they are one-time expenditures and their time frame is uncertain.

Political legitimacy

For Indigenous peoples, the legitimacy of the tribunal will depend on three factors. The first is the quality of consultation in designing the tribunal.⁶⁵ The second is the diversity of appointments; RCAP recommended that half of the appointees be Indigenous.⁶⁶ Third, participation must be voluntary. Indigenous peoples will need to opt in to the tribunal process, in a similar way as they do with the Specific Claims Tribunal.⁶⁷

For Canadians, the tribunal will be legitimate because it will further reconciliation, create certainty for resource development projects and reduce litigation. Some workers in the resource industry may be displaced, as Indigenous governments could refuse to grant permission for development projects on traditional lands or insist that more financial benefits accrue to them.⁶⁸ However, many of these industries suffer without modern treaties due to lack of certainty in project approval.⁶⁹

Technical (jurisdictional) feasibility

Comprehensive agreements involve both federal and provincial/territorial governments, because section 91(24) of the *Constitution Act, 1867* does not give the federal government jurisdiction over land and resource issues where the province has underlying title.⁷⁰ The tribunal's effectiveness would depend on provinces agreeing to negotiate through the tribunal and giving it necessary authority over provincial areas of jurisdiction.⁷¹

⁶³ Indigenous and Northern Affairs Canada, "Comprehensive Claims."

⁶⁴ Department of Justice Canada, *Principles*.

⁶⁵ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 566.

⁶⁶ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 584-85.

⁶⁷ *Specific Claims Tribunal Act*, SC 2008, c 22, s 14.

⁶⁸ PricewaterhouseCoopers, *Financial and Economic Impacts*, 11.

⁶⁹ PricewaterhouseCoopers, *Financial and Economic Impacts*, 12.

⁷⁰ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 574.

⁷¹ Royal Commission on Aboriginal Peoples, *Report*, vol. 2, 569.

Policy 2: Reform of Municipal Finance and Governance

Governance background

Municipalities were conceived of as “creatures of the provinces,” lacking constitutional status, at a time when most Canadians lived in rural areas.⁷² By 2011, however, Canada’s six largest metropolitan areas housed nearly half the population and generated 50.7 percent of Canada’s GDP.⁷³ The population of the Greater Toronto Area (GTA) is projected to grow by a further 2.9 million, or 42.3 percent, by 2041;⁷⁴ Metro Vancouver’s population will increase by 1.2 million, or 54 percent, between 2006 and 2041.⁷⁵ This growth is largely driven by immigration, making cities increasingly diverse. By 2036, approximately 66.5 percent of immigrants will live in or around Canada’s three largest cities and 92 percent will live in one of 16 census metropolitan areas.⁷⁶

Municipal powers are derived from provincial statutes and policies. Recent statutory reform has increased municipalities’ legal power.⁷⁷ However, financial powers have barely changed, hindering municipalities’ ability “to function independently, to plan, and to implement policy.”⁷⁸ Meanwhile, municipal statutory responsibilities have grown to include transportation, emergency services, land-use planning, social and family services, social housing, parks and recreation, and cultural services.⁷⁹ Municipal expenditure needs are highest in large cities due mainly to the higher costs of social services and infrastructure.⁸⁰ The result has been a culture of dependence on senior governments, which infantilizes municipalities and diffuses responsibility for inaction.⁸¹ Municipal political accountability is also weakened by the nature of municipal politics. Voter turnout is comparatively low in municipal elections, and incumbents, advantaged by name recognition in the absence of political parties, are re-elected at high rates.⁸²

Current policy landscape

The New Governance Agenda focuses on Ontario, where the municipal revenue problem is most acute. Municipalities are authorized to levy property taxes, development charges, vacant-home taxes and fees.⁸³ The City of Toronto can impose additional “direct taxes,” but not income, sales or gas taxes; road tolls require provincial approval.⁸⁴ Municipal revenue comes mainly from property taxes (41.7 percent), user fees (19.9 percent) and intergovernmental

⁷² *Constitution Act 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 92(8); Magnusson, “Are Municipalities Creatures of the Provinces?”

⁷³ Statistics Canada, “Gross Domestic Product.”

⁷⁴ Ontario, Ministry of Finance, *Ontario Population Projections Update, 2016-2041*, 4.

⁷⁵ Metro Vancouver, *Regional Growth Strategy Projections*, 3.

⁷⁶ Statistics Canada, *Immigration and Diversity*, 7, 29.

⁷⁷ Garcea, “The Empowerment of Canadian Cities,” 86-87.

⁷⁸ Hasso, “The Role of Local Government,” 33.

⁷⁹ Association of Municipalities Ontario, *What’s Next Ontario*, 8.

⁸⁰ Slack, *Financing Large Cities*, 4.

⁸¹ Levi & Valverde, “Freedom of the City,” 447.

⁸² Kushner, Siegel, and Stanwick, “Ontario Municipal Elections,” 541-43.

⁸³ *Municipal Act*, SO 2001, c 25, part VIII-XII.1; *Development Charges Act*, SO 1997, c 27, s 2.

⁸⁴ *City of Toronto Act*, SO 2006, c 11, Sched A, s. 267(2).

transfers (21.3 percent).⁸⁵ Toronto's property tax represents only 33 percent of operating revenue,⁸⁶ having increased at an average annual rate of 2.5 percent since 2010, resulting in the lowest property taxes in the GTA.⁸⁷

Ontario's municipalities face significant operating and capital shortfalls. Maintaining existing service levels solely through property tax increases would require an average annual increase of 4.51 percent for 10 years.⁸⁸ Municipalities also face an infrastructure gap of approximately \$60 billion, requiring an additional average annual increase of 3.84 percent, for a combined total property tax increase of 8.35 percent annually for 10 years.⁸⁹ For the City of Toronto to maintain existing service levels, it needs to raise an additional \$900 million annually by 2023.⁹⁰ To maintain service levels and increase spending to pay for deferred costs and approved plans, the City needs to raise an additional \$1.4 billion annually.⁹¹ Of the City's \$40-billion 10-year capital plan, \$21 billion is unfunded after accounting for recent federal and provincial commitments.⁹²

The property tax is advantageous for municipalities because its base is immobile, revenues are stable, and the tax is borne by local residents.⁹³ However, its visibility makes it difficult to increase.⁹⁴ Unlike the income tax, property taxes are not withheld at source but paid in a lump sum.⁹⁵ It is also regressive for taxpayers with large assets but low incomes, such as elderly residents.⁹⁶ No country has been able to raise more than 10 percent of total tax revenue from property taxes.⁹⁷ Canada is one of only five countries in the world in which property taxes account for over 90 percent of municipal tax revenues.⁹⁸ Harry Kitchen and Enid Slack argue that municipalities require a greater mix of revenue tools to meet growing expenditure demands.⁹⁹

Proposal

Serving as an example for national reform, provincial legislation will be amended to provide municipalities with additional revenue tools, including income taxes and road tolling. Municipal income taxes will be applied as a surtax of provincial income tax liability only to individuals with

⁸⁵ Association of Municipalities Ontario, *What's Next Ontario*, 25.

⁸⁶ Toronto, *Long-Term Financial Plan*, 61.

⁸⁷ Toronto, *Long-Term Financial Plan*, 46.

⁸⁸ Association of Municipalities Ontario, *What's Next Ontario*, 4.

⁸⁹ Association of Municipalities Ontario, *What's Next Ontario*, 4.

⁹⁰ Toronto, *Long-Term Financial Plan*, 14.

⁹¹ Toronto, *Long-Term Financial Plan*, 14.

⁹² Toronto, *Long-Term Financial Plan*, 15; Infrastructure Canada, "Backgrounder."

⁹³ Bird & Slack, "Metropolitan Governance and Finance," 743.

⁹⁴ Slack, "The Property Tax," 7.

⁹⁵ Slack, "The Property Tax," 3.

⁹⁶ Kitchen and Slack, *More Tax Sources*, 7.

⁹⁷ Slack, *Financing Large Cities*, 9.

⁹⁸ Kitchen and Slack, *More Tax Sources*, 9.

⁹⁹ Kitchen and Slack, *More Tax Sources*, 2.

designated postal codes — municipal residents.¹⁰⁰ Additionally, the provincial laws governing municipal elections will be amended to incentivize the formation of political parties; parties will be able to collect donations and election ballots will identify candidates' parties.¹⁰¹ The adoption of municipal political parties will be a condition for the use of the new revenue tools.

Justification

Economic efficiency

Canada's productivity growth is lagging relative to past performance and trends in other developed countries.¹⁰² As the manufacturing sector has declined, the economy has increasingly clustered around two subeconomies. The first is natural resources, which incentivizes low labour productivity because upstream positions in global supply chains do not reward value-added production.¹⁰³ The second is knowledge, innovation and creativity, which creates high-value-added products and is generally oriented around medium to large municipalities.¹⁰⁴ Dense clusters of human and physical capital result in economies of scale and enable industries and services to have higher productivity than they would in rural settings.¹⁰⁵ However, the labour productivity of Canadian cities lags behind that of their global peers. Between 2000 and 2010, labour productivity in the GTA declined by 6 percent.¹⁰⁶

Building infrastructure and maintaining a high quality of life are essential to urban productivity growth and require additional municipal revenue. According to the Federation of Canadian Municipalities, almost 60 percent of Canada's core public infrastructure is owned and maintained by municipalities, and 33 percent of that infrastructure is in "fair, poor or very poor condition."¹⁰⁷ Numerous studies have indicated the link between infrastructure investment and productivity growth.¹⁰⁸ Statistics Canada attributes 50 percent of multifactor productivity growth between 1962 and 2006 to public infrastructure investments.¹⁰⁹ The "low-hanging fruit" for investment available in the 1960s and 1970s to increase productivity are likely no longer at hand, but transportation infrastructure is a significant exception.¹¹⁰ Metrolinx estimates that the direct and indirect costs of congestion in the GTA are \$6 billion annually.¹¹¹

Quality of life is critical to attracting global talent and firms. Don Drummond and Alistair Bentley argue that a lack of skilled managers in Canada, as compared with the United States, is one reason Canadian firms do not adopt global best practices to improve labour productivity.¹¹²

¹⁰⁰ Kitchen and Slack, *More Tax Sources*, 14.

¹⁰¹ Moore, *Potential and Consequences*, 6.

¹⁰² Drummond and Bentley, *Productivity Puzzle*, 4.

¹⁰³ Drummond and Bentley, *Productivity Puzzle*, 27.

¹⁰⁴ Florida and Spencer, "Canada's Urban Competitiveness Agenda," 6-7; Wolfe, *21st Century Cities in Canada*, 12.

¹⁰⁵ Dobbs et al., *Urban World*, 11.

¹⁰⁶ Toronto Region Board of Trade, "Toward a Toronto Region Economic Strategy," 8.

¹⁰⁷ Federation of Canadian Municipalities, *Informing the Future*, 10.

¹⁰⁸ Canadian Chamber of Commerce, *Foundations of a Competitive Canada*, 4.

¹⁰⁹ Statistics Canada, *Impact of Public Infrastructure*, 7.

¹¹⁰ Drummond and Bentley, *Productivity Puzzle*, 20.

¹¹¹ Metrolinx, *Costs of Road Congestion*, 1.

¹¹² Drummond and Bentley, *Productivity Puzzle*, 8-9, 26-27.

Quality of life depends on infrastructure, public safety, cultural and recreational amenities, access to child care and education, and a clean environment.¹¹³ Canada's large urban areas often score well on quality of life measurements due to education, immigration and environmental indicators.¹¹⁴ However, lack of infrastructure, unaffordability and inequality undermine labour attractiveness.¹¹⁵

Good governance

The proposed option will allocate financial power to municipalities commensurate with their statutory responsibilities, enabling the provision of necessary services and infrastructure. This promotes municipal autonomy, efficiency and democratic accountability, as municipalities will be increasingly responsible for both raising and spending money.¹¹⁶ User fees are appropriate for services with "private good" characteristics.¹¹⁷ They should be adopted whenever there is a clear link between the fee charged and the benefit received, which enables citizens to consume socially optimal levels of services and enables governments to invest socially optimal levels of capital.¹¹⁸ General taxes should fund services with "public good" characteristics like police and fire protection, whose individual beneficiaries are difficult to identify.¹¹⁹ Mandatory political parties will further strengthen political accountability. Political parties reduce the importance of name recognition, focus elections on city-wide issues and enable voters to hold elected officials to account for a party's track record.¹²⁰ Political parties will be a condition for using the revenue tools, even though statutory provisions may be sufficient to incentivize their creation. The tools are conditional because permanently reducing dependency on intergovernmental transfers requires a political culture change rather than piecemeal tax increases.

The trade-off, however, is that this option does not encourage government to account for the positive spillovers of municipal services across boundaries. Alternative instruments would better account for spillovers, but would not consistently promote autonomy, efficiency and accountability. First, regional taxation would require new governance structures that could undermine municipal autonomy and accountability because action would depend on regional cooperation.¹²¹ Second, uploading services to the province would reduce efficiency and accountability because local governments are more efficient and the provincial government is more remote.¹²² Finally, intergovernmental transfers would increase dependency, diffuse accountability for inaction and cause inefficiency because municipalities would not make trade-offs between spending and taxation.¹²³

¹¹³ Economist Intelligence Unit, *Liveonomics*, 12.

¹¹⁴ Toronto Region Board of Trade, *Toronto as a Global City*, 39.

¹¹⁵ Florida and Spencer, "Canada's Urban Competitiveness Agenda," 38-39.

¹¹⁶ Kitchen and Slack, *More Tax Sources*, 8.

¹¹⁷ Kitchen and Slack, *More Tax Sources*, 4.

¹¹⁸ Kitchen and Slack, *More Tax Sources*, 4, 11.

¹¹⁹ Kitchen and Slack, *More Tax Sources*, 4.

¹²⁰ Moore, *Potential and Consequences*, 12.

¹²¹ Skuzinski, *Risk of Regional Governance*, 65, 139-140.

¹²² Slack and Bird, *Merging Municipalities*, 4.

¹²³ Kitchen and Slack, "Special Study," 2269-71; Arcelus et al., "On the Cost-Efficiency of Service Delivery in Small Municipalities," 1478.

Table 5: Characteristics of fiscal instruments

	Promotes financial autonomy	Promotes efficiency	Promotes democratic accountability	Accounts for “spillovers”
Municipal taxation (proposed)	✓	✓	✓	
Regional taxation		✓		✓
Uploading services to province	✓			✓
Intergovernmental transfer arrangement				✓

Fiscal sustainability

If municipalities raise income taxes, provincial revenue would decrease due to reductions in the size of the tax base. If Toronto levied a 13 percent surtax on the provincial income tax, which would generate \$754 million, provincial income tax revenues would diminish by \$88 million.¹²⁴ No changes to provincial taxes are proposed because it is uncertain to what extent municipalities will levy income taxes, use other tools — like property taxes and road tolls — or cut spending.

Political legitimacy

Although new taxes are invariably controversial, so too is underfunding services and infrastructure.¹²⁵ Municipal politicians and voters need to confront that trade-off. Residents of neighbouring municipalities may resent road tolls, as was demonstrated when Ontario vetoed Toronto’s proposed road tolls.¹²⁶ However, people are being asked only to pay for the services they consume and to internalize the negative externalities of their behaviour, such as congestion.¹²⁷ This risk is partially mitigated by removing Ontario from the decision-making process.

¹²⁴ Kitchen and Slack, *More Tax Sources*, 24.

¹²⁵ Toronto, *Long-Term Financial Plan*, 14.

¹²⁶ Crawley, “Kathleen Wynne.”

¹²⁷ Kitchen and Slack, *More Tax Sources*, 12.

Requiring political parties may also be controversial although many global cities have them. Opponents may argue that parties undermine community representation.¹²⁸ The most vociferous opponents are likely to be incumbent politicians who benefit from the status quo.

Technical feasibility

Road tolls are facilitated by modern technology, which requires upfront capital investments.¹²⁹ Road tolls could yield net annual revenues for Toronto of between \$166 million and \$336 million.¹³⁰ Income taxes can be collected through provincial income tax forms.¹³¹ A 1 percent surtax on provincial personal income tax liability would yield Toronto \$57.3 million a year.¹³² Municipal income taxes incentivize residents to avoid the tax by moving to a low-tax municipality.¹³³ This risk would be mitigated if neighbouring municipalities acted in concert. Regardless, property taxes also create incentives to move to low-tax jurisdictions.¹³⁴ Municipalities will not be allowed to levy sales taxes due to the difficulty of integrating them with the HST. The Canada Revenue Agency does not track where HST is collected, instead calculating each province's entitlement through a formula.¹³⁵ It would have to calculate the taxable consumption base for each municipality that is levying a sales tax.¹³⁶ Moreover, many businesses operate across municipal boundaries, and almost all businesses purchase goods and services from across municipal boundaries, which makes it difficult to calculate value added.¹³⁷

Policy 3: Mandatory Corporate Environmental Insurance

Governance background and policy landscape

Corporations control what they pollute. The corporate impulse of profit maximization incentivizes corporations to pollute at suboptimal levels — where social costs exceed social benefits — if the corporation believes it will not be forced to internalize negative externalities.¹³⁸ This is further compounded by limited liability. In the 1896 case of *Salomon v. Salomon & Co Ltd*, the House of Lords held that shareholders are not liable for a corporation's outstanding debts because corporations are separate legal entities from their shareholders.¹³⁹ If environmental liability causes corporate bankruptcy, environmental costs are socialized.¹⁴⁰

¹²⁸ Moore, *Potential and Consequences*, 10.

¹²⁹ Persad, Walton, and Hussain, *Toll Collection Technology*, 1-4.

¹³⁰ Toronto, *Immediate and Longer-term Revenue Strategy Direction*, 44.

¹³¹ KPMG, *Revenue Options Study*, 110.

¹³² Kitchen and Slack, *More Tax Sources*, 21.

¹³³ Kitchen and Slack, *More Tax Sources*, 15.

¹³⁴ Kitchen and Slack, *More Tax Sources*, 7.

¹³⁵ Kitchen and Slack, *More Tax Sources*, 17.

¹³⁶ Kitchen and Slack, *More Tax Sources*, 15-17.

¹³⁷ KPMG, *Revenue Options Study*, 134.

¹³⁸ Schwartz, "Products Liability," 714.

¹³⁹ *Salomon v. A Salomon & Co Ltd*, [1896] UKHL 1, [1897] AC 22.

¹⁴⁰ Bergkamp and Pak, "Piercing the Corporate Veil," 174; *Northstar Aerospace Inc (Re)*, 2013 ONCA 600 at paras 19-22; *Nortel Networks Corporation (Re)*, 2013 ONCA 599 at para 7.

Proposals to reform limited liability, however, have been dismissed as technically infeasible due to the likely response of capital markets.¹⁴¹

Various federal and provincial environmental statutes purport to make polluters pay for environmental costs through charging them with offences, administrative remedies and heads of civil liability.¹⁴² Yet enforcement is systemically lax, rendering environmental law increasingly “symbolic.”¹⁴³ Environmental enforcement activities, including warnings and orders, have declined since 2005 under the *Canadian Environmental Protection Act (CEPA)* despite the hiring of additional enforcement officers.¹⁴⁴ Prosecutions and convictions under federal environmental legislation are rare and average fines are low: just \$10,524 under *CEPA*.¹⁴⁵ Politics is the most significant cause of lax enforcement.¹⁴⁶ Government dependence on corporations to produce the “prosperity voters demand” makes it extremely difficult to limit corporate profit maximization.¹⁴⁷ Corporations’ political and economic power gives them privileged access to and influence over regulators.¹⁴⁸

Proposal

All corporations operating in Canada will be mandated under the *Canada Business Corporations Act (CBCA)* to purchase environmental damage insurance. The trigger for environmental damage insurance to pay out funds will be not corporate liability, but the mere existence of environmental harm; this structure is similar to the Netherlands’ model of environmental insurance.¹⁴⁹

Canadian insurers already offer general insurance policies, which can cover environmental harm, and environmental liability insurance, which covers the costs of remediation and third-party claims of property damage or bodily injury.¹⁵⁰ Under the mandatory regime, private insurers will *not* be obliged to provide coverage to corporate applicants.¹⁵¹ Instead, firms will be able to apply to government for exemptions from insurance requirements if they are denied coverage or if premiums would be exorbitant. Exemptions will be granted if it is in the public interest and if, as an alternative to insurance, the corporation sets aside funds to cover the costs of likely pollution incidents.¹⁵²

¹⁴¹ Grundfest, “The Limited Future of Unlimited Liability,” 389.

¹⁴² Overholt et al, “Environmental Liability in Business.”

¹⁴³ Girard, Day, and Snider, “Tracking Environmental Crime,” 221.

¹⁴⁴ Ecojustice, *Getting Tough*, 10.

¹⁴⁵ Ecojustice, *Getting Tough*, 10.

¹⁴⁶ Ecojustice, *Getting Tough*, 9.

¹⁴⁷ Girard, Day, and Snider, “Tracking Environmental Crime,” 235.

¹⁴⁸ Girard, Day, and Snider, “Tracking Environmental Crime,” 235.

¹⁴⁹ Faure, “Alternative Compensation Mechanisms,” 75.

¹⁵⁰ Marsh & McLennan Companies, *Changing Landscape*, 3.

¹⁵¹ Organisation for Economic Co-operation and Development, *Environmental Risks and Insurance*, 50.

¹⁵² Richardson, “Mandating Environmental Liability Insurance,” 327.

Justification

Economic efficiency

Mandatory environmental insurance will be efficient because firms will be forced to internalize the risk of environmental externalities *ex ante*.¹⁵³ Existing law creates an incentive for corporations to underinsure due to both the unlikelihood of enforcement activities and the availability of the bankruptcy option if the firm causes significant environmental harm. A rational firm with full information about environmental risk is especially likely to underinsure if the firm value is low — meaning lower than expected liability — and if the firm does not expect environmental costs to materialize for several years.¹⁵⁴ It is profit maximizing for the firm to operate without insurance since it could not survive if forced to internalize environmental costs.¹⁵⁵ Mandatory insurance will mean that environmental accidents will not cause bankruptcy and, even if a firm did go bankrupt, environmental costs would be borne by the insurer.

Mandatory environmental insurance would replace statutory provisions imposing liability on directors for environmental harms if a corporation goes bankrupt.¹⁵⁶ Directors' liability is insufficient to internalize pollution costs, because directors may have insufficient funds and courts are hesitant to hold directors fully liable due to potential unfairness.¹⁵⁷

Good governance

Managing environmental risks requires “placing responsibility on people in a position to do something about the risk”: the polluters.¹⁵⁸ Environmental policy should require polluters to pay for negative externalities but give them flexibility in how to adjust their behaviour, which balances efficiency and effectiveness.¹⁵⁹ It is appropriate for government to mandate mandatory insurance because it facilitates the operation of the market for environmental risk.¹⁶⁰ Mandatory insurance, which provides firms with a price signal for environmental risk, also incentivizes innovation.¹⁶¹ Firms will improve their technology in response to price signals, which reduces the cost of controlling pollution.¹⁶²

Insurers will become “surrogate regulators.”¹⁶³ Insurers will be responsible for guaranteeing compensation for damage as well as ensuring that there are sufficient incentives for corporations to take due care and reduce environmental risk.¹⁶⁴ Insurers will become actively involved in the assessment and management of their insureds' risks and, through pricing

¹⁵³ Richardson, “Mandating Environmental Liability Insurance,” 293.

¹⁵⁴ Schwartz, “Products Liability,” 708-10.

¹⁵⁵ Schwartz, “Products Liability,” 713.

¹⁵⁶ Ciarrocchi, *Directors' and Officers' Duties and Liabilities*, 15-17.

¹⁵⁷ Hansmann and Kraakman, “Toward Unlimited Shareholder Liability,” 1929.

¹⁵⁸ Baker and Moss, “Government as Risk Manager,” 92.

¹⁵⁹ Esty, “Red Lights,” 24.

¹⁶⁰ Baker and Moss, “Government as Risk Manager,” 90-91.

¹⁶¹ Esty, “Red Lights,” 26.

¹⁶² Esty, “Red Lights,” 27.

¹⁶³ Richardson, “Mandating Environmental Liability Insurance,” 315.

¹⁶⁴ Richardson, “Mandating Environmental Liability Insurance,” 295.

mechanisms, will incentivize the reduction of environmental risks.¹⁶⁵ Government will need to set price signals for harms that cannot be fully quantified by the market.¹⁶⁶ If pollution does not harm an identifiable third party, government will be the de facto policy beneficiary.

Dividing control over environmental risk and financial responsibility if risk materializes creates the prospect of moral hazard. Corporations may use their insurance as a licence to pollute and thereby take uneconomical risks.¹⁶⁷ In response, insurers can specialize in environmental insurance or rely on third-party audits of corporate behaviour and safeguards.¹⁶⁸ Deductibles and co-pays can shift some risk back from the insurer to the corporation.¹⁶⁹

Political legitimacy

Exemptions are likely to cause controversy. Mandatory insurance can restrict major development projects that insurers do not have the funds to cover or can cover only at exorbitant premiums.¹⁷⁰ Environment and Climate Change Canada would need to decide if these projects can proceed without insurance.¹⁷¹ Environmentalists will likely oppose any exemptions. Requiring exempted corporations to set aside financial resources to pay for possible liabilities, as under the *Pipeline Safety Act*, would mitigate this risk.¹⁷² Exemptions for businesses and industries with small environmental footprints or that have difficulty affording insurance will also be an issue.¹⁷³ Obliging all corporations to obtain insurance minimizes the risk of adverse selection, as both high- and low-risk firms would be insured.¹⁷⁴

Technical feasibility

Factual and legal uncertainty about environmental risk could cause insurers to overcharge, leading firms with positive social benefits to exit the market.¹⁷⁵ Alternatively, inaccurate risk calculations may cause insurers to undercapitalize and risk insolvency.¹⁷⁶ This risk can be mitigated through a transitional period in which insurance requirements are phased in while the market acclimatizes, and insurers obtain additional information about environmental risks. Informational risk is also mitigated by mandating environmental damage insurance rather than liability insurance because payouts would not depend on the likelihood of enforcement by Environment and Climate Change Canada, administrative tribunals and courts.¹⁷⁷ Finally, certain

¹⁶⁵ Richardson, "Mandating Environmental Liability Insurance," 315.

¹⁶⁶ Esty, "Red Lights," 39.

¹⁶⁷ Faure, "Alternative Compensation Mechanisms," 77.

¹⁶⁸ Faure, "Alternative Compensation Mechanisms," 77.

¹⁶⁹ Baker and Moss, "Government as Risk Manager," 93.

¹⁷⁰ Richardson, "Mandating Environmental Liability Insurance," 317.

¹⁷¹ Richardson, "Mandating Environmental Liability Insurance," 317.

¹⁷² *Pipeline Safety Act*, SC 2015, c 21.

¹⁷³ Richardson, "Mandating Environmental Liability Insurance," 313.

¹⁷⁴ Richardson, "Mandating Environmental Liability Insurance," 312.

¹⁷⁵ Faure, "Alternative Compensation Mechanisms," 76.

¹⁷⁶ Richardson, "Mandating Environmental Liability Insurance," 305.

¹⁷⁷ Faure, "Alternative Compensation Mechanisms," 95.

types of environmental risk — like historical and gradual pollution — should be exempted from insurance requirements because they cause significant factual and legal uncertainty.¹⁷⁸

Determining the amount of insurance that firms will be required to purchase is challenging because environmental risk varies across industries and various sizes of firms.¹⁷⁹ Government could set minimum coverage levels for industries based on the safest firms in each industry, although this would cause firms to underinsure.¹⁸⁰ Instead, government should incentivize insurers to offer only sufficient policies by holding them liable for providing policies that are patently disproportionate to the level of risk.

Finally, corporations may avoid the mandatory insurance requirement by incorporating provincially. However, since the *CBCA*'s enactment in 1975, most provinces have amended their business corporation statutes to emulate its requirements.¹⁸¹ This is probably because uniformity requires less intensive legislative development and involves higher predictability and lower transaction costs for business.¹⁸²

Conclusion

The New Governance Agenda improves upon nineteenth-century institutions by reallocating and realigning power and responsibility. The comprehensive claims tribunal promotes social equity by fostering Indigenous self-government. Municipal reform prepares Canada for the global knowledge economy by enabling investments in services and infrastructure. Mandatory corporate environmental insurance balances economic activity with environmental protection by requiring corporations to internalize negative externalities.

The New Governance Agenda embodies an appropriate role for government by empowering actors and networks with competence and political legitimacy, whether in the public or private sector, to provide necessary services or facilitate market management of risk. The political, jurisdictional and technical obstacles are worth surmounting. Effective governance will be critical in the twenty-first century. Without effectiveness, citizens lose confidence and question whether the system works for them or for “a small handful of elites.”¹⁸³

¹⁷⁸ Faure, “Alternative Compensation Mechanisms,” 275.

¹⁷⁹ Hansmann and Kraakman, “Toward Unlimited Shareholder Liability,” 1927.

¹⁸⁰ Hansmann and Kraakman, “Toward Unlimited Shareholder Liability,” 1927

¹⁸¹ Rousseau, “Evolution of Corporate Law,” 3.

¹⁸² Rousseau, “Evolution of Corporate Law,” 7.

¹⁸³ Trump, “Let Me Ask America.”