



Aboriginal Governance in the Decade Ahead: Towards a New Agenda for Change

A Framework Paper for the TANAGA Series

John Graham and Jake Wilson, 2004

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Executive Summary

Purpose

The conditions of Aboriginal peoples in Canada rank as one of our most serious shortcomings as a nation. It is not surprising, therefore, that the government of Paul Martin has made Aboriginal issues one of its top priorities.

Based on mounting evidence that sound governance is a necessary condition for communities and nations to make rapid progress in improving the well-being of their citizens, we have two purposes in writing this paper. First, we will outline the principal governance challenges facing Aboriginal communities, focusing primarily but not exclusively on First Nations. Second, we propose an agenda for change to deal with these challenges over the coming decade.

Governance and Good Governance

We begin by defining some key terms. Governance is not synonymous with government. Rather it is a process whereby societies or organizations make their important decisions, determine whom they involve in the process and how they render account. The formal elements of these processes – agreements, procedures, conventions, policies, institutional arrangements – are most easily observed and analysed. But there are also a number of less tangible factors such as history, culture, technology and traditions - factors that also influence how decisions are made.

In principle the concept of governance may be applied to any form of collective action. Governance is about the more strategic aspects of steering, the larger decisions about both direction and roles. But governance is not only about *where to go*, but also about *who should be involved in deciding*, and in what capacity. There are four areas or zones where the concept is particularly relevant: governance in ‘global space’, or global governance; governance in ‘national space’, i.e. within a country; organizational governance (governance in ‘organization space’); and community governance (governance in ‘community space’) including activities at a local level where the organizing body may not necessarily assume a legal form.

Because governance affects all societies, defining the principles of ‘good’ governance is difficult and controversial. The United Nations Development Program (UNDP) has enunciated nine principles which, with slight variations, appear in much of the literature. To minimize overlap and maximize their analytical value when applying them to practical circumstances, we have found it useful to consolidate the principles to five: legitimacy and voice; fairness; accountability; direction; and performance.

There are strong grounds to argue that five UNDP-based principles have a claim to universal recognition because they are based to significant degree on a large body of international law pertaining to human rights. That said, support at a high level of abstraction is one thing; their application is another. In this regard the following are useful reminders:

- These principles represent an ideal that no society has fully attained or realized. As the UNDP notes, democracy and human development are a “journey” not a “destination”, “...a promise rather than a list”.

- The principles are not ‘water-tight’ compartments; they overlap and sometimes reinforce one another e.g. sound accountability buttressing legitimacy and voice;
- On the other hand, these principles are not absolute. Most conflict with others at some point and this calls for balance and judgment in their application;
- Societal context (history, culture and technology) will be an important factor in how this balance is determined and how these principles play out in practice;
- Complexities abound in the application of these principles: "the devil is in the detail"; and
- Governance principles are about both ends and means - about the results of power as well as how it is exercised.

Good Governance Challenges in an Aboriginal Context

We apply the five good governance principles to Aboriginal communities in order to tease out the principal challenges facing them. For each principle, we review evidence to illustrate the current situation and consider the major deficiencies in existing governance systems. Where appropriate we propose a number of practical measures to address some of these issues in the short term. On less tractable matters, we identify areas for future consideration.

Note that our focus is on *governance systems* and not simply on *Aboriginal governments*. The federal and sometimes other levels of government are important players in these systems. Furthermore, many of their principal elements - the *Indian Act* is a good example – are not of Aboriginal origin. Thus this analysis is in no way critical of the quality of Aboriginal leaders, who struggle – often with remarkable success – to improve the well-being of their communities, despite the questionable governance ‘cards’ dealt to them.

The key challenges are the following:

Legitimacy and Voice

- Divisive and culturally inappropriate electoral systems

Fairness

- Membership, status and residency issues which divide communities into different classes of residents with different programming and political rights
- Issues relating to the role of women in First Nation communities
- The paucity of basic instruments of governance – policies, laws and enforcement mechanisms

Direction

- The legacy of oppression and colonization, which prevents some communities and individuals from seizing control of their development agendas

Performance

- Issues surrounding the small size of First Nation communities relative to the local, provincial and sometimes federal responsibilities they carry
- An over-emphasis on public housing, leading to a wide variety of social, health and economic problems

Accountability

- Weak accountability regimes stemming from a variety of factors including an almost total reliance on outside funding sources and a large, dominating public sector with few checks and balances

Towards a new agenda

Based on the analysis in this paper, we propose a number of practical measures to improve First Nation governance in the short term. They are all based on the premise that an ‘outside’ party like the federal government can do little to improve governance without working in close collaboration with Aboriginal groups. Some of these proposals would also apply to some Inuit and Métis communities.

- As a starting point, it would be useful for the federal government to discuss with Aboriginal leaders what constitutes ‘good’ governance and what might be guiding principles on which to base future work together.
- The federal government and First Nation leaders working together might craft a new approach to housing, one which puts the emphasis on individual as opposed to public ownership
- A voluntary certification system could be created to improve financial management and related governance functions
- The issue of the size and number of First Nation communities could be dealt with through aggregation of some responsibilities to a higher-tier of Aboriginal government, both in the immediate and longer term, and by shifting current funding support from poorly designed aggregation solutions that are based on realizing economies of scale through the provision of ‘free’ services to First Nations
- A strategy could be developed to fill the numerous regulatory gaps facing First Nations communities, gaps relating to basic health and safety issues such as potable water and sewage treatment
- A set of principles and practical applications should be developed to structure more effectively the relationship of politics and business in First Nation communities, and
- Some useful short term work could be done on the issue of policies and by-laws and related enforcement concerns.

Longer-term Concerns

We have also identified a number of less tractable issues for consideration and resolution in the longer term. These include:

- Developing and reviewing alternatives to the ‘first past the post’ electoral systems
- Researching approaches to membership issues
- Exploring ways to enhance the role of women in Aboriginal governance
- Developing countervailing forces to the public sector – the private sector, media and civil society
- Exploring taxation and related accountability issues
- Exploring the process for building sustainable governance capacity, including the development of assessment tools for good governance
- Understanding more thoroughly the range of linkages between good governance and positive socio-economic outcomes based on both international and Aboriginal experience.

The recent Powley decision also points to the need for some serious thinking and discussion around the future direction of Métis Nation governance – what it might look like, what might be the principal options to consider and how it might evolve.

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Introduction

There is near consensus that the conditions of Aboriginal peoples in Canada rank as one of our most serious shortcomings as a nation. Thus it was not surprising that starting in the fall of 2002, Paul Martin made a series of policy statements about the high priority Aboriginal issues would take in his government.¹ One of his first acts as Prime Minister was to create a cabinet committee on Aboriginal Affairs that he himself chairs, a secretariat within the Privy Council Office to support this committee and a position of special advisor on Aboriginal issues in the Prime Minister's Office. With this new machinery in place, the time is ripe for creating a new agenda for change. As Martin put it himself, "if we can seize the opportunities the times present us, we can break the cycle of poverty, indignity and injustice in which so many Aboriginal Canadians live".²

How can such change be achieved? There is mounting evidence that sound *governance* is a necessary condition for communities and nations to make rapid progress in improving the well-being of their citizens. This evidence comes from a wide variety of sources including the World Bank, operating in developing countries³; the Harvard Project on American Indian Economic Development⁴; and in British Columbia where researchers identified a strong correlation of First Nations with low suicide rates to those with significant initiatives relating to self-government.⁵ Indeed UN Secretary-General Kofi Annan has stated, "Good governance is perhaps the single most important factor in eradicating poverty and promoting development".⁶ And First Nations share this view: a 2001 Ekos poll of more than 1400 First Nations people found that 71% agreed that "providing the tools for good governance will improve conditions for economic and social development".⁷ Based on this premise that governance matters, this paper will argue as follows:

- Aboriginal peoples – especially First Nations – have undergone a major transformation in their governance over the last 50 years. Indeed, there is no other country in the world that has placed such a wide variety of responsibilities in such small, local governments.
- Socio-economic conditions in many communities have improved markedly over this period. That said, governance systems in many First Nation communities are seriously problematic. Some of these same governance problems afflict the Métis Nation and some Inuit communities outside Nunavut.
- An understanding of the principal governance challenges facing Aboriginal communities leads to an immediate agenda for change and, in addition, to proposals for a program of research and reflection on several difficult, less tractable issues.

In order to establish the usefulness and applicability of 'good governance' in the Aboriginal context, we address the following questions at the outset: what exactly do we mean by 'governance'; what principles might guide its effective implementation; and what claim do these principles have to universality. It is to these questions that we now turn.

¹ For example, at the Caledon Institute's 10th anniversary lunch in Ottawa on November 6, 2002, Martin noted that Aboriginal policy was one of his top three priorities in the area of social policy (IOG participant notes).

² Paul Martin, "Making History: The Politics of Achievement", p. 5-6, at www.paulmartintimes.ca

³ Daniel Kaufmann et al, "Governance Matters", August 1999, www.worldbank.org

⁴ Stephen Cornell and Joseph Kalt, "Sovereignty and Nation-Building: the Development Challenge in Indian Country Today", Harvard Project on American Indian Economic Development, 2001

⁵ Michael Chandler and Christopher Lalonde, "Cultural Continuity as a Hedge against Suicide in Canada's First Nations", *Transcultural Psychiatry*, V. 35, June 1998

⁶ Kofi Annan, www.unu.edu/p&g/wgs/

⁷ Cited in "Highlights of First Nations Survey On-Reserve", www.inac.gc.ca/nr/prs/s-d2001

I. Principles of Good Governance

What is ‘Governance’?

Definitions can be challenging, subtle, complex and powerful. Let us begin by a definition of what governance is *not*. Governance is *not* synonymous with government. This confusion of terms can have unfortunate consequences. When a public policy issue relating to a problem of “governance” becomes defined implicitly as a problem of “government”, the consequence is often that the responsibility for providing a solution rests solely with government – to the exclusion of the roles of other players.

Since governance is not just about government, what is it about? Partly it is about how governments and other social organizations interact, how they relate to citizens, and how decisions are taken in a complex world. Thus governance is a process whereby societies or organizations make their important decisions, determine whom they involve in the process and how they render account. The formal elements of these processes – agreements, procedures, conventions, policies, institutional arrangements – are most easily observed and analysed. But there are also a number of less tangible factors such as history, culture, technology and traditions - factors that also influence how decisions are made.

In principle the concept of governance may be applied to any form of collective action. Governance is about the more strategic aspects of steering, the larger decisions about both direction and roles. But governance is not only about *where to go*, but also about *who should be involved in deciding*, and in what capacity. There are four areas or zones where the concept is particularly relevant:

- Governance in ‘global space’, or global governance, deals with issues outside the purview of individual governments.
- Governance in ‘national space’, i.e. within a country
- Organizational governance (governance in ‘organization space’): this comprises the activities of organizations that are usually accountable to a board of directors.
- Community governance (governance in ‘community space’): this includes activities at a local level where the organizing body may not necessarily assume a legal form.

Governance in ‘national space’ is best understood in terms of the sets of relations between four broadly-defined sectors of society, each of which represent a different aspect of the activities and

Figure 1 – many developed countries

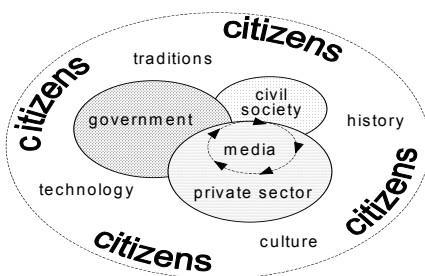
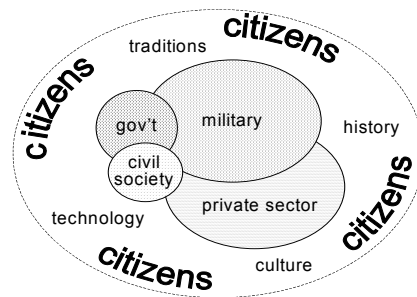


Figure 2 – some less developed countries



roles of the citizenry at large. These are: business, civil society, government, and media. Their size as illustrated in *figure 1* may provide a crude indication of the relative power of these four other. However, a similar illustration for many less-developed countries could show a very different distribution of power. For example, the military or a political *party* (see *figure 2*) might occupy the largest part of the terrain. The role of government might be quite insignificant.

Five principles of Good Governance

Because governance affects all societies, defining the principles of ‘good’ governance is difficult and controversial. The 1997 United Nations Development Program document “Governance and Sustainable Human Development” enunciates a set of nine principles (see *Box 1*) which, with slight variations, appear in much of the literature. To minimize overlap and maximise their analytical value when applying them to practical circumstances, we have found it useful to consolidate the list to five.

<i>Box 1: Principles of Good Governance</i>	
IOG Principles	UNDP Principles
Legitimacy and Voice	<p>Participation – all men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their intention. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively.</p> <p>Consensus orientation – good governance mediates differing interests to reach a broad consensus on what is in the best interest of the group and, where possible, on policies and procedures.</p>
Direction	<p>Strategic vision – leaders and the public have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.</p>
Performance	<p>Responsiveness – institutions and processes try to serve all stakeholders.</p> <p>Effectiveness and efficiency – processes and institutions produce results that meet needs while making the best use of resources.</p>
Accountability	<p>Accountability – decision-makers in government, the private sector and civil society organizations are accountable to the public, as well as to institutional stakeholders. This accountability differs depending on the organizations and whether the decision is internal or external.</p> <p>Transparency – transparency is built on the free flow of information. Processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.</p>
Fairness	<p>Equity – all men and women have opportunities to improve or maintain their well-being.</p> <p>Rule of Law – legal frameworks should be fair and enforced impartially, particularly the laws on human rights.</p>

This proposed list of good governance principles warrants elaboration. First, these principles represent an ideal that no society has fully attained or realized. As the UNDP notes, democracy and human development are a “journey” not a “destination”, “...a promise rather than a list”⁸. Furthermore, there is controversy about how best to stage this journey, that is, whether different approaches to governance are suited to different stages of development. For example, some repressive societies with a high degree of government control have experienced levels of economic development far surpassing that of many of the more richly endowed developed countries. Supporters attribute economic success and social stability to their governance policies⁹.

The Case for Universality

An even more fundamental point is whether it is appropriate to even propose a universal set of good governance principles. Some argue that the emphasis given to different aspects of governance will vary in different settings because societies value outcomes differently. Determining what constitutes “good governance” thus leads to a debate on values and cultural norms, and on desired social and economic outcomes. This in turn leads to questions about the role of government, how governments should relate to citizens, relationships between legislative, executive and judicial branches of government, and the roles of different sectors. In short, does cultural relativism trump any attempts at developing universal norms of good governance?

Of the five proposed principles, “Direction” and “Performance” are surely the most anodyne. On the other hand, the most controversial in their claim for universal status are likely “Legitimacy and Voice” and “Fairness”. And yet both of these can rest their case on over a half century of UN accomplishments in the field of human rights, accomplishments that have the broad support of a large majority of UN members. (See Annex A for more detail on the linking of these two governance principles – legitimacy and voice and fairness – with key clauses in the United Nations Declaration of Human Rights adopted in 1948.) Since that time the UN has adopted eight treaties and five protocols¹⁰, which together make up the body of international human rights law and which support and elaborate on the original 1948 Declaration.

Yet another indicator that the international human rights movement is not some “western” ploy occurred at the World Conference on Human Rights in Vienna in 1993. There, 171 States, 800 NGOs, national institutions, academics – altogether 7000 participants – agreed to the Vienna Declaration, which reaffirmed “...the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.”¹¹ The United Nations Millennium Declaration took up this

⁸ United Nations Development Program, “Human Development Report: 2002”, p. 61

⁹ For an interesting analysis of the relationship between governance and economic growth, see the UNDP’s “Human Development Report: 2002”. One robust finding is that “...while the economic performance of dictatorships varies from terrible to excellent, democracies tend to cluster in the middle. The fastest-growing countries have typically been dictatorships, but no democracy has ever performed as badly as the worst dictatorships” (p. 56).

¹⁰ The eight treaties are: the Convention on the Prevention and Punishment of the Crime of Genocide (1951); the Convention on the Elimination of all Forms of Racial Discrimination (1969); the Covenant on Economic, Social and Cultural Rights (1976); Covenant on Civil and Political Rights (1976); Elimination of Discrimination against Women (1981); against torture (1987); the Rights of the Child (1990); Protection of the Rights of all Migrant Workers (adopted in 1990, not yet in force).

¹¹ See Newton Bowles, “The Diplomacy of Hope” (United Nations Association of Canada: Ottawa, 2001).

theme in stating that governments "...will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development."¹²

In summary, there are strong grounds to argue that five UNDP-based principles have a claim to universal recognition¹³. That said, support at a high level of abstraction is one thing; their application is another. In this regard the following are useful reminders:

- The principles are not 'water-tight' compartments; they overlap and sometimes reinforce one another e.g. sound accountability buttressing legitimacy and voice;
- On the other hand, these principles are not absolute¹⁴. Most conflict with others at some point and this calls for balance and judgment in their application;
- Societal context (history, culture and technology) will be an important factor in how this balance is determined and how these principles play out in practice¹⁵;
- Complexities abound in the application of these principles: "the devil is indeed in the detail"; and
- Governance principles are both about ends and means - about the results of power as well as how it is exercised.

Good Governance in an Aboriginal Context

A strong case can be made that the five principles outlined above can be applied in a Canadian Aboriginal context. In the 1996 Royal Commission on Aboriginal Peoples (RCAP), nine key aspects of Aboriginal traditions of governance were identified: the centrality of the land, individual autonomy and responsibility, the rule of law, the role of women, the role of elders, the role of the family and the clan, leadership and accountability, and consensus in decision-making.¹⁶ In a similar vein, Haudenosaunee (Mohawk) political theorist Taiaiake Alfred, from Kahnawake, has outlined eight characteristics of strong indigenous communities, including: wholeness with diversity, shared culture, communication, respect and trust, group maintenance, participatory and consensus-based government, youth empowerment, and strong links to the outside world.¹⁷

¹² The African signatories of the New Partnership for Africa's Development (NEPAD) made much the same declaration: "...Africa undertakes to respect the global standards of democracy, the core components of which include political pluralism, allowing for the existence of several political parties and workers' unions, and fair open and democratic elections periodically organized to enable people to choose their leaders freely." (Section 79)

¹³ For an Arab and Islamic perspective on the question of good governance and human rights, see Muhammad AS Hikam, "Islam and Human Rights: Tensions and Possible Co-operation: The Case of Indonesia", The Asia Foundation, February 1997, and "Liberating Human Capabilities: Governance, Human Development and the Arab World", *United Nations Development Report*, Chapter 7, 2002

¹⁴ This statement will come as no surprise to those interested in constitutional law. Freedom of speech, for example, does not permit the yelling of 'fire' in a crowded theatre. That said, circumscribing governance principles based on human rights demands far greater care than factors associated with performance or direction.

¹⁵ For a thoughtful discussion of "... the troubled relationship that is developing between multiculturalism and the defence of women's rights", see Anne Phillips, "Multiculturalism, Universalism and the Claims of Democracy", United Nations Research Institute for Social Development, December 2001.

¹⁶ RCAP Report, "Restructuring the Relationship", Vol. 2, Part 1, p. 116.

¹⁷ Taiaiake Alfred, *Peace Power, Righteousness: an Indigenous Manifesto* (Oxford University Press, Don Mills, 1999), p. 82.

From these two lists and the full explanations in the actual texts (see Annexes 2 and 3), it is clear that the principles are largely comparable with those of ‘good governance’, although particular emphasis in many Aboriginal cultures on certain aspects of each of our five categories must be noted: (a) *legitimacy and voice* are achieved through a strong emphasis on consensus rather than simple majority rule; (b) *fairness*, in terms of conceptions of *equity*, involves a unique view of and respect for the roles of elders, women, and youth in society; while in terms of a system of *rule of law*, it is rooted in spiritual learnings and oral traditions rather than written legislation; (c) *direction*, or leadership, tends to derive from adherence to common culture, community identity, and the promotion of collective well-being; (d) *performance*, particularly in terms of use of resources, is based in a holistic view of people’s place in nature and a deep respect for the land and all its creatures; and (e) *accountability* relationships are built in to family, kinship, and community structures and as such may not resemble the formal institutions of European cultures.

As we consider contemporary Aboriginal governance challenges in the next section of the paper, it is important to remain mindful of these characteristics of Aboriginal social organization and culture albeit tempered with the useful reminder of David Newhouse of Trent University that “Tradition is a guide not a jailor”.

II. Good Governance Challenges in the Aboriginal Context

The intent of this section is to apply the five good governance principles to Aboriginal communities in order to tease out the principal challenges facing them. For each principle, we review evidence to illustrate the current situation and consider the major deficiencies in the governance systems. Where appropriate we propose a number of practical measures to address some of these issues in the short term. On less tractable matters, we identify areas for future consideration.

Note that our focus is on *governance systems* and not simply on *Aboriginal governments*. The federal and sometimes other levels of government are important players in these systems. Furthermore, many of their principal elements - the *Indian Act* is a good example – are not of Aboriginal origin. Thus this analysis is in no way a critique of the quality of Aboriginal leaders, who struggle – often with remarkable success – to improve the well-being of their communities, despite the questionable, governance ‘cards’ dealt to them.

Our analysis pertains primarily to First Nation communities, although some governance challenges we discuss also affect some Inuit communities, the Métis, and First Nations people living off reserve.

1. Legitimacy and Voice

Divisive and Culturally Inappropriate Electoral Systems

As noted above, traditional forms of Aboriginal governance place great emphasis on consensus-based decision making as a means of promoting the general welfare of the community as a whole. One of the many problematic legacies of colonial rule for Aboriginal peoples, however, was the imposition on First Nation through the *Indian Act* of the first-past-the-post (FPTP) and block vote

electoral systems, systems fundamentally at odds with a consensus-based approach. A former First Nation leader from Northern Ontario, Wally McKay, sums up his experience as follows:

It would be fair to state that all First Nation communities have experienced serious forms of divisions amongst themselves as a result of elections. Not only do we have divided loyalties between clans but these election systems have divided families, brother against brother, sister against sister, parents against their own children, and elders against elders. The youth are confused, frustrated and exasperated as they witness these incredible often nasty events in the selection of leaders.¹⁸

Exacerbating these problems is the short term of elected leaders under *the Act* – two years. This is insufficient to allow newly elected leaders to effect meaningful change, according to McKay, and results in a continuing state of instability and uncertainty.

Wayne Warry, an anthropologist from McMaster University who has worked extensively with a tribal council in northern Ontario, supports the thesis of the divisive nature of the political systems imposed through the *Indian Act*¹⁹:

Today's band councils can be dominated by one or more family factions that are never considered to be truly representative of the community at large. Menno Boldt has suggested that there is a polarization of Aboriginal communities into haves and have-nots... Small political élites exist in almost every Aboriginal community – and this elite status translates into band employment for perhaps thirty percent of the reserve population. This group stands in contrast to the majority of residents, who rely on unemployment insurance or other forms of social assistance. This dual class and power structure, as Boldt notes, is rooted in colonial structures. Over time, those in political power have gained access to land entitlements, housing and salaries associated with band employment. A significant portion of band members, then, feel shut out from political processes and reliant on this elite for any improvement in their social and economic well being. This political division is at least partly responsible for the criticism that the behaviour of Aboriginal leaders replicates the sins of government bureaucrats.²⁰

Echoing the *Royal Commission on Aboriginal Peoples*, Warry believes that the processes of community healing and self-government are intrinsically linked. As Aboriginal communities struggle to define new governance systems, they will need to abandon the first-past-the-post election system and imposed council system in favour of a system based on community districts or electorates. “Elections might also be supplemented by appointments to ensure representation of minority religious (and other) groups”.²¹ Warry even hints that reform might involve non-electoral systems of choosing leaders.

¹⁸ Wally McKay, *Instruments of Governance: Restoring First Nations Governments*, prepared for CESO Aboriginal Services, June 1999.

¹⁹ The *Indian Act* does permit First Nations, with the approval of the Minister, to choose Chief and Council “...according to the custom of the band”. However, as one Assembly of First Nation document notes “...there has been a tendency for bands reverting to custom to adopt models similar to the *Indian Act* elective system.” See AFN, “The Voice of First Nations: Planning for Change”, 2001.

²⁰ Wayne Warry, *Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-Government* (University of Toronto Press, 1998), p. 230.

²¹ *Ibid*, p. 235.

Taiaiake Alfred, meanwhile, is unequivocal in proposing that Aboriginal communities should abandon electoral systems:

Native governments must be made legitimate within their communities. The only way to accomplish this is by rejecting electoral politics and restructuring Native governments to accommodate traditional decision-making, consultation, and dispute resolution processes.²²

International Experience

The nature of the problems described by Warry and McKay, problems emanating from an imposed political structure in a colonial system, have parallels internationally. In an aptly entitled article, *Electoral Systems and Conflict in Divided Societies*, two scholars, Ben Reilly and Andrew Reynolds, sum up international experience in developing countries with ethnic, tribal or linguistic divides this way:

What the collective evidence from elections held in divided societies does seem to suggest is that an appropriately crafted electoral system can do some good in nurturing accommodating tendencies, but implementation of an inappropriate system can do severe harm to the trajectory of conflict resolution and democratization in a plural society.²³

Reilly and Reynolds note that perhaps the most common way through which democratizing societies come to use a particular electoral system is colonial inheritance. It is also likely to be the least appropriate:

Colonial inheritance of an electoral system is perhaps the least likely way to ensure that the institution is appropriate to a country's needs, as the begetting colonial power was usually very different socially and culturally from the society colonized. And even where the colonizer sought to stamp much of its political ethos on the occupied land, it rarely succeeded in obliterating indigenous power relations and traditional modes of political discourse. It is therefore not surprising that the colonial inheritance of Westminster systems has been cited as an impediment to stability in a number of developing countries...²⁴

The inappropriateness of imposed electoral system is also a prominent theme of the Cornell-Kalt study of tribal governments in the United States and their impact on economic development. Their emphasis is not so much on community divisiveness but a corollary, political legitimacy:

To perform beneficially, self-government – governing institutions and their decisions – ultimately must have the support of the community. Without this support, the results are likely to be instability, stagnation, and a government that serves only the temporary interests of the faction in power... But where does sustainable support for the institutions and policies of self-government come from? Our research indicates that such support depends critically on achieving a match between the formal institutions of governance on the one hand and the culture of the society on the other... For many American Indian tribes, there is a real possibility of a mismatch between their formal governments and the standards of political legitimacy found in their cultures.²⁵

²² Alfred, op. cit. p. 136.

²³ Ben Reilly and Andrew Reynolds, *Electoral Systems and Conflict in Divided Societies*, Papers on International Conflict Resolution No. 2, Washington, National Academy Press, 1999, p. 8.

²⁴ Ibid, p. 24.

²⁵ Cornell and Kalt, pp. 17-18.

Principles for Reform

Reilly and Reynolds describe eleven different electoral systems grouped into three broad categories:

- Plural-majority systems – *First-past-the-post*, the system used at the federal and provincial levels in Canada and the *Block vote*, the system established under the *Indian Act*, are two examples under this category
- Semi-proportional systems – examples are *the Single non-transferable vote system*, used in Japan and several other countries whereby each elector has one vote but there are several seats in the district to be filled (this encourages minority representation)
- Proportional representation systems – These systems aim to reduce the disparity between a party's share of national votes and its share of parliamentary seats (a minor party with 10% of the vote should gain 10% of the seats). Such systems encourage power sharing and consensus-building

Their principles for choosing the most appropriate system for a society are summed up in the box below.

Principles for Choosing an Appropriate Electoral System

- There is no one 'best' system that will suit all societies
- Key factors that should be taken into account when designing a system include:
 - the political history of the society
 - the way and degree to which ethnicity has been politicized
 - the intensity of the conflict
 - the demographic and geographic dispersion of the population and the groups in conflict
- System requirements will differ in societies which are in transition to democracy as opposed to those which are in a consolidation phase
- Avoid overly majoritarian systems i.e. the Block vote and the First-past-the-post systems
- Reform should build on the existing system rather than jumping to a completely new system

The problems of inappropriate electoral systems afflicting First Nations also have resonance in other Aboriginal communities and organizations. Reform of electoral systems in Aboriginal communities in Canada, therefore, is an issue that deserves further consideration in the longer term. Indeed, the current debates at the federal level and in several provinces over the possibility of moving to a system of proportional representation may also influence Aboriginal people and increase the likelihood of change.

2. Fairness

Our category of ‘fairness’ in governance encompasses two UNDP principles: equity, and rule of law. In terms of *equity*, there is a wide-ranging list of issues to grapple with – the previous section, for example, raised the vexing polarization of First Nation communities into haves and have-nots. In this section, we tackle two major areas of concern: (a) issues surrounding First Nation membership, Indian status, and reserve residency; and relatedly, (b) the legal and institutional treatment of women. In terms of the *rule of law*, we examine (c) the paucity of active by-laws, policies, enforcement mechanisms and other governance instruments in First Nation communities on which the rule of law is usually based in contemporary governments.

Membership, Status and Residency Issues

In 1985, Bill C-31 modernized the Indian Act through three main provisions. First, it reinstated Indian status to about 114,000 individuals who (or whose parents) had previously lost status under prior versions of the Act. Second, it standardized rules defining Indian status. And third, it gave First Nations the option of developing their own band citizenship or membership rules.

One of the many difficulties with Bill C-31, however, is that the new rules for status and membership worsened an already bewildering array of institutionalized categories of Aboriginal people. The Bill created two categories of Indian status: section 6(1), where both of a person’s parents are registered Indians; or section 6(2), where one parent of a person is registered under 6(1) and the other is non-Indian. Those with one parent registered under 6(2) and the other who is non-Indian, however, do not gain status. (This has become known as the two generation rule or ‘two strikes and you’re out’.)

At the same time, people with *or* without Indian status can be band members depending on the rules the particular band has adopted. These membership rules vary across Canada with the vast majority adopting Indian Act criteria, a one-parent rule, a two-parent rule, or one of a variety of blood quantum rules.

The long-term implications of Bill C-31 are nothing short of devastating. Given current trends with regards to rates of fertility, mortality and most importantly out-marriage, there will be ‘reserves without Indians’ within the next 100 years – that is, for many First Nations there will be no status Indians as defined by the *Indian Act*. For some First Nations, this impact will occur very soon. In a study done for the United Anishnaabeg Councils, then consisting of eight First Nations in southern Ontario, one projection shows the final status Indian birth occurring for one First Nation as early as 2012, and for four others in the 2030-2040 period²⁶.

But perhaps as important in the shorter term is the potential for significant cleavages developing in First Nation communities because of different categories of residents. Indeed, with three categories relating to status (6(1), 6(2) and non-status) and two relating to membership (member or non-member), there are six possible categories of residents for communities averaging less than 600

²⁶ United Anishnaabeg Councils, “Impacts of the Authority to Determine E-dbendaagzijig”, Research and Analysis Directorate, Indian and Northern Affairs, 1999

people. Adding to the mix is the recent Corbiere decision, which creates the potential for having different political rights for members on and off reserve.

Little wonder, then, that confusion and cleavages are quickly emerging. Here is part of a summary of an extensive consultation undertaken of 43 Anishinabek First Nations on the issue of self-government

The general feeling of community members with respect to membership is that it is currently a mess. Community members indicated that there are too many rules that are complicated and too detailed. The rules that exist seem to change or be applied arbitrarily...The community members indicated that we have too many categories of our people. People spoke of examples of problems where mothers are members and have status but their children are not. They spoke of one parent having three children, each with different levels of status or membership.²⁷

For Stewart Clatworthy, a demographer, who has studied extensively the problems emanating from Bill C-31, the affects are far reaching:

These developments hold implications for political and social stability as well as economic and social development of First Nation communities. The growth of these new divisions among First Nations will have implications for the form of administration of Aboriginal self-government. Moreover, federal and provincial governments will also need to develop policies with respect to responsibilities for the provision and funding of services to the various divisions in First nation communities. Failure to address these issues will result in future litigation, whereby courts may become the arbitrators of social policy.²⁸

Nor is the membership issue confined to First Nations. Tony Belcourt, the current President of the Métis Nation of Ontario with some 33 years as an elected leader, indicates the difficulties - indeed the anguish - of trying to define who is a Métis:

So I find it very difficult to come up with a categorical definition because there is far too much involved in that issue. And it is also, so explosively, definitive, potentially divisive, and can hurt a lot of people...There is one thing that people really care about and that is their identity, and they jealously guard their identity...I detest the idea of having to come up with a definition. And, I don't want to be rushed into doing it either without a lot of discussion in the communities. I don't want a gun pointed to my head to tell me that I have to define Métis by such and such a date. I detest that...²⁹

Underlying all of these concerns, however, is a difficult fundamental question that will continue to require frank and patient discussion. How can the viability of communities be sustained within the current approach to Aboriginal governance in Canada - an approach built on the classification of people based on a shared culture, language and history - when out-marriage rates, which are already high, continue to increase? And is it wise, given the uncertainties surrounding this issue, to provide constitutional protection to self-government agreements?

²⁷ Fred Bellefeuille, "The Anishinabeg Nation has Spoken - Part 1", *Anishinabek News*, February 2000

²⁸ Stewart Clatworthy, "New Cleavages in First Nation Communities", *Horizons*, Vol. 4, No. 1, Policy Research Initiative, February 2001

²⁹ Tony Belcourt, quoted by Linda Lord, "The Dangerous Definition Game", *Metis Voyageur*, December 2001

Treatment of Women

Aboriginal women traditionally played important roles in the governance of Aboriginal communities, particularly in matrilineal cultures. But largely as a result of colonizing influences, today many Aboriginal community governance structures are firmly male-dominated.³⁰ For example, in 2000, of the 633 chiefs in Canada, only 87 were female.³¹ Women have frequently also been excluded from important self-government, land claims, and constitutional negotiations.³² Sayers and MacDonald draw a link between this lack of political power and deeper social issues such as family violence, a problem described by some as reaching epidemic proportions in many First Nation communities.³³

The *Indian Act* prior to 1985 exacerbated the plight of First Nation women by stipulating that women who married non-First Nations men lost membership and status, while non-First Nations women who married First Nations men gained it.³⁴ This disenfranchisement and severance of status-related benefits impelled many women to leave their communities. Even after they regained status and membership after 1985, however, many faced further discrimination when they attempted to move back – particularly in terms of housing allocations³⁵ – because they were sometimes seen as having ‘betrayed’ their community by leaving in the first place. Thus the reinstatement of status to many Aboriginal people in 1985 had the inadvertent effect of creating yet another category, ‘Bill C-31 Indians’, and another line of social division.

A further area of concern to many women centres on family law in First Nations communities. The Royal Commission on Aboriginal Peoples (RCAP) identified “serious areas of legal vacuum respecting matrimonial real property on reserves”.³⁶ This vacuum has led in practice to charges of occasionally arbitrary and capricious decisions on the part of First Nation leaders about the handling of estates, decisions which have tended to adversely affect women in particular. The RCAP pointed out that the area of family law “falls within the core of (inherent) Aboriginal self-government jurisdiction and as such, does not require negotiation of a self-government agreement to be exercised”.³⁷

The Commission therefore called for federal, provincial and territorial governments to promptly acknowledge this right and amend their legislation accordingly; for Aboriginal and non-Aboriginal governments to cooperate in transferring this authority to Aboriginal governments; and for Aboriginal communities to set up committees, “with women as full participants”, to study issues such as the division of assets after divorce, child custody, wills and estates, and spousal and child support obligations.

³⁰ Judith F. Sayers and Kelly A. MacDonald, “A Strong and Meaningful Role for First Nations Women in Governance”, in Judith F. Sayers et al., *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports*, Status of Women Canada Policy Research Study, November 2001, p. 11.

³¹ Anderson, cited in Sayers and MacDonald, p. 12.

³² Absolon et al., *First Nations Gender Lens*, prepared for the British Columbia Ministry of Women’s Equality, in Sayers and MacDonald, p. 13.

³³ Sayers and MacDonald, op. cit., p. 13.

³⁴ Ibid, p. 11.

³⁵ Ibid, p 10.

³⁶ RCAP, “Family Law Recommendations”, at http://www.ainc-inac.gc.ca/pr/pub/matr/rcapflr_e.html.

³⁷ Ibid.

Still other legal issues of concern to First Nations women relate to deficiencies in policing and criminal justice on-reserve, particularly in terms of restraining orders and the prevention of domestic abuse.

Mechanisms of the Rule of Law

As noted by the Royal Commission, the centrality of *rule of law* as a fundamental guiding principle is as important for Aboriginal peoples as it is in European tradition.³⁸ The difference as the Royal Commission explained is that the law, instead of being primarily secular in nature, "...for many Aboriginal people is grounded in instructions from the Creator or, alternatively, a body of basic principles embedded in the natural order... [and] gives direction to individuals in fulfilling their responsibilities as stewards of the earth, and by extension, other human beings".³⁹ In Aboriginal cultures this system of law was based in oral tradition and elders' teachings rather than in written codes, as has been the case in European cultures.

The demands of running multi-million dollar organizations with dozens of staff administering a wide range of complex programs have made it imperative that First Nations utilize contemporary governance instruments such as laws, policies and formal enforcement mechanisms. As one elder told an Institute associate, "We could manage ourselves very well but we didn't have money. We need new rules to manage money."

At a recent workshop in Montreal, participants from five tribal councils in Quebec identified additional reasons for having written policies and by-laws:⁴⁰

- To provide a means to 'de-politicize' every day decision-making in the communities
- To permit leaders and administrators to exert First Nation sovereignty
- To help ensure stability and security
- To provide a means for ensuring the accountability of First Nation leaders, and administrators.

Despite these compelling reasons, the evidence suggests that the use of these instruments, with certain notable exceptions – for example in the area of property taxation - is very much underdeveloped. Take by-laws, for example. While there are some 3000 bylaws on the books in the 612 First Nations across Canada, this figure 'double counts' by including both amending bylaws and the original bylaws which have been repealed, and furthermore does not take into account whether the bylaws are actually operational in practice. The real figure is certainly much lower.

The Quebec workshop participants identified some of the principal reasons for the under utilization of contemporary governance instruments. First, the *Indian Act* requires Ministerial approval of First Nation bylaws in all areas except for intoxicants (which require band referenda), even though First Nation bylaws can be overturned in the courts if there are legal inconsistencies. Second, communities lack sufficient expertise and resources to develop and enact by-laws. And third, the

³⁸ RCAP, Vol. 2, Part 1, *Restructuring the Relationship*, p. 119.

³⁹ Ibid, p. 120.

⁴⁰ Institute On Governance, "Workshop Report, A Framework for Action: Building stronger First Nation Communities through Policies and By-laws", March 2002, at www.iog.ca

lack of sanctions and enforcement options represent a significant barrier, in part relating to the federal government moratorium on the use of Justices of the Peace.⁴¹

The proposed *First Nations Governance Act* had several provisions to deal with some of these shortcomings. Among these were enlarging the by-law making power of First Nations, removing the necessity of ministerial approval for by-laws, development of a registry system for by-laws, improving enforcement options and providing for a conflict resolution mechanism. Given that the new Liberal government will not re-introduce this bill because of stiff opposition from a number of First Nation leaders, there is a need to seek other options.

Two suggestions emerging from the Quebec workshop offer a modest beginning. Participants judged that creating a vehicle such as an internet site with confidentiality provisions for the exchange of information on policies and by-laws might be a useful starting point. Another idea was to develop a ‘how-to’ guide for developing policies and by-laws.

In summary, much remains to be done in this important area of developing the basic instruments of governance for contemporary, First Nation governments.

3. Direction

Our good governance principle of ‘direction’ is termed ‘strategic vision’ by the UNDP, which defines it as follows:

Leaders and the public have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.

This is a tall order for any society let alone one with the historical suffering and devastation that Aboriginal peoples have endured. Indeed it is a tribute to will and fortitude that many Aboriginal people and communities have overcome the past (along with continuing discrimination in the present) and achieved the major accomplishments – political, economic, legal, social, cultural, spiritual – that they have in recent years. But such development has still eluded many. An Afro-American writer, Shelby Steele, makes the point about the burden of historical oppression as follows:

I think one of the heaviest weights that oppression leaves on the shoulders of its former victims is simply the memory of it. This memory is a weight because it pulls the oppression forward, out of history and into the present, so that the former victim may see his world as much through memory of his oppression as through the experiences in the present.⁴²

This is not to argue that the past is unimportant or should be forgotten. As writer Ian Buruma notes, “Without history, including its most painful episodes, we cannot understand who we are or indeed

⁴¹ The principal reason for the moratorium is the lack of key safeguards in the *Indian Act* regarding hiring, pay, and firing that are necessary to ensure the independence of Justices of the Peace.

⁴² Shelby Steele, *The Content of Our Character: A New Vision of Race in America* (St Martin’s Press: New York, 1990), p. 150.

who others are. A lack of historical sense means a lack of perspective”.⁴³ But in Steele’s judgement it is a question of balance:

I believe that one of the greatest problems black Americans currently face - one of the greatest barriers to our development in society – is that our memory of oppression has such power, magnitude, depth, and nuance that it constantly drains our best resources into more defense than is strictly necessary...the irresistible pull into the past can render opportunities in the present all but invisible...Worse, by focusing so exclusively on white racism and black victimization, it implied that our fate was in society’s control rather than our own, and that opportunity itself was something that was given rather than taken. This identity robs us of the very self-determination we have sought for so long and deepens our dependency on the benevolence of others.⁴⁴

This theme of taking charge of one’s development agenda resonates well with the results of the Harvard Project on American Indian Economic Development at the John F. Kennedy School of Government.⁴⁵ Harvard researchers began with a puzzle. Why do tribes with the most successful economies not always have well-educated citizens, abundant natural resources and access to financial capital? After almost a decade of research involving more than 30 tribes across the United States, the Project had an answer: “Economic Development on Indian Reservations is first and foremost a political problem”.

To illustrate this conclusion, the Harvard researchers describe two approaches to economic development. The first is what they call the “jobs and income” approach. The perceived problem is a lack of jobs. The solution is for an economic development officer to get some businesses going in the community. And the results, according to the research, are invariably disappointing. Businesses seldom last long.

The second approach is what they call “the nation-building approach”. While the perception of the problem is largely the same – a lack of jobs and income – the solution is more long term and comprehensive. In essence it is to put in place “an environment in which people want to invest”. Their definition of an investor is broad and includes a cash-rich joint venture partner, a community member willing to develop a new business, a newly trained school teacher willing to return to his or her community or a community member contemplating a job with the band government. In short, “an investor is anybody with time or energy or ideas or skills or good will or dollars who’s willing to bet those assets on the tribal future”.⁴⁶

At the heart of this nation-building approach is ‘de facto’ sovereignty, where sovereignty is used not in the international sense to signify a sovereign country. Rather, the meaning is on a more practical plane: who is in charge of realizing economic development for the Tribe. Who is the effective decision-maker? As the Harvard researchers note:

Making the federal government bear responsibility for improving economic conditions on Indian reservations may be good political rhetoric, but it is bad economic strategy. When tribes take

⁴³ Ian Buruma, “The Joys and Perils of Victimhood”, *New York Review of Books*, April 8, 1999, p. 4

⁴⁴ Steele, 1990, p. 151-170. Another writer puts Steele’s argument succinctly as follows: “The language of victimhood seduces, then paralyzes.” See Irshad Mangi, “Risking Utopia: On the Edge of a New Democracy” (Douglas and McIntyre: Vancouver & Toronto, 1997).

⁴⁵ Cornell and Kalt, at www.ksg.harvard.edu/hpaied/CornellKalt%20Sov-NB.pdf

⁴⁶ Ibid, p. 7

responsibility for what happens on reservations *and have the practical power and capacity to act on their own behalf*, they start down the road to improving reservation conditions.⁴⁷

Some Aboriginal thinkers have noted that taking responsibility for the development of the nation has to extend to the individual level. Douglas Cardinal, the internationally renowned Aboriginal architect, has eloquently expressed this vision. In his view “we are magical beings, as human beings, because we have this power of creativity”. People can act “responsibly”, as “spiritual warriors”, by using this power of creativity in the “land of total possibility ... the land of the eagle”, by declaring their visions powerfully, making commitments, keeping their word, empowering others, and being ‘unreasonable’ in carrying through their promises. For Cardinal, fear and victimhood are at odds with this vision of responsibility, for “fear makes you small”. Only by taking responsibility for oneself can such “spiritual warriors” then take responsibility for others.⁴⁸

There is little doubt that the issue of direction in Aboriginal governance merits further consideration and would benefit from frank discussion not only within Aboriginal society but also among Aboriginal peoples, government players, and the rest of Canadian society. There are no simple answers to this complex set of challenges.

4. Performance

Good governance is about both means and ends, about issues relating to both process and performance. To this point in the paper, our focus has been primarily on means – leadership selection, membership, and strategic direction. But governance systems to warrant the label ‘good’ should produce goods and services that meet the needs of citizens. And here there is reason for concern as many First Nations suffer from lamentable housing, poor quality drinking water, public facilities which do not meet building code norms and education systems that perform below Canadian averages to name a few of a number of problematic areas. Indeed, many of these concerns go to basic health and safety issues.

In this section, we examine two performance-related topics: the question of the size of First Nation communities and its relationship to performance and the age-old question of housing.

Size and the Provision of Public Services

Critical to any informed reflection on the provision and regulation of public services in First Nations is this point: no country in the world has developed local governments like those in Canadian First Nations today, that on the one hand serve so few citizens, and on the other have such

⁴⁷ Ibid, p. 29-30. That the federal government bears the prime responsibility for the development of Aboriginal communities is not an uncommon view. Writing in the Nov.-Dec 2004 edition of the *Aboriginal Times*, the publisher, Roland Bellerose, had this to say in the lead article: “Mr. Martin is now head of the Liberal party and [Canada’s 27th Prime Minister] but how will his biography read regarding Aboriginal people and their issues? Two schools of thought would dictate either of the following: Canada’s Prime Minister Paul Martin – a strong visionary – Aboriginal people experience an improved standard of living providing for a brighter future OR Canada’s Prime Minister Paul Martin – a strong supporter of the status quo – Aboriginal people still facing abhorrent living conditions with no future in sight.”

⁴⁸ Douglas Cardinal, quoted in A. J. Carty, “The Convergence of the Arts and Sciences”, speech, National Symposium on Arts Education, Ottawa, July 2, 2000, at: http://www.nrc-cnrc.gc.ca/newsroom/speeches/convergence_e.html; and in Institute On Governance, “Aboriginal Governance in Urban Settings”, conference summary, November 19, 1998.

a wide range of responsibilities.⁴⁹ Indeed, in the rest of Canada and elsewhere in the western world, governments serving on average 600 or so people have responsibilities limited to recreation, sidewalks and streets, and perhaps water and sewers.⁵⁰ No countries assign such small communities responsibilities in the ‘big three’ areas of education, health, and social assistance, let alone in other complex areas such as policing, natural resource management, economic development, environmental management, and so on.

Achieving economies of scale is the usual argument for assigning the delivery of programs and services to larger entities (usually called aggregation). But the evidence that such solutions will either save money or obtain a bigger bang from existing funds is surprisingly thin, at least in the non-Aboriginal world. Consider the following points:

- There are a wide variety of ways that local governments can deal with small size without adopting an aggregation option: some of these include contracting with the private sector or developing service agreements with neighbouring municipalities
- The empirical evidence suggests that there is no ‘ideal’ size for local government. There is little uniformity in what drives costs across the range of local responsibilities and these cost drivers can change significantly over time.
- Implementation costs of aggregation are consistently underestimated and there are some important ‘drivers’ for long term cost increases among newly aggregated governments (having service standards rise to the highest level among former governments and adjusting wages to meet the level of the most generously paid employees are two examples)
- Aggregation can reduce local competition that helps stimulate innovation
- There is strong evidence to suggest that citizens prefer smaller governmental units so as to preserve local control and choice.

To rest the case for aggregation principally on the achievement of economies of scale, therefore, appears shaky at best. Stronger, more cogent arguments lie elsewhere and it is to these that we now turn. In particular it is useful to develop a view of how self-government agreements should deal with the issue of aggregation. Achieving clarity around self-government, which is far along the governance continuum, will be helpful in dealing with many of the transition points.

Past self-government agreements, whether of a comprehensive or sectoral nature, have involved the creation of First Nation governments with law-making authority in areas that, in the non-Aboriginal world, are associated with municipal, provincial and even federal levels of government. Examples of municipal-like responsibilities include the provision of basic public works – e.g. water, sewage treatment, roads and the delivery of education, social assistance, some public health services. Provincial-like responsibilities on the other hand include the administration of justice; broad taxation powers; broad regulatory powers in areas such as public works, environmental protection, and natural resource management; certain redress mechanisms; property tax assessment; land registry systems and revenue equalization among municipalities.

⁴⁹ The only close parallel are tribal governments in the United States, which tend to be larger on average and have fewer responsibilities.

⁵⁰ See for example, Harry Kitchen and Enid Slack, “Providing Public Services in Remote Areas”, forthcoming. The IOG estimates that First Nation per capita expenditures are on average 7 to 8 times larger than those of small municipalities (populations of less than 1000 people) in the rest of Canada.

In the non-Aboriginal world, there are some ‘good governance’ reasons for why provinces carry out certain functions and municipalities others. Take regulation, for example. The provision of potable water and the collection and treatment of sewage are done to exacting standards established in a regulatory regime. Provinces are the regulators; municipalities, the operators. If the standards are not being met, provinces have the power to order municipalities to take corrective action, including the shutting down of a facility. Thus it is not clear how the combining of these regulatory and operating responsibilities in a single tier Aboriginal government would work. How can a government, especially a small one, regulate itself? And public works is not the only jurisdictional area where this problem might arise – other examples are child and family services, the management of natural resources, environmental protection and policing.

Similar rationales could be developed for why other provincial-like (and federal-like) responsibilities are not found in local governments. For example, in property tax assessment, the principle is to separate this power from the property tax power so as to avoid a potential conflict of interest (the taxing power has a built-in interest to see assessment values rise). Another example is the tendency of some provinces to have redress mechanisms for local decision-making at the provincial level (the Ontario Municipal Board is one example) to ensure that parochial interests at the local level do not trump the broader public interest.

Thus, the need to keep separate certain provincial-like powers from local governments provides a powerful rationale for aggregation in a First Nation context. What is needed to realize effective self-government is the creation of two tiered, First Nation government – a provincial-like tier with provincial-like powers and a local tier consisting of a number of governments dedicated to providing local services to their communities. Moreover, two other important ramifications follow:

- the provincial-like tier should not be based on delegated powers from individual First Nations – this would render it too unstable and put important health and safety concerns at risk, should the delegation be withdrawn, and
- the political leaders at the provincial-like tier should be different from those at the local tier to avoid conflicts of interest, among other things

It is important to clarify that the provincial-like tier need not encompass all of the First Nations in an entire province. Rather, First Nation compatibility should be the primary (but not sole) factor in determining the make-up of these governments.

There are three other ‘good governance’ rationales for supporting a case for aggregation in a First Nation context. One major reason, as the Royal Commission and numerous others have pointed out, concerns the provision of certain services by governments in small communities where family connections are a major fact of life and where discretionary powers of officials and political leaders can exacerbate tensions within the community based on family lines.

A second ‘good governance’ rationale has to do with core capabilities of a government – political leadership, senior administrative competence - capabilities which can not be obtained by contracting out or making servicing arrangements with other levels of government. Once again the RCAP used this rationale for arguing for large, Nation-level governments.

Finally, aggregation can also be justified by arguing that, in creating a third level of government, we need to think carefully about how the Canada as a whole will function. With only 10 provinces and three territories, a vast array of collaborative structures and processes can be fashioned that provide the glue for making the country work better. So the number of governments matter. A federation with say 600 Aboriginal governments is going to work much differently (and likely less co-operatively) than, say, a federation with 60 Aboriginal governments.

If the above conclusions about the future shape of First Nation governments under self-government agreements have validity then a number of policy implications follow. Among these are

- implementing current agreements such as the First Nations Land Management Initiative and other sectoral self-government agreements need to be re-considered so that a First Nation government is not regulating itself
- federal funding should be phased out for bodies such as tribal councils that have been established to provide ‘free’, advisory services to First Nations for economies of scale reasons
- parties currently negotiating self-government agreements should incorporate the concept of a two tier system into their deliberations, and
- there should be no new self-government agreements involving single tier governments.

Housing

Today the state of First Nation housing is disquieting at best, even though the two federal organizations primarily responsible, INAC and CMHC, have provided First Nations with about \$3.8 billion over the past 10 years for on-reserve housing.⁵¹ In 2001, INAC estimated that there was a shortage of about 8,500 houses on reserve, while about 44 percent of the existing stock of some 89,000 houses required renovations.⁵² Statistics Canada estimates that rates of overcrowding are four times higher in Aboriginal versus non-Aboriginal dwellings nationwide.⁵³ As the Auditor-General report of April 2003 pointed out, poor housing conditions have negative effects on health, education, and overall social conditions, and urgent action is required if housing is to better accommodate the needs of the rapidly growing on-reserve population.⁵⁴

A further problem is this: in the non-Aboriginal world the mortgaging of housing assets is one of the main sources of capital for small businesses. In First Nation communities, on the other hand, housing from a small business standpoint is ‘dead’ capital.

And yet despite this overall gloomy picture there are many housing success stories, from communities in all regions, levels of income, and degrees of remoteness. The example of the Mohawks of the Bay of Quinte, one of 14 nationwide CMHC housing award winners in 2002, is particularly instructive. There, a number of exemplary practices are employed, including extensive use of quasi home ownership through the use of Certificates of Possession; band mortgage guarantees; de-politicized allocation processes; rent-geared-to-income provisions for young

⁵¹ Auditor General of Canada, “Federal Government Support to First Nations – Housing On Reserve”, *April 2003 Report*, Ch. 6. At <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20030406ce.html>

⁵² Ibid.

⁵³ Andy Siggner, “an Overview of Aboriginal Housing Conditions in Canada”, Statistics Canada presentation.

⁵⁴ Auditor General of Canada, April 2003.

families, seniors, and people on social assistance; innovative energy efficient designs; revolving loan funds with significant ‘sweat equity’ components; occupant training and empowerment; detailed zoning and planning; and user fees for utilities like potable water. Today, the community of approximately 2000 people manages a multi-million dollar housing portfolio, a large majority of community households own their own homes, and housing conditions are generally excellent.⁵⁵ Moreover, the community accesses multiple sources of funding such that federal funding accounts for only a small percentage of the overall housing portfolio revenue.

The success of the Mohawks of the Bay of Quinte point to the main policy reforms required to dramatically improve First Nation housing:

- placing more emphasis on individual ‘ownership’ either through CP systems or land designations initiatives⁵⁶
- encouraging more private sector investment in housing
- running housing portfolios in a business-like fashion according to sound plans that balance revenues and expenses, and
- effecting improved co-ordination among federal partners (including perhaps some consolidation or re-tuning of federal programming)

Among the major players in First Nation housing, there appears to be a growing convergence around these policy themes or some variation of them. For example, the AFN’s 2003 pre-budget submission called for the establishment of “self-sustaining and viable housing systems”, which would include “housing markets” to “improve the ability of [First Nations] citizens to buy and sell homes, [and] provide qualified owners with a larger stake in home maintenance and community improvement”. The document also called for the use of “innovative models of financing, such as revolving loan funds, to allow more of our people to graduate from social housing to home ownership”.⁵⁷

The AFN’s current approach appears to be in line with that of INAC and CMHC. Among the four goals of INAC’s 1996 housing policy was included “[the promotion of] individual pride and shared responsibility, including home ownership and increased private market investment”.⁵⁸ While the record since then in achieving the objective has been mixed, it is possible that this goal will gain more prominence during the program and policy review processes currently underway, particularly if the new government follows through with the high priority it has accorded Aboriginal affairs.

In general, there appears to be the need for a significant ‘paradigm shift’ towards the principle that responsibility for housing rests primarily with First Nations and home occupants, and that the

⁵⁵ CMHC, “Deputy Prime Minister Manley Announces CMHC’s 2002 Housing Award Finalists”, July 31, 2002, at: <http://www.cmhc-schl.gc.ca/en/News/nere/2002/2002-07-31-1000.cfm>

⁵⁶ Some might argue that home ownership is not culturally appropriate for many First Nation communities. There is evidence to the contrary. In a cross Canada survey of some 94 First Nations involving over 1800 households chosen at random, 98% of respondents indicated that they would like to own their own homes. Ekos Research Associates, “Summary Report: Evaluation of the On Reserve Housing Program”, Indian and Northern Affairs, Audit and Evaluation Branch, 1985.

⁵⁷ Assembly of First Nations, “2003 Pre-Budget Submission”, p. 19-20.

⁵⁸ Cited in Auditor General of Canada, *April 2003 Report*, point 6.26, at <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20030406ce.html>

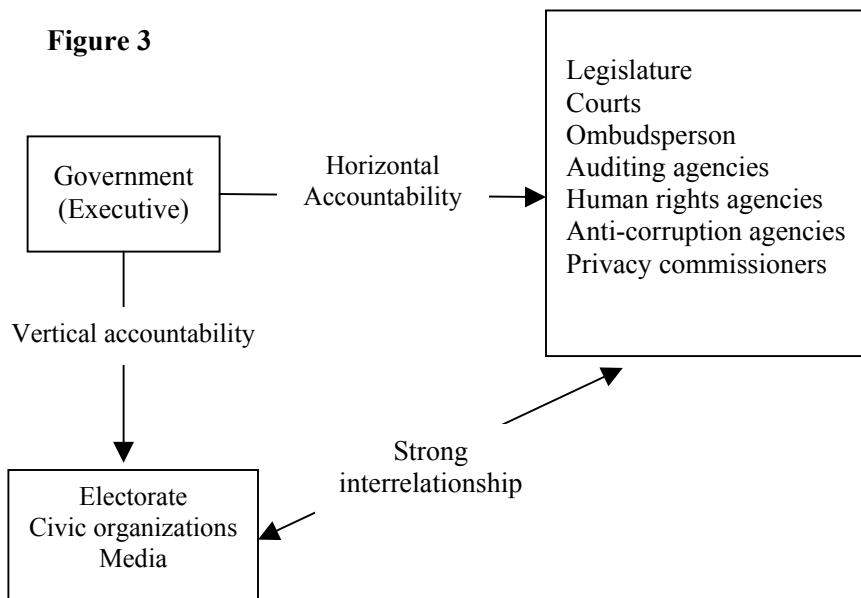
federal government’s role should be more of a support and financing function. The current confluence of political forces offers a major opportunity to effect such a shift.

5. Accountability

Accountability is central to democratic governments whether in an Aboriginal or non-Aboriginal context. Citizens grant sweeping powers to their political leaders. They entrust them with responsibility for critical decisions about design and implementation of public policy and use of public funds. In turn, citizens want to guard against abuse of these powers. On a more mundane level, they also want to ensure that their political leaders use their power wisely, effectively and efficiently, and that they will be responsive to demands by citizens to change the ways in which it carries out its functions. They expect, therefore, that their political leaders will be held accountable for their actions.

Framers of democratic governments (including the Iroquois Confederacy whose system of government inspired many features of the Constitution of the United States) have known for centuries the importance of checks and balances vis-à-vis the exercise of power. Thus, direct accountability to citizens via the ballot box is not sufficient to ensure a healthy relationship between governors and the governed. There is a requirement for another complimentary set of accountability relationships: the government must *restrain itself* by creating and sustaining independent public institutions empowered to oversee its actions, demand explanations for improper or illegal behaviour and, when circumstances warrant, impose penalties.

These two kinds of accountability are referred to by some as “vertical accountability” (to citizens directly or indirectly via civic organizations or the news media) versus “horizontal accountability” (to public institutions of accountability imposed by the government upon itself, including the legislature, the judiciary, auditing agencies, ombudsperson, human rights commissions). Figure 3 illustrates these two kinds of accountability relationships.



In many First Nation communities both sets of accountability relationships are weak. In terms of vertical accountability, civic organizations are fragile or non-existent and the media, if it exists, tends to be owned and controlled by First Nation governments or their advocacy organizations. Further, First Nation members, with few exceptions⁵⁹, do not pay taxes or even user fees for utilities such as water to their own governments. Experience from all over the world in both national and local contexts has shown that taxation – for obvious reasons – is a key driver of active citizenship and strong accountability.⁶⁰ Professor Emeritus Robert Bish of the University of Victoria, the former Co-Director of its Local Government Institute, points to Norway as the only country he knows that receives a large share of its revenue from a source other than taxes (i.e. oil revenues) and whose government services have not deteriorated⁶¹.

Further, without a significant source of its own revenue First Nations accountability relationships tend to be skewed towards its most important funder, the federal government.

Horizontal accountability mechanisms also tend to be weak. The legislative and executive branches of government are fused in the Chief and Council system and with few exceptions there is no independent, First Nation-run judicial system to act as check on the power of the First Nation government. In addition, there are no independent, First Nation run institutions of accountability such as auditing, human rights or privacy agencies.

In sum, the First Nation governance system is hugely unbalanced with a large, dominating public sector and few of the checks and balances that play such a prominent role in all liberal democracies. The long-term direction, therefore, is clear. First Nation citizens should eventually pay taxes to their First Nation governments and their governance systems need more balance through i) enlarged and more active private and civil society sectors; ii) the development of an independent media; and iii) the creation of several autonomous institutions of accountability. All of these developments are more likely to occur if First Nation governments are not confined to single, small communities.

Shorter term initiatives

The changes proposed above will take decades to accomplish. But what about the immediate term?

The example of the Membertou First Nation in Nova Scotia suggests an intriguing alternative. In January 2002, it became the first native government in North America to receive certification for an international set of business standards by obtaining an ISO 9001:2000 compliance rating. The rating by the International Organization for Standardization, according to Chief Terrance Paul, will

⁵⁹ The Cowichan First Nation is one such exception. Consumers, including First Nation members, pay a 7% tax on fuel, cigarettes and liquor sold on their reserve, a tax that is administered by the First Nation. According to press reports, Cowichan is the ninth native group in Canada to impose taxes on their reserve. See *Globe and Mail*, July 25, 2002, p. A6. The contrast with regards to taxation in 14 local governments in Nunavik in northern Quebec is instructive. With populations varying in size from under 300 to just over 2000, these local governments raise about half of their expenditures through taxes and other locally generated revenue.

⁶⁰ See, for example, Mick Moore, “Political Underdevelopment”, Paper presented at the 10th Anniversary Conference of the Development Studies Institute, London School of Economics, 7-8 September 2000, p. 4.

⁶¹ Robert Bish as quoted in the Institute On Governance report “Workshop on Tribal Councils, Scale and Aggregation, Summary Report”, Ottawa, August 27, 2003

ensure accountability, transparency and openness in business. The press release quotes then Minister Robert Nault:

Clearly this community is a leading example among First Nations, demonstrating what can be accomplished once the fundamentals of good governance are in place.⁶²

This example points to an interesting possibility: accountability and governance more generally could be improved through a *voluntary* system, where First Nations would seek to be accredited by a non-profit institute, or certification agency, which would be administered by Aboriginal people.⁶³ Incentives for certification would come from three sources: private sector investors and creditors, who would be attracted to the investment opportunities in certified First Nations; the federal government, which could reduce its reporting requirements for certified First Nations; and, most importantly, First Nation community members, who might demand improved financial management and accountability from their leaders.

Such an institute would be set up by a group of prominent First Nations people, and could include members of the Aboriginal Financial Officers Association and the Canadian Institute of Chartered Accountants. It would need start-up, government funding, although applicant First Nations would pay some of the costs of certification. The standard would include various elements - ranging from conflict of interest guidelines, codes for leadership selection to conflict resolution processes - and would have varying degrees of complexity, depending on the size of the community involved.

It is important to note that certification could be also denied or not renewed, depending on the circumstances. Market forces would thus produce firms adept at providing First Nations with the assistance necessary to develop the elements of the standard or improve those that needed upgrading in their communities. CESO Aboriginal Services might also be asked by the certification agency to take a proactive role in providing assistance in getting prospective First Nations 'up to speed'. The voluntary nature of the arrangement would overcome the need for national consensus for implementation to proceed, and would avoid debates about federal jurisdiction over First Nation governance.

6. Conclusions

Newly appointed Ministers of Indian and Northern affairs have a habit of declaring that they will be the last Minister of that department. Through hard work, good will and common sense, they assume they will solve within a couple of years one of Canada's longest standing pieces of unfinished business – creating a comfortable space for the nation's Aboriginal peoples.

The analysis of this paper should put to rest any such delusions. Many of the challenges facing governance systems for First Nations and, indeed for other Aboriginal groups, are deep seated and will require decades to deal with. That said, there are opportunities to make some dramatic and significant changes in the near term and these need to be acted upon.

⁶² Robert Nault as quoted in "Membertou first band to win ISO rating", *Communities First: First Nation Governance*, www.fng-gpn.gc.ca

⁶³ For more information, see IOG policy brief #8, "Getting the Incentives Right: Improving Financial Management of Canada's First Nations", at www.iog.ca

Further, in crafting an agenda for change, it is useful to reflect on international experience which is unequivocal. To be sustainable, governance reforms must come from the demands of the affected citizens and from the sustained actions of their governments. The role of ‘development’ agencies is very much a circumscribed one. As Mark Schacter, a former Director with the Institute, notes:

Recent talk about “capacity building” is as much about a fundamentally new way for development assistance agencies to conceptualize and implement their mandate as it is about new field-level techniques. Both are important, but the latter will see little success in the absence of the former. If a “capacity-building” approach is to be taken seriously, it means that development assistance agencies must become better at bending their policies and procedures – their “way of doing business” – to the needs and circumstances of the countries they serve. Beyond that, development assistance agencies must see their objective, *ideally*, as being to put themselves out of business. A development assistance agency is successful when a country or community it serves no longer needs its help, or at least, needs less of it.⁶⁴

With these points in mind, we turn to the final section of the paper, which points toward a new agenda for change in the decade ahead.

III. Towards a New Agenda

Based on the analysis in this paper, we can propose a number of practical measures to improve First Nation governance in the short term. They are all based on the premise that an ‘outside’ party like the federal government can do little to improve governance without working in close collaboration with Aboriginal groups. Some of these proposals would also apply to some Inuit and Métis communities.

- As a first step, it would be useful for the federal government to discuss with Aboriginal leaders what constitutes ‘good’ governance and what might be guiding principles on which to base future work together
- The federal government and First Nation leaders working together might craft a new approach to housing, one which puts the emphasis on individual as opposed to public ownership
- A voluntary certification system could be created to improve financial management and related governance functions
- The issue of small First Nation communities could be dealt with by promoting aggregation of some responsibilities to a higher-tier of Aboriginal government, both in the immediate and longer term, and by shifting current funding support from poorly designed aggregation solutions that are based on realizing economies of scale through the provision of ‘free’ services to First Nations
- A strategy is needed on how best to fill the numerous regulatory gaps facing First Nations communities, gaps that affect health and safety relating to a wide array of matters including potable water, sewage treatment and environmental protection

⁶⁴ Mark Schacter, “Capacity Building: A New way of Doing Business for Development Assistance Organizations”, Policy Brief No. 6, January 2000, at www.iog.ca

- A set of principles and practical applications should be developed to structure more effectively the relationship of politics and business in First Nation communities, and
- Some useful short-term work could be done on the issue of policies and by-laws and related enforcement concerns.

Longer-term Concerns

We have also identified a number of less tractable issues for consideration and resolution in the longer term. These include:

- Developing and reviewing alternatives to the ‘first past the post’ electoral systems
- Researching approaches to membership issues
- Exploring ways to enhance the role of women in governance matters
- Developing countervailing forces to the public sector – the private sector, media and civil society
- Exploring taxation and related accountability issues
- Exploring the process for building sustainable governance capacity including the development of assessment tools for good governance
- Understanding more thoroughly the range of linkages between good governance and positive socio-economic outcomes based on both international and Aboriginal experience.

The recent Powley decision also points to the need for some serious thinking and discussion around the future direction of Métis Nation governance – what it might look like, what might be the principal options to consider and how it might evolve.

Annex 1

HUMAN RIGHTS PRINCIPLES AND GOOD GOVERNANCE		
Good Governance Principles	UNDP Principles	United Nations Universal Declaration of Human Rights
Legitimacy & Voice	Participation	<ul style="list-style-type: none"> ▪ “Everyone has the right to freedom of opinion and expression...” (Article 19) ▪ “Everyone has the right to freedom of peaceful assembly and association” (Article 20) ▪ “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives” (Article 21) ▪ “Everyone has duties to the community...” (Article 29)
	Consensus Orientation	<ul style="list-style-type: none"> ▪ “The will of the people shall be the basis of the authority of government: this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage...” (Article 21) ▪ “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society” (Article 29)
Fairness	Equity	<ul style="list-style-type: none"> ▪ “All human beings are born free and equal in dignity and rights...” (Article 1) ▪ “Everyone is entitled to all the rights and freedoms set forth in the this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2) ▪ “Whereas the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (Preamble)
	Rule of Law	<ul style="list-style-type: none"> ▪ “Whereas it is essential ...that human rights should be protected by the rule of law” (Preamble) ▪ “All are equal before the law” (Article 7) ▪ “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal...” (Article 10) ▪ “No one shall be subjected to arbitrary arrest, detention or exile” (Article 5) ▪ “No one shall be arbitrarily deprived of his property” (Article 17)

Annex 2

Taiaiake Alfred's Characteristics of Strong Indigenous Communities

Wholeness with diversity. Community members are secure in knowing who and what they are; they have high levels of commitment to and solidarity with the group, but also tolerance for differences that emerge on issues that are not central to the community's identity.

Shared culture. Community members know their traditions, and the values and norms that form the basis of society are clearly established and universally accepted.

Communication. There is an open and extensive network of communication among community members, and government institutions have clearly established channels by which information is made available to the people.

Respect and trust. People care about and co-operate with each other and the government of the community, and they trust in one another's integrity.

Group Maintenance. People take pride in their community and seek to remain part of it; they collectively establish clear cultural boundaries and membership criteria, and look to the community's government to keep those boundaries from eroding.

Participatory and consensus-based government. Community leaders are responsive and accountable to the other members; they consult thoroughly and extensively, and base all decisions on the principle of general consensus.

Youth empowerment. The community is committed to mentoring and educating its young people, involving them in all decision-making processes, and respecting the unique challenges they face.

Strong links to the outside world. The community has extensive positive social, political, and economic relationships with people in other communities, and its leaders consistently seek to foster good relations and gain support among other indigenous peoples and in the international community.

Source: Taiaiake Alfred, *Peace, Power, Righteousness: an Indigenous Manifesto*, Oxford University Press, Don Mills, 1999 p. 82.

Annex 3

Attributes of Aboriginal Traditions of Governance

The Royal Commission on Aboriginal Peoples

The centrality of the land – For many Aboriginal peoples, the land, which encompassed not only the earth but water, the sky, all living and non-living entities, is the source and sustainer of life. People must act as stewards of the earth.

Individual autonomy and responsibility – Individuals have a strong sense of personal autonomy coupled with an equally strong sense of responsibility to the community.

The rule of law – For many Aboriginal peoples, the law is grounded in instructions from the Creator or in a body of basic principles. Any failure to live by the law is an abdication of responsibility and a denial of a way of life.

The role of women – In many Aboriginal societies, women's roles were significantly different from those of men in governance. According to the Commission, women must play a central role in the development of self-governing entities.

The role of elders – Elders are the trusted repositories of learning on history, medicine and spiritual matters. Their roles include making of decisions on certain matters, providing of advice and vision, and resolving disputes.

The role of the family and the clan – Traditionally, the family or clan constituted the basic unit of governance for many Aboriginal peoples.

Leadership and accountability – For many Aboriginal societies, especially those that placed little value in hierarchy, leaders were chosen and supported by the entire community and held little authority beyond that earned through respect. Accountability was an ingrained feature of this pattern of leadership.

Consensus in decision-making – Many Aboriginal people speak of the principle of consensus as a fundamental part of their decision-making processes.

Source: *Report of the Royal Commission On Aboriginal Peoples, Volume 2, Part One*, P. 115 - 139.