AGGREGATION AND FIRST NATION GOVERNANCE:

LITERATURE REVIEW AND CONCLUSIONS

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AGGREGATION AND FIRST NATION GOVERNANCE

EXECUTIVE SUMMARY

Purpose, Organization and Scope

Throughout history, there is evidence of Aboriginal peoples collaborating to provide better services, protection and representation to their members. For example, the Anishinabek Nation can trace its roots to the Confederacy of the Three Fires, which existed long before Europeans arrived in North America. More recent examples include political advocacy organizations – some of which have existed for more than half a century – as well as self-government agreements calling for a significant degree of aggregation.

The Royal Commission on Aboriginal Peoples made an important contribution to the debate around aggregation by arguing that individual Aboriginal communities are too small to develop the necessary capacity to govern the many jurisdictions often contemplated by the negotiating parties. Instead, it recommended that Aboriginal governments be formed around 60 to 80 'Nations'.

The purpose of this paper is two fold: first we will canvass the range of aggregation options, in addition to the Commission's nation-based proposal, that those involved in self-government negotiations and other initiatives might wish to consider. This is the subject of Part One of the paper. Second, based on this discussion we draw a number of specific conclusions about aggregation in a First Nation context, the focus of Part Two.

Part One: Aggregation Models

The organization of this part of the paper is fashioned around a discussion of the five models of aggregation and the following examples:

Aggregation Model	Examples Canvassed
Single tier	▪ RCAP ▪ Canadian Municipal experience
Two tier (a) delegated (b) not delegated)	▪ Nisga'a (not delegated) ▪ UAC (delegated) ▪ Two Tier Municipal (not delegated) ▪ Sweden (not delegated) ▪ First Nation Province (Courchene and Power)
Power Sharing Treaties	▪ European Union
Special purpose bodies – no specific legislated powers	▪ Sectoral Self-government agreements ▪ NW Ontario School Boards ▪ Municipal experience
Special Purpose Bodies – specific legislated powers	▪ Cree School Board ▪ FN Policing and Child & Family Services ▪ Municipal Finance Authority of BC

The principal conclusions from this part of the study are the following:

- There has been little research done on aggregation in a First Nation context
- The research in a non-Aboriginal context is richer but the results are mixed at best
- There is little agreement among academic scholars and others on the costs and benefits of aggregation
- Often cited benefits include reduced costs from economies of scale; improved accountability; reduction in unhealthy local competition; improved regional planning; improved tax equity; and improved services for outlying regions
- Often cited costs of aggregation are almost the reverse of the claimed benefits: increased costs; less accountability; reduction in local choice and control; and reduced equity
- The empirical evidence suggests two important conclusions: i) implementation costs of aggregation are invariably underestimated and realized economic benefits are often overestimated; ii) high costs per capita of local services are usually associated with very small and very large local governments
- Voluntary aggregation, with few exceptions, occurs only at the service delivery level and not at the creation of new aggregated government bodies with law making powers (the European Union is one of the notable exceptions)

Table 1 provides more detail on the key characteristics, the potential benefits and costs, and some outstanding issues surrounding each of the five types of aggregation.

Part Two: Implications for First Nation Governance

Surprisingly, despite the seeming theoretical and empirical confusion surrounding aggregation in a non-Aboriginal context, the situation for First Nations is somewhat clearer. Here are the principal conclusions of this section of the paper.

1. Collaboration or 'aggregation' among Aboriginal peoples occurred long before European contact. In that sense there is nothing new. Nonetheless it has taken on increased importance in Canada in part because of one key trend over the past fifty years. There is no country in the world that has developed local governments as we have in First Nation communities that, on the one hand, serve so few citizens and, on the other, have such a wide range of responsibilities (US tribal governments are the only close parallel).

2. Aggregation is not an internal matter to be decided only by Aboriginal peoples. The issue has important funding, political and legal ramifications affecting other governments. Indeed, what is at stake is the 're-confederating' of Canada – something that concerns every Canadian.

3. There are at least six arguments for achieving higher levels of aggregation among First Nations, particularly in a self-government context (the last four relate to 'good governance':
   - Effecting better advocacy
   - Achieving savings or improved service through 'economies of scale'

   Good Governance reasons

- Developing effective regulatory systems that separate the regulator from operations and managing other provincial-like responsibilities such as certain kinds of redress, revenue equalization, administration of the courts, property tax assessment, intergovernmental relations etc.
- Managing with integrity funding programs directed at families or individuals
- Ensuring sustainable and effective 'core' governance capabilities such as high quality political and administrative leadership
- Making the Canadian federation work effectively

4. Increased 'clout' through <u>advocacy</u> is a long standing reason why Aboriginal groups have collaborated in the past. The long term direction for this type of aggregation appears to be clear: it should be voluntary and funded by the participating FN entities. How to get there, however, will present significant challenges – political and economic.

5. Achieving savings or better service through <u>economies of scale</u> is perhaps the most commonly voiced argument for aggregation, especially in a service-related context. Nonetheless the evidence noted in Part One above suggests some skepticism is warranted, particularly in that local governments can manage small size through a variety of means – contracting out, service arrangements with other governments – which don't require aggregation. What to avoid seems evident. The federal government should not 'encourage' aggregation through the funding of aggregated service agencies (e.g. tribal councils, technical service corporations) that provide free services to a group of First Nations, all in the name of achieving economies of scale. Stronger, more cogent arguments for aggregation lie elsewhere.

6. The most compelling argument for aggregation in a self-government context (whether comprehensive or sectoral agreements) lies in achieving <u>'good governance'</u>. First Nation self-government is about creating a new order of government in Canada, one that combines functions that are local, provincial and federal in nature. There are sound governance reasons for keeping separate certain provincial-like responsibilities from more local responsibilities. The prime example is regulation, something that affects a wide variety of service areas from drinking water to day care centres. The principle is that governments can not regulate themselves effectively. Therefore First Nations require a two-tier system of government where the province-like tier, for stability reasons, is not based on delegated powers from individual First Nations, powers that could be withdrawn.

7. In addition to regulation there are other provincial-like (and federal-like) powers that should be kept separate from local governments. Examples include property tax assessment, some forms of redress, the administration of the court system and revenue equalization.

8. Three additional 'good governance' reasons for supporting aggregation among First Nations are the following:

   i)   dealing more effectively with tensions among families in small communities, tensions which the exercise of discretionary authority can exacerbate;
   ii) ensuring First Nation governments have sustainable and effective core capabilities

for governance such as high quality political leaders and senior administrators (this argument was first raised by the RCAP)

iii) ensuring that the Canadian federation, as it is reconfigured with a third level of government, can continue to work in a collaborative fashion (this suggests the need for some significant level of aggregation among First Nation governments)

9. Based on the above points, the common design principles for approaching aggregation for self-government purposes include the following:

Aggregation in a Self-government Context:
Common Design Principles

- the principal arguments for aggregation in a First Nation context should be based on 'good governance' principles and not the realization of savings or better service through economies of scale
- First Nations' taxing their citizens is likely the best, long term incentive for prompting innovative solutions to economies of scale issues
- the combination of provincial-like and local law-making responsibilities strongly points to the need for a two tier system of First Nation government.
- Among other things the provincial-like tier would be responsible for regulatory matters, major tax powers, revenue equalization among lower tier governments, certain redress functions and the administration of justice.
- The local tier, made up of a number of First Nations, would have a range of law-making powers dealing with service delivery responsibilities and other local matters such as zoning etc.
- There could be a number of special purpose bodies (e.g. school boards, policing commissions, child and family service agencies) responsible to the provincial-like tier.
- The provincial-like tier would not have delegated powers but would have separate 'constitutional' standing; further it would not need to encompass all First Nations in a single province but could be regional in nature
- Political leaders in the two tiers would be different.

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10. More immediate implications include the following:

- The government and First Nations should phase out 'forced' attempts at achieving economies of scale such as the Tribal Council funding program; rather attention should be focused on using existing incentives (AFA funding agreements) or developing new ones for encouraging innovative and voluntary solutions to economies of scale problems
- Future initiatives using the same Tribal Council rationale for realizing economies of scale - that is, the federal government funding some central service agency which provides free services to First Nations - should be avoided. For example, there is a proposal for a new governance institute for First Nations in the proposed *First Nation Governance Act*. Such

an organization, if established, should be on a fee for service basis after an initial start-up phase.

- Combining regulatory and operational responsibilities in a single tier, self-governing entity should be avoided unless the First Nation participants are willing to be subject to existing provincial regulatory regimes where no federal regime exists

- The federal government and the First Nation signatories to the First Nations Land Management Initiative should make significant efforts to devise an approach that separates regulatory responsibilities from operations in such areas as potable water, sewage treatment, solid waste management and environmental protection

- For those negotiating sectoral self-government agreements, there should be efforts among the parties to make the proposed regime compatible with an eventual move to the two tier government structure described above.

- For those self-government agreements where there are delegatory powers from participating First Nations to a regional government, the federal government and First Nations should
  - separate out provincial-like and local powers
  - ensure the regional government is assigned the provincial-like powers and
  - provide strong disincentives for First Nations to opt out of the regional government.

Various sources have inspired the proposals in this paper including the Royal Commission on Aboriginal Peoples, local government examples in Canada and Europe and various self-government agreements. Nonetheless the author takes full responsibility for the paper's contents and looks forward to the debate they may engender.

Table 1 – Summary of Models of Aggregation				
Model	**Key Characteristics**	**Potential Benefits**	**Potential Costs**	**Other Observations**
1. One-Tier (e.g. Royal Commission proposal)	Two or more separate governments are merged into one All governance functions are shared Can involve shifting responsibilities among levels of government Requires legislative change	Increased capacity to provide more and better services to everyone Cost savings More straightforward accountability Better performance in the world economy	Implementation and other costs of aggregation are typically underestimated and the benefits overestimated Decreased citizen influence over local government	No evidence of an optimum size of government No evidence that single-tier aggregation saves money Few examples of voluntary "one-tier" aggregation
2. Two-Tier (e.g. Nisga'a)	Certain governance functions from two or more local governments are given to a new regional government body. Governance functions transferred to regional body are generally those with high overhead (e.g. public works) or those perceived as being quite complex (e.g. economic planning) Requires legislative change	Greater accountability than special purpose bodies Provides a framework for local governments to work together and make joint decisions Increased capacity to deal with regional issues while leaving non-regional issues to local municipalities	Inefficient and costly to run Complicated structures reduce the ability of citizens to hold governments accountable Competition between lower tiers impedes their international competitiveness	Long duration in Canada and abroad attests to its viability Recent trend in Canada is to move away from this model in large urban settings Where this model continues to be used, the trend is to directly elect the regional tier
3. Power Sharing Treaty (e.g. European Union)	Two or more autonomous nations agree, through an international treaty, to establish an organization to exercise power over delegated areas of responsibility within their respective jurisdictions Requires legislative change	Has impressive track record Have been no wars between the participating nations That 11 states are applying for entry into the European Union (EU) attests to its effectiveness	"Democratic deficit" Remoteness of the "bureaucrats in Brussels" Loss of national sovereignty	EU having legislative powers is unique among international agreements No consensus among member states on the Union's future direction EU is "voluntary", but it has taken 5 decades for it to evolve

4. Special Purpose Bodies without specific Legislated Powers (e.g. First Nations Lands Advisory Board, Tribal Councils)	Two or more governments agree to establish an organization to provide specialized services to the governments Requires no legislative change	This type of aggregation is the easiest to create and modify Economies of scale lead to an increased capacity to provide services in the area of aggregation	Limited accountability to the electorate Arrangements can easily be abrogated, making them potentially unstable As quasi-monopolies, continued service quality can be an issue	Popular option among Aboriginal and non-Aboriginal governments
5. Special Purpose Bodies with Specific Legislated Powers (e.g. First Nations Regional Police Services)	Two or more governments agree to establish an organization to exercise power over delegated areas of responsibility within their respective jurisdictions May require legislative change	This is the next easiest model of aggregation to create and modify It is more stable because its legislative base makes it more difficult for governments to leave an arrangement Economies of scale lead to an increased capacity for services	It is more difficult to create and modify these arrangements because of their legislative base Limited accountability to the electorate As quasi-monopolies, continued service quality may become an issue	Another popular option among Aboriginal and non-Aboriginal governments

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I   INTRODUCTION

A   Purpose

This paper is an updated version of an earlier piece of Institute research entitled "Governance Models to Achieve Higher Levels of Aggregation", written some three years ago in September 2000.   The earlier version was primarily a literature review and had a distinctly self-government focus. This paper updates some of the literature but also borrows extensively on Institute experience, particularly in regard to the issue of structuring regulatory functions for First Nation governments. This is the focus of Part One of the paper.

But the chief difference from the earlier version is that this paper attempts to develop a more comprehensive set of conclusions about what aggregation implies for the creation of a third level of government or as some have put it for 're-confederating' Canada. So it has moved well beyond a literature review. These conclusions are the focus of Part Two.

For the purposes of this paper, aggregation is defined as a formal arrangement among governments to share or delegate services and powers through the creation of new public bodies or by shifting responsibilities from one level of government to another. Given such a definition the issue of aggregation in an Aboriginal context is not new. Indeed, throughout history, there is evidence of Aboriginal peoples collaborating to provide better services, protection and representation to their citizens. For example, the Anishinabek Nation can trace its roots to the Confederacy of the Three Fires, which existed long before Europeans arrived in North America.

That said, the Royal Commission on Aboriginal Peoples made a substantial contribution to the recent debate by arguing that individual Aboriginal communities are too small to develop the necessary capacity to govern the many jurisdictions contemplated by the negotiating parties, jurisdictions that span those assigned to municipalities (e.g. fire, ambulance and sewage services), provinces (e.g. health care and education), and, in some case, the federal government (e.g. fisheries co-management). According to the Commission, nations, of which there are some 60 to 80 in Canada, rather than communities, should be the fundamental building blocks of self-government agreements.

The Royal Commission's nation-based solution would represent a radical departure for the vast majority of Aboriginal groups across the country. Thus, while sympathetic to the Commission's premise that the community may not represent the ideal governing building block for all jurisdictions, many involved are discussing other aggregation options. These discussions beg several important questions: what is the range of aggregation options available to communities? What are the primary characteristics of each of these options? What has been the experience of others? What appear to be the primary benefits and costs of these various options?   And is there a preferred option or more broadly a common set of design principles that can be applied in a self-government context.

The purpose of this paper is to address these and other questions.

B   Organization

The organization of the paper is fashioned around a discussion of the five models of aggregation that emerge from the literature and the Institute's experience:

1) Single-Tier Aggregation;
2) Two-Tier Aggregation (both delegated and non-delegated powers);
3) Aggregation through Power Sharing Treaties;
4) Special Purpose Bodies without Legislated Powers; and
5) Special Purpose Bodies with Legislated Powers.

In examining each of these models in turn, this paper considers what the literature and our own experience have to say about its costs, benefits and rationale, as well as describing some examples from both Aboriginal and non-Aboriginal settings within Canada and abroad. The paper concludes by focusing on the implications for First Nations, implications which some may find provocative.

C   Scope

While much has been written on the costs and benefits of the different methods of aggregating local and national governments, the same can not be said of aggregation involving First Nations. For this reason, this paper draws heavily upon the literature discussing aggregation outside of the First Nations context.

Such an approach has strengths and weaknesses. Reviewing the experience of non-Aboriginal governments in national and international settings may bring a refreshing perspective, sparking new ideas and fresh thinking. On the other hand, Aboriginal governments, especially those with a land base, do not have close parallels with non-Aboriginal governments at the local level. First Nations, for example, enjoy a distinct constitutional status unlike any municipality, whether in Canada or abroad. Further, any aggregation occurring between First Nations generally involves noncontiguous territories. There are also important cultural differences in approaches to governance that must be taken into account. In addition, First Nations tend to be much smaller than many of the examples showcased in this paper but, paradoxically, have a much broader range of powers than any local government in Canada or in the western world. Finally, that First Nation citizens do not pay taxes to their First Nation governments is a critical factor in reflecting on the incentives for aggregation.

For all of these reasons, therefore, it is not the intention of this paper to suggest that non-Aboriginal approaches to aggregation could be adopted by Aboriginal governments without substantial modification. Nonetheless , a central premise of this paper is that the experience of others combined with that of First Nations themselves can provide a stimulating mix of ideas for those involved in negotiations to re-establish Aboriginal governance.

We now turn to the first model of aggregation to be canvassed in this paper – the amalgamation

of several local governments into a larger, single tier government.

<u>**PART ONE: LITERATURE REVIEW**</u>

II   SINGLE-TIER AGGREGATION

A   Overview

Single-tier aggregation is simple in concept: it involves taking two or more governments and merging them into one. This type of aggregation can either be vertical (e.g. aggregating a regional and local government into one body) or horizontal (e.g. combining two or more municipal governments into one regional government). In either case, all the governance structures, processes and functions of the separate governments are combined into one. Nonetheless, the newly formed government is not simply the sum of its merging parts. In general, aggregation of this sort also involves a redistribution of functions between the new single-tier government and any other governments to which it relates. For instance, in the case of a number of municipalities joining into one regional government, their provincial government may grant them new responsibilities in light of their increased functional capacity. Thus, single-tier aggregation has the potential of being a relatively simple method of increasing the capacity of local government to deliver not only their existing services, but also new ones.

The rest of this section will examine two instances of single-tier aggregation. First, we look at the Royal Commission on Aboriginal Peoples' suggestion of one-tier, nation-based government in Canada. Then, we examine the recent experiences of municipal amalgamation within the provinces of New Brunswick, Nova Scotia and Ontario.

B   The Approach of the Royal Commission on Aboriginal Peoples

The Commission's approach to the question "What is the most desirable level (or levels) for government functions?"[1] is centred on its distinguishing between an Aboriginal nation, of which there are 60 to 80 across Canada (for example, the Cree communities across the Prairie provinces might constitute one nation), and a local Aboriginal community, of which there are about 1000 (these would include the over 600 First Nations). The Commission defines an Aboriginal Nation as having the following three characteristics:
 the nation has a <u>collective sense of national identity</u> that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland;
- it is of <u>sufficient size and capacity</u> to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and
- it constitutes a <u>majority of the permanent population</u> of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.[2]

Based on its legal analysis, the Commission concludes that the international right to self-determination, which, according to the Commission, is the "... fundamental starting point for

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[1]   Report Of the Royal Commission on Aboriginal Peoples, Volume 2, Part 1, P. 156
[2]   Ibid, Volume 2, Part 1, P. 182

Aboriginal initiatives in the area of governance"[3], is vested in Aboriginal nations rather than small local communities. In addition, Aboriginal peoples possess the inherent right of self-government within Canada, a right guaranteed under section 35 of the *Constitution Act 1982* and that, here too, this right is vested "... in people that make up Aboriginal nations, not in local communities as such."[4]

As a corollary, the Commission maintains that Aboriginal people are entitled to identify their own national units for the purpose of exercising their rights to self-government and that their nations to not have to be recognized by the federal government. Nonetheless, as a practical matter, there is a need for federal and provincial governments to acknowledge the existence of the various Aboriginal nations in order to engage in serious negotiations "... designed to implement their rights of self-determination".[5]

Thus, from the Commission's perspective, the fundamental building block for its proposed model of governance is the Aboriginal nation and, consequently, in its treatment of individual policy spheres such as economic development, education, health, culture and language, the Commission recommends that the law-making authority be vested with the Aboriginal nation as well as the capacity to develop policy. From that starting point, the Commission identifies four levels of responsibility for government functions - the local community, the Aboriginal Nation, the multi-nation level and, finally, the Canada-wide level. Table 2[6], on the following page, illustrates the application of this model to the field of education. At the local community level, politicians and officials would be responsible for, among other things, implementing nation policy in local Aboriginal institutions and making decisions on the instruction of local students.

At the Nation level, in addition to its law-making and policy functions, the nation would be responsible for receiving and distributing revenues. Multi-nation organizations at the regional or provincial level, on the other hand, would have responsibility for negotiating policy frameworks with the province, developing curriculum, and monitoring academic standards, advising provincial ministers of education and provide training.

The fourth level of organization is what the Commission terms "Canada-wide networks". In the case of education, such networks would take a "... federated form rather than a centralized hierarchy"[7] and would include an Aboriginal Peoples' International University, an electronic clearing house, a statistical clearing house, a documentation centre and associations for standard-setting and accrediting post-secondary programs and institutions.

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[3] Ibid, Volume 2, Part 1, p. 193
[4] Ibid, Volume 2, Part 1, P. 236
[5] Ibid, Volume 2, Part 1, P.184
[6] This table is taken directly from the Commission's report. See Volume 3, P.564
[7] Ibid, Volume 3, P. 565

Table 2 - Model of an Aboriginal Education System			
Local Community	**Aboriginal Nation**	**Multi-Nation Organization**	**Canada-Wide Networks**
· Participates in policy-making through representation in Aboriginal nation governing bodies and nation education authority · Makes decisions on instructions of local students · Implements nation policy in local Aboriginal institutions · Negotiates tuition agreements in accord with nation policy · Participates in decision making in local institutions under provincial/territorial jurisdiction	· Enacts or adopts laws on Aboriginal education · Establishes an education authority to make policy on: ➢ education goals and means of achieving them in the nation ➢ administration of schools and colleges within the nation ➢ tuition agreements ➢ purchase of provincial/ territorial services · Receives revenues and distributes funds for government services including education · Participates in establishing policy framework province-wide through representation in multi-nation organizations	· Negotiates policy framework with the province or territory for: ➢ tuition agreements ➢ access to provincial or territorial services ➢ transfer between Aboriginal and provincial or territorial academic programs · Develops curriculum · Monitors academic standards in Aboriginal system · May co-ordinate nation support of Aboriginal post-secondary institutions · Advises provincial ministers of education, colleges and universities and training · Provides an umbrella for representation of community of interest governments administering education	· Federated organizations reflecting nation interests ➢ Aboriginal Peoples' International University ➢ electronic clearinghouse ➢ statistical clearinghouse ➢ documentation centre ➢ associations for standard setting and accrediting post-secondary programs and institutions

The governance model and economic development

In applying its model to other policy fields, the Commission provided further rationale for why certain functions were placed at particular levels. For example, in the field of economic development, the Commission had this to say:

> Responsibility for programming should not be lodged at the level of individual First nation, Metis, or Inuit communities, where most funding and programming are now directed. There is a strong case for implementing economic development programs at the level of the Aboriginal nation, confederation or provincial/territorial organization, given the scarcity and cost of skilled personnel, among other factors. There are also considerations of scale. Better choices can be made if decision makers can choose from a number of alternatives, encourage linkages that go beyond the boundaries of particular communities, and amass the financial resources to support large projects as well as small ones. In a world of large international trading blocks that are gradually eroding the importance of state borders, Aboriginal people will need to have units of sufficient scale and strength to act effectively in a highly competitive environment.[8]

Based on this rationale, the Commission applied its four-level model and proposed that only the managing of certain economic development personnel be located at the local community level.

There may have been one other rationale behind the Commission's identifying the Aboriginal Nation as the fundamental building block and that had to do with integrity in governance. The Commission had this to say about this topic:

> There is a widespread perception in some communities that their leaders rule rather than lead their people, and that corruption and nepotism are prevalent. Increasingly, Aboriginal people are challenging their leaders through a variety of means, including legal suits brought against leaders by individual members for alleged breaches of public duty. For First Nations people, this situation is traced to the *Indian Act* system of governance and associated administrative policies. Over the past 100 years the act has effectively displaced, obscured or forced underground the traditional political structures and associated checks and balances that Aboriginal peoples developed over centuries to suit their societies and circumstances.[9]

It is clear from other sections of the Commission's report, particularly in its arguments about the right to self-determination and the inherent right to self-government, that the "traditional political structures" to which it was referring emanated from the Aboriginal Nation rather than individual communities.

Suffice it to say that many First Nations and their political organizations do not subscribe to the Commission's legal analysis. Here, for example, is the perspective of the Federation of

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[8] Ibid, Volume 2, Part 2, P. 838
[9] Ibid, Volume 2, Part 1, P. 345-346

Saskatchewan Indian Nations (FSIN):

> Some interesting implications for questions around machinery flow from inherent rights and treaty rights. The inherent right to self-government is grounded in individual First Nations in Saskatchewan (72 of which make up the FSIN). This must be the starting point in considering the authority to govern in the First Nations context. The old adage of "government of, for, and by the people" occurs at the level of the individual First Nations band. Autonomy is pivotal to how bands define themselves, and also to how both Tribal Councils and the FSIN are organized and where their authority comes from - both for current systems and for new self-government, Treaty-based systems.

> This First Nations perspective differs in fundamental ways from the federal-provincial perspective [the perspective from which many of us tend to view the world]. In Canada, governing authority flows from the Crown and the Constitution (both written and unwritten), which provides a mandate for two levels of government. Ultimately, though, "government of, for, and by" is based in the Canadian people as a whole through their relationship to the Crown, which is a single entity whose authority is carried out at two different levels.

> In First Nations governments, governing authority comes from the people at the band level. Any broader scale governments will need to receive their authority from powers delegated by individual bands up to those broader levels. This, in some respects, then reverses the traditional flow of delegation of authority and accountability (at least compared to the federal/provincial view of the world). That is, in First Nations governance, which is based on the inherent right, delegation flows from local/band/First Nations level where authority fundamentally resides upwards to broader scaled levels and the requisite accountability then flows downward.[10]

The Institute is not aware of any significant analysis of the Commission's proposal for a nation-based approach to self-government. One exception is a recent paper[11] prepared by David Newhouse, the current Chair of Native Studies at Trent University. Newhouse argues that the idea of a central authority, inherent in the Commission's proposal, "…violated a fundamental principle of Cree, Ojibway, Dakota, Saultuex and Dene society." He elaborates as follows:

> Government is viewed more as a process than a set of structures. Its goals are to seek harmony, balance and peace centred always on the notion of respect. Traditional governments always existed in a constant state of flux…The leadership of any individual was always open to question. In some cases,

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[10] Quote from the Federation of Saskatchewan Indian Nations in *Exploring Machinery Options in Support of Intergovernmental Fiscal Arrangements*, which was written by the Institute On Governance in 1998.
[11] Newhouse, David, "Aboriginal Governance: Comments to International Day of the World's Indigenous Peoples", Indian and Northern Affairs, August 9, 2000

leadership changed from issue to issue depending upon the consensus of the community.[12]

Thus, one argument against the Commission's proposal is that nation-based government runs counter to Aboriginal traditions about governance.

Summary

In summary, the Commission answers the question of what is the desirable level for government functions by proposing a model where the primary governance functions – legislating, policy-making and receiving and distributing resources – rest with the Nation. For this reason, we have categorized the Commission's model as a single tier approach even though it encompasses a number of special purpose bodies at the regional and national level and includes some program delivery at the community level.

The Commission's rationale for this heavy emphasis on the Nation is fourfold:

- Legal reasons – the right to self-determination and to self-government rest with the Nation rather than the community;
- Capacity to govern reasons – the scarcity and cost of skilled personnel demand this level of aggregation;
- Economic reasons – having the size and financial strength to act effectively in the global economy; and
- Integrity reasons – a larger governing unit will reduce the prevalence of nepotism and corruption.

C   The Canadian Municipal Experience

There has been much experimentation in Canada with one-tier municipal amalgamation. In recent years, the provinces of New Brunswick, Nova Scotia, and Ontario have all, for various reasons, undertaken to amalgamate several of their municipalities into larger ones.

Arguments for Single-Tier Aggregation

In the case of New Brunswick, the municipalities in the Miramichi area were amalgamated in 1995 based on the arguments that such an approach would improve administrative efficiency, coordination and integrated service delivery, as well as enhancing the equity of the existing tax system.[13] The provincial government also supported this amalgamation based on the additional arguments that it would: a) strengthen urban-centred regions by making them more self-sufficient; and b) counter the diminished accountability that resulted from the emergence of new intermunicipal special-purpose bodies.[14]

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[12] Op cit P. 13
[13] Burns, Leo W., Tim McCarthy and John C. Robinson, *Miramichi City: Our Future – Strength through Unity*, Fredericton, Ministry of Municipalities, Culture and Housing, 1994, p. 29
[14] Ibid. p. 273.

Similarly, in Nova Scotia, the 1993 Interim Report of the Municipal Reform Commissioner for Halifax County suggested that amalgamation would result in $9.8 million or 2.2 per cent annual savings.[15] Moreover, the report indicated that a consolidated municipality would be able to plan more effectively, make sounder financial decisions, and that it would be more responsive and accountable to citizens.[16]

Around the same time as the Halifax amalgamation, an Ontario task force looking into local government in the Greater Toronto Area was asked by its government:

- How do we get the best value for our investment in local government?;
- What are the major structural and operational changes to urban government that would increase its cost-effectiveness and responsiveness?;
- How should the principles of equity, competition, and choice apply to municipal functions across the GTA?; and
- To report on the appropriate geographic scale, heirarchy, and responsibilities of local government.[17]

In response to these questions, the task force recommended the consolidation of the Municipality of Metropolitan Toronto and the four surrounding regional municipalities into a single Greater Toronto regional government. This single regional government would have a more limited range of functions than the governments that it would replace[18], thereby resulting in annual savings of $107 million.[19]

Arguments Against Single-Tier Amalgamation

The benefits of single-tier aggregation are not nearly as clear as some claim. As Andrew Sancton argues, "there is no academic evidence to suggest that consolidation produces savings."[20] Indeed, in the Miramichi, Harry Kitchen reports that "initial evidence suggests that the annual costs of operating this new municipality have increased by $1.5 million annually."[21] In Nova Scotia, consultants for each of the municipalities within the Halifax area pointed out that the efficiency and effectiveness savings from amalgamation "would roughly be cancelled out by increases in expenditures caused by 'policy harmonization' and 'service levelling'."[22] Similarly, the Ontario task force actually noted that "the savings in eliminating administrative duplication can be offset by the upward migration of wages and service standards that often occurs when different wage and service structures are combined."[23] Moreover, it observed that "amalgamation

[15] Hayward, C. William, *Interim Report of the Municipal Reform Commissioner, Halifax County (Halifax Metropolitan Area)*, Halifax: n.p., 1993, p. 75.
[16] Ibid., p. 38.
[17] Task Force on the Future of the Greater Toronto Area, *Greater Toronto: Report of the GTA Task Force*, Toronto: Queen's Printers for Ontario, 1996, p. 230.
[18] Ibid., p. 165.
[19] Ibid., p. 254.
[20] Sancton, Andrew. "Reducing costs by consolidating municipalities: New Brunswick, Nova Scotia, and Ontario" in *Canadian Public Administration*, vol. 39, no. 3, p. 267.
[21] Kitchen, Harry, "Presentation to Municipal Government Officials at Brant County on Municipal Restructuring," December 21, 1995, p. 11.
[22] Ibid.
[23] Task Force on the Future of the Greater Toronto Area, *Greater Toronto*, p. 212.

reduces competition between municipalities, potentially leading to less efficiency. With fewer municipalities against which to benchmark, there is less opportunity to measure relative performance and less pressure to keep costs down."[24]

Not only is there evidence to suggest that the savings from amalgamation are overstated, but there is also reason to believe that the costs of an amalgamated government might actually go up. In cases were amalgamation results in larger, more heterogeneous municipal councils, public choice theory dictates that since councilors no longer have a common interest in proposed projects, they will be inclined to support each other's pet projects in an attempt to garner support for their own pet projects. This results in more projects being approved, than otherwise would be the case, thereby reducing the cost savings that might otherwise be achieved.[25]

In a similar vein, a wide ranging study that examined the experience of aggregation in the United States came to the conclusion that "…local government systems which are fragmented and deconcentrated are generally associated with lower spending and greater efficiency"[26].

At the same time, the Canadian municipal experience also indicates that there are significant non-financial arguments against consolidation. First, there is the issue of the loss of community identity. In New Brunswick, the government proposed to amalgamate the municipalities within the Moncton area. This proposal was ultimately rejected on the grounds that it would reduce the local political power of the Francophone community, which is a minority interest at all other levels of government.[27] The other major non-financial argument against single-tier aggregation is that it may decrease accountability to citizens. The reason for this is that an amalgamated government may become larger and more complex, and may have offices located further away from citizens. As such, some citizens within an amalgamated municipalities perceive their governments as distant and inaccessible, and therefore more difficult to influence.[28]

Summary

Within the Canadian municipal context, it is apparent that weighing the costs of single-tier aggregation against its benefits is by no means an easy process. The evidence that cost-savings are sure to result from amalgamation is dubious. Indeed, as Sancton observes, "the real debate on this issue is not about cost-savings; it is about the nature of local territorially-based communities and about their potential for democratic self-governance within the complex political and economic environment in which we find ourselves."[29] As such, any government considering single-tier aggregation should give primary consideration to whether an aggregated government will be more effective than a fragmented one, and how such an aggregation will affect matters of accessibility and accountability of the new government to its citizens.

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[24] Ibid., p. 213.

[25] Sancton, p. 277.

[26] Boyne, George, "Local Government Structure and Performance: Lessons from America", Public Administration, Vol. 70 (Autumn), 1992, pp. 333-357

[27] Ibid. p. 274.

[28] Ibid., p. 43.

[29] Sancton, p. 286.

On a final note, we have observed that there are few, if any, examples of "voluntary" single-tier aggregation. That is, aggregation of local governments is invariably forced upon municipalities by their provincial governments. This suggests that how one evaluates the costs of amalgamation against its benefits is largely dependent upon one's point of reference. In particular, provincial governments seem more likely to be swayed by the potential for cost savings, whereas local governments appear more likely to be convinced of the potential losses of accessibility and accountability.

D   Conclusions

Single-tier amalgamation appears to be an increasingly popular option in Canada and abroad. Arguments for this approach include costs savings, better performance in the world economy, higher quality services and more straightforward accountability. However, the empirical evidence does not support many of these claims. Moreover, we have found few, if any, examples of voluntary one-tier aggregation.

Overall, in examining the literature discussing single-tier aggregation, it becomes apparent that there is no optimal size for a government. In the words of Peter Diamant, "There is nothing in a review of the Canadian municipal scene to suggest that there is an ideal size, by population or area, for different types of municipalities. Nor is there any reason to anticipate that some standardization of local government is likely to solve the problems, real or perceived."[30] This implies that local governments must constantly examine their structures, processes and functions to ensure that they are appropriate to the circumstances facing them.

III   TWO-TIER AGGREGATION

A   Overview

In contrast to single-tier aggregation, two-tier aggregation involves a number of governments coming together and forming a second level, "regional" government, to deal with those issues that are beyond the capacity of any of them to handle individually. In so doing, the participating organizations aggregate a number of their governance structures, processes and functions upwards to the newly formed body.

It is useful to distinguish two forms of two tier aggregation - delegated and non-delegated. In a delegated model, various governments agree voluntarily to create a regional government with delegated powers, powers that could be 'taken back', depending on the conditions of the union. This form of two tier government, as we shall see, is a common feature of many self-government agreements. In a non-delegated model, the regional government is established in its own right and its powers can not be 'taken back' by the second tier.

The rest of this section will explore five examples of two-tier aggregation. First, we look at the details of the Nisga'a Self-Government Agreement (a non-delegated form) to be followed by an examination of the United Anishnabeg Councils, a delegated form of two tier self-government. This is followed by an examination of Canada's experiences two-tier municipal government. As

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[30] Diamant, p. 8.

well, we detail Sweden's two-tier municipal government. Finally, we briefly explore the proposal by Thomas Courchene and Lisa Powell for the development of a First Nations Province.

B   Nisga'a Self-Government Agreement

First initialed by the parties in August 1998, the Nisga'a Final Agreement has now been ratified by federal and provincial governments and the Nisga'a nation. Among self-government agreements, this one is unique in that it establishes a non-delegated, two tier system of government for the Nisga'a. Thus, the Agreement defines "Nisga'a Government" as consisting of two levels: Nisga'a Central Government, referred to in the Agreement as the Nisga'a Lisms Government, and Nisga'a Village Governments, of which there would be initially four.[31] The central government would consist of at least three officers elected at large, the chief and other councillors of the Nisga'a Village Governments and one representative from each of the Nisga'a Urban Locals (there would be initially three such locals - greater Vancouver, Terrace and Prince Rupert/Port Edward).[32]

The large majority of jurisdictions laid out in the Agreement fall under the responsibility of the central government including forest management, fisheries management, wildlife management, environmental assessment and protection, administration of justice (policing, the establishment of a court system and correctional services), conferring of citizenship, culture and language, marriages, health and social services, education, intergovernmental relations and direct taxation of Nisga'a citizens. In contrast, the jurisdiction of village governments is limited to local matters such as the regulation of traffic and transportation within its village.

Public works is a shared jurisdiction between the two levels. Furthermore it is a good illustration of how the agreement handles the relationship of Nisga'a laws to federal and provincial laws. Thus, both levels of Nisga'a government can make laws in respect to the design, construction, maintenance and demolition of buildings, structures and public works on their respective lands. (Federal and provincial laws of general application would prevail in the event of a conflict.) Other sections of the agreement dealing with public works call for a similar sharing – for example, in the use, management, planning, zoning and development of their respective lands. In this instance, in the event of a conflict, Nisga'a laws would prevail over federal and provincial laws. In other areas of jurisdiction of direct relevance to the public works function, such as health and environmental protection, the Nisga'a central government has exclusive jurisdiction vis-à-vis the village governments, but federal and provincial laws of general application would prevail in the event of a conflict.

In a limited number of instances, the central government is in a hierarchical relationship with the village governments. For example, the central government can make laws to recover from the village governments own source revenue. Further, the power to amalgamate, create or dissolve villages is vested in the central government.

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[31] The total population of the Nisga'a nation as of December 31, 1996 was 5079; the four Nisga'a communities ranged in size from 1750 (Kincolith) to 326 (Gitwinksihlkw).

[32] See *Nisga'a Treaty Negotiations: Agreement-In-Principle*, February 15, 1996, P.68

C   United Anishnabeg Councils (UAC)

The seven First Nations in southern Ontario (Beausoleil, Hiawatha, Georgina Island, Curve Lake, Moose Dear Point, Alderville, Scugog) that make up the United Anishnabeg Councils (UAC) recently signed an agreement in principle, an agreement which outlines significant law-making jurisdiction for the First Nations including education, environmental protection and a range of public works function from potable water to solid waste to transportation matters. The Agreement also permits the First Nations to delegate any of their powers to a regional government, which would be governed by a Council of Chiefs from the individual First Nations.

This delegated, two tier governance model is a feature of several other self-government agreements now under negotiation including the Meadow Lake Tribal Council, the educational agreement with the Union of Ontario Indians and a similar sectoral agreement with the Federation of Saskatchewan Indian Nations.

In reflecting on the efficacy of this delegated, two tier system, it is useful to examine the various instruments that governments must use to govern appropriately. One such instrument is regulation. It is prevalent in a wide variety of areas - ranging from the provision of drinking water, the protection of the environment, food safety to social services like child welfare - to ensure the health and safety of their citizens and the environmental integrity of their communities and surrounding areas.

The critical importance of a well designed regulatory system became clear in the Walkerton tragedy where six people died and thousands became seriously ill because of e-coli contamination. A key principle that has emerged in fashioning an appropriate regulatory regime is to keep separate the regulator from the operator. As one commentator from a Canadian-based think tank has noted:

> When the government is a supplier of a service, such as water, it tends to be a poor regulator of quality. Regulator and supplier often work in the same department, may belong to the same union, and are both responsible to the same elected officials – who want to avoid unpleasantness and conflict. Problems are hushed up or ignored with a wink and a nod. Governments can be far more rigorous regulators when they are at arm's length from the supplier.[33]

In Canada's system of government, the regulators tend to be the provincial and federal governments with the regulatees being municipal governments, special purpose bodies like Child Aid Societies or private for profit or not for profit organizations.   Municipal governments also assume some regulatory powers - for example in administering the building code with private developers and land owners. In sum the dominant pattern is to keep the regulators and operators separate[34].

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[33] "Tap Dancing: Canadians avoid the real problem with water", *The Ottawa Citizen*, May 14, 2001. The problem of having a public body with conflicting functions or mandates is sometimes referred to in law as "institutional bias" - that is, the performance of one function biases the proper performance of the other.

[34] One example of where this is not the case is with the federal government environmental protection laws – specifically the Fisheries Act and the Canadian Environmental Protection Act. In these instances, one federal department (Environment Canada) is able to bring charges against another (for example, Indian and Northern

In reflecting on how the regulation instrument will work in a two tier, delegated system like the UAC system, several questions emerge:

- Will the principle of separating the operators from the regulators be respected by assigning each of these function to separate tiers?
- If regulation is delegated to the regional tier how will the necessary independence be achieved, given that the same political leaders responsible for operations are also those charged with regulation?
- What would happen if one or more First Nations withdrew their delegated regulatory powers from the Regional government?
- What will be the ongoing role of the provincial and federal governments?

There appear to be no easy answers to these and other questions when contemplating this model of government.

D   Two-Tier Municipal Government

In the words of Peter Diamant, "while the single-tier system has been the most common and enduring form of local government in Canada, the multi-tier has survived in the three most populous provinces: Ontario, Quebec and B.C."[35]

Ontario

In the case of Ontario, it has had a multi-tier county system for over 150 years in the southern portions of the province.[36] The county councils form the upper tier of the two-tier structure, with the councils being composed of elected officials from the local municipalities. That said, "Ontario is moving toward a system of representation on the regional councils where the chairs and councillors are elected through direct elections."[37]

Quebec

The Province of Quebec also has a two-tier system of municipalities and counties, known in Quebec as "municipalités régionales de comté" (MRCs). Like Ontario's county councils, MRC councils are comprised of locally-elected municipal councillors, although "half of the MRCs use a proportional representation procedure that weights votes according to the population of the member municipalities."[38] While the original purpose of the MRCs was to conduct regional planning, Diamant observes that:

> Municipalities are encouraged, but not pressured, to have services delivered where ever practical by the MRC. Additional powers and responsibilities can be acquired by the MRC from its member municipalities if two-thirds of its council

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Affairs), a situation which, in the author's experience, has created a multitude of difficult problems.
[35] Diamant, p. iii.
[36] Ibid., p. 20.
[37] Ibid., p. 13.
[38] Ibid., p. 20.

agree, but MRCs do not have the power to levy taxes or pass by-laws affecting incorporated land areas. As such, the local municipalities maintain their status as the political and tax-raising units of local government, negotiating cost sharing with the MRCs on individual-service basis.[39]

British Columbia

While Ontario and Quebec's systems of two-tier government are interesting, British Columbia's regional district (RD) system is probably the most relevant to this paper [40]. The reason for this is that British Columbia's "regional districts have developed as a local government structure that is both flexible and well-suited to dealing with issues where large, relatively low density, rural areas surround urban centres."[41] These characteristics make this particular model of two-tier municipal government the most easily adapted of the different Canadian municipal models to the situations faced by First Nations.

Regional districts provide a broad array of services. As Allan O'Brien notes:

> For adjacent municipalities, they are a mechanism for supplying inter-municipal services. RDs also provide services in unincorporated areas, or parts of them, similar to those a municipality might supply. They may provide different services to different parts of the districts and in certain circumstances can supply services outside their own boundaries. They may supply services for municipalities by contract and can accept jurisdiction for providing local services transferred by municipalities. The regional districts can now make service decisions by by-law, rather than getting the province to revise letters patent as was formerly required.[42]

Despite the many activities they do engage in, RDs do not, however, levy taxes. Rather, they send a separate requisition for each service, including the appropriate share of administrative costs, to either the municipality receiving the service or, in the case of services provided to rural areas, to the province, which levies and collects property taxes in these areas.[43] Either way, the requisitioned government pays for the service and passes the proportion of the costs that it sees fit down to the citizens who benefit from the service.

With respect to the governance structure of the RDs, they are overseen by:

> ...a board of directors composed of mayors and councillors appointed by the municipalities and persons elected from the unincorporated parts called electoral areas. Representation reflects municipalities, area and to some extent population.

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[39] Ibid..

[40] For an excellent description of the Regional District system, see Robert Bish, "Accommodating Multiple Boundaries for Local Services: British Columbia's Local Governance System", presented at a colloquium at the Workshop in Political Theory and Policy Analysis, Indiana University in October 2002. Contact rbish@uvic.ca for copies.

[41] Ibid., p. 14.

[42] O'Brien, Allan. *Municipal Consolidation in Canada and its Alternatives*, Toronto: ICURR Press, 1993, p. 52.

[43] O'Brien, p. 53.

In votes that affect only part of the regional district, only representatives from the part affected may vote. Some votes require a two-thirds majority.[44]

In 1989, the provincial government amended the legislation for the RDs so as to encourage them to create community commissions in the rural areas they serviced. This was meant to provide a degree of self-government to the rural areas. These commissions are comprised of "four specially elected commissioners and the director who is elected to the board from the surrounding electoral area. The by-law setting up the commission sets out the administrative powers being delegated to it."[45]

As part of a review of the Regional District regime undertaken in 1999, Professor Robert Bish of the University of Victoria noted a number of problems including a mismatch between the voting rules and the financing formulas for the various services. Recommendations to deal with these and related problems included:

- Greater use of custom agreements among collaborating governments to better balance voting rights and costs, and
- Agreements among municipalities for collaboration on services should have time limits, renewal provisions, notice provisions for exit and a process for dispute resolution

Another significant problem for which there appears to be no easy solution was a lack of understanding among citizens about how regional districts functioned, a result in part of the multitude of agreements that the flexibility of the regional district structure encourages.

Of the important lessons of the Regional District experience to emerge from the nearly forty years of experience with the model one is that collaboration occurs usually on the basis of activities and not on functions. Using the example of the recreation function, Professor Bish notes that "…large recreation centres have economies of scale and must be produced for a large population. At the same time those municipalities participating in the [regional district's] recreation centre also run their own recreation programs in their municipality to complement the programs of the large centres where local citizen preferences differ from regional ones" [46].

Summary

From looking at the cases of municipal government in Ontario, Quebec and British Columbia, it is apparent, as Diamant observes, that the strength of two-tier government lies in the framework it provides for: a) municipalities to work together to deliver services; b) the formalization of the political relationships amongst municipalities; and c) the establishment of a mechanism for joint decision-making.[47] Moreover, with respect to British Columbia's regional districts, "the inherently flexible, non-interventionist approach and the gradual expansion of activities in response to local decisions have resulted in a system that is accepted, practical and functional."[48]

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[44] O'Brien, p. 52.
[45] Ibid., p, 53.
[46] Op. Cit. P. 16
[47] Diamant, p. 34.
[48] Ibid., p. 14

As such, it may be useful to First Nations considering the development of a two-tier model of government to learn more about British Columbia's regional district model.

Two-tier systems of government, however, are not without their weaknesses. Indeed, the arguments usually cited to counter the formation of two-tier municipal systems are: a) they are not easy to understand and therefore reduce accountability to citizens; b) they require a lot of effort to ensure that there is good co-ordination among the various levels; and c) they are costly to run. Moreover, as former City of Ottawa Mayor, Jim Watson, has noted, the disadvantages of two-tier systems are that they: employ more politicians than are necessary for effective governance; involve unnecessary regulatory duplication; and experience competition between municipalities that impedes their ability to compete internationally.[49]

E   Local Government in Sweden

The sophisticated two tier system of local government in the Scandinavian countries of Sweden, Denmark and Norway is worthy of a brief overview in this study of aggregation for a variety of reasons. First, these countries are unitary states, meaning that the relationship between the local and national governments is direct, uncomplicated by a provincial layer of government. Furthermore, in contrast to Canada, local governments enjoy a measure of constitutional protection and have wider spending and tax powers than their Canadian counterparts. Finally, these countries have experimented with a system of intergovernmental transfers based on both revenue and expenditure equalization – a feature that the Royal Commission called for in structuring the new relationship between Canada and Aboriginal governments. For the purposes of this paper, we look at only Sweden, noting that there are marked similarities with how local government functions in both Denmark and Norway.

History and Structure of Government

Sweden has a territory of some 450,000 square hectares (approximately the size of the Yukon Territory) and a population of almost 9 million inhabitants. Fifty percent of the population lives in a geographic area representing 3 percent of the land mass. Thirty percent of the population lives in three metropolitan areas.

Sweden has a long tradition of local government with the foundation of the present system being laid in the 1860s. The local government sector comprises 288 municipalities (the first tier), 23 county councils (the second tier, which are not 'superior' to municipalities) and parishes. (The latter are not important for the purposes of this case study).   Municipalities range in population from 3,000 inhabitants to 700,000 in Stockholm. Over half the municipalities have less than 20,000 inhabitants. The average county council has approximately 350,000 inhabitants and they range in size from 136,000 to 1.7 million inhabitants.[50]

The importance and special role of local government is laid out in the Swedish Constitution but

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[49] Watson, Jim. *The Ottawa Report: A Monthly Update by Ottawa Mayor Jim Watson*, Nov. 1998, p.1.
[50] ...Analyses of Swedish municipal structures indicate that the two "most expensive" types of municipalities are small, sparsely populated ones and major cities.   Source: Soren Haggroth and Kai Kronvall, "Swedish Local Government"

mainly in terms of principles so that the extent of local self-government jurisdiction is a political question. The protection of the local right to taxation is also mentioned in the Constitution but the types of taxes and the tax base are not set out. Only Parliament, and not the executive branch, can impose powers and obligations on local governments.

In addition to the Constitution, the legal framework is provided first by the 1992 Local Government Act, which lays out a governance framework, dealing with such matters as organization, decision-making roles, referendums, redress and financial management. This Act also provides a general power to engage in matters of local concern. The largest part of local government activities, however, is based on special legislation, which regulate their compulsory activities - for example, education, health and social assistance.

Expenditure responsibilities

Local governments are one of the cornerstones of the Swedish welfare state and account for about 38% of total public sector expenditures and 28% of Sweden's total employment. Education and social services (child care, care of the elderly and disabled and assistance to individuals and families) constitute close to 60% of municipal expenditures. The county councils' most predominant task is health care, which accounts for some 75% of their total expenditures followed by services for mentally handicapped[51] (10% of expenditures). Table 3[52] summarizes municipal and county council expenditures on activities in 1993:

Table 3 - Summary of Swedish Municipal and County Council Expenditures	
Activity	**% Expenditure**
Health and medical care	24%
Social welfare activities	27%
Education	18%
Administration	5%
Energy, water and waste management	5%
Leisure and the arts	4%
Communications	4%
Sundry activities	13%

While expenditure responsibilities in the above areas rest with local authorities, the responsibility for results achieved is very much shared between the national and local governments. This is the case because of the regulatory nature of the national legislation and the fact that the national government provides some of the funding through grants (see below). To illustrate the nature of this shared jurisdiction in the area of education, the national government

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[51] Services to the mentally handicapped have been transferred to municipalities as of 1996
[52] "The new proposed equalization system for municipalities and county councils in Sweden" op. cit. P. 2

has established, among other things, a national agency to inspect schools, evaluate the results they achieve and, in general, to make recommendations on how to bring about greater effectiveness. Nonetheless, the decision about what portion of their budget to allocate to the school system is left to municipalities with the result that per student spending on education varies across the country.

Revenue Generation Capacity

The three primary sources of revenue for local government in Sweden are taxes (about 67% of the total), grants from the central government (20%) and user fees (7%).   Sweden has no local property tax. Rather, the primary tax vehicle at the local level is a flat rate tax on personal income, where the definition of taxable income is determined by the central government but where each municipal and county government can determine its own tax rate. (This flat rate tax is applied on top of a central government tax on personal income.) In 1997, the average local tax rate was 32% and varied from a low of 26.5% to a high of 34.4%, a variation of 8 percentage points. Tax collection is the responsibility of the central government. Prior to tax reforms carried out in the 1980s and in 1991, the local tax base included corporate income, certain real estate taxation and individual capital gains tax. Since the tax reforms, local taxation is confined to taxation of employment income.

The tax base per capita (tax potential) varies enormously for municipalities from 71% to 173% of the average per capita tax base (these figures are for 1996).

Intergovernmental transfer arrangements

As noted in an earlier section, grants from the central government are an important revenue source for local governments. In 1992, grants accounted for 26% of municipalities' total revenue and 15% for county councils. Dependency varied widely. Some municipalities get more that 50% of their revenue from such grants while others receive less than 10%.

Prior to 1993, more than two thirds of the 'dollar' value of these grants were in the form of conditional grants directed at specific local government services – for example, in the area of primary education there were some 30 conditional grants, directed at specific aspects of the education system. These conditional grants were given with a variety of objectives. In some cases, the central government was attempting to control the scope and quality of the services offered; in other cases the grants served as a stimulus for local governments to expand certain services.

Unconditional grants, about a third of the total, were traditionally given to regions regarded as poor to make up for large differences in tax potential or costs.

Since the early 1990s, significant pressures have been building in Sweden to radically alter the relationship of the central government to local governments. An economic slow down, huge central government deficits, a striving for uniformity in the European Union and changes in the political ideology of the government are all factors that have combined to promote greater economic efficiency and competitiveness with significant implications for local governments in general and the fiscal transfer arrangements in particular. Among other things, ensuing reforms

have eliminated the conditions attached to national government transfers to county and municipal governments.

Summary

In summary, noteworthy features of the Swedish two tier system of municipal and county governments are the following:

- Some measure of constitutional protection;
- A non-hierarchical relationship between the two tiers;
- Significant expenditure responsibilities, most notably in the 'big three' areas of education, health and social services with education and social being assigned to the first (municipal) tier and health assigned to the second tier;
- Significant revenue generation powers for both tiers, including taxation of personal incomes;
- An unconditional grant system from the national government to the two tiers, a system based on both expenditure and revenue equalization;
- The responsibility of the national government for setting out the legislative framework for most local expenditure areas with the result that accountability is somewhat blurred;
- The more recent emphasis on the part of the national government on performance indicators and measuring results as opposed to controlling inputs.

F   First Nations Province Proposal

While it is currently only a theoretical construct, a model of two-tier Aboriginal government worthy of consideration was proposed by Thomas Courchene and Lisa Powell in their book, *A First Nations Province*. As the title of the book indicates, Courchene and Powell suggest that the solution to a number of the political and capacity issues facing First Nations could lie in the creation of a First Nations Province (FNP). In their words, "since a federal system is, by its very nature designed to accommodate the sharing of 'sovereignty' and/or self-government, one obvious 'Canadian' solution to Aboriginal aspirations for self-government is to integrate the First Nations fully into the federal structure -- that is, to grant provincial status to the First Nations."[53]

The particular structure that they envision for the FNP is one that, like other provinces, would be territorially based, consisting of existing land reserves, crown lands and settlements, as well as any other territory arising from land-claims settlements.[54] As a province, the FNP would enjoy all the powers and privileges afforded to other provinces, including:

- All the constitutional powers granted to provinces, including control over education, justice, lands and resources, health care, and use of the notwithstanding clause;
- Access to provincial equalization payments and the ability to conduct intra-First Nation equalization;
- Federal political representation through Members of Parliament being elected from their

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[53] Courchene, Thomas, J. and Lisa Powell, *A First Nations Province*, Kingston: Institute of Intergovernmental Relations, 1992, p. 5.
[54] Ibid.

territories;

- The ability to determine its own internal political structure, within the basic parameters established by the Constitution;
- A seat at all constitutional and First Minister deliberations; and
- The resources and economies of scale to be able to provide more services to it citizens (e.g. an Aboriginal post-secondary institution).[55]

In terms of the structures that would be created to govern the FNP, Courchene and Powell suggest that since land claim settlements and self-government agreements are signed by individual First Nations, the FNP would likely be set up as a confederation of First Nations, each of which would delegate powers up to the FNP.[56] This would give First Nations the "flexibility to pursue their own priorities in many areas, in much the same way as Saskatchewan and Quebec have flexibility in the way they pursue various policies."[57] Moreover, this two-tier structure could be set up so that "reserves or bands could acquire the equivalent of municipal status. Or like-minded reserves or bands could link together to acquire 'regional' authority which, in terms of powers, would be somewhere between a municipal and a provincial government."[58]

A single FNP may be impractical given the great diversity of the Aboriginal population. However, Courchene and Powell do acknowledge this diversity and indicate this issue could be addressed by establishing multiple FNPs. However, they caution against creation of too many FNPs as "the diseconomies of scope and scale would set in quickly."[59]

While Courchene and Powell's FNP proposal may seem radical, they point out that both the concept and the structures of the FNP bear a likeness to existing entities. As noted above, conceptually the FNP could fit within a federal system of governance. Moreover, provincial status embodies a significant degree of self-government and sovereignty. Structurally, the Assembly of First Nations has in place many of the key infrastructure elements that would need to be fashioned and could be modified to produce an FNP. In addition, Courchene and Powell observe, albeit writing in the early 1990s, that polls have identified self-government as one of the few constitutional "winners." As such, if any constitutional amendment is to succeed, they believe it would be this one.[60]

G   Conclusions

There is a rich array of experience with two-tier systems, both in Canada and abroad. Indeed, there is a wide variety of possibilities for structuring the second tier, including a current trend of having its political leaders chosen through direct elections. Moreover, two-tier government has endured, in some cases for over a hundred years. This, by itself, suggests the viability of two-tier aggregation. Additional arguments in favour of two-tier government are that it provides a greater degree of accountability than special purpose bodies which are discussed later in this paper and

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[55] Ibid., p. 7-45.
[56] Ibid, p. 14.
[57] Ibid. p. 15.
[58] Ibid.
[59] Ibid. p. 49.
[60] Ibid., p. 50-51.

that it increases the capacity of local governments to manage regional issues such as economic development. That said, the chief arguments against two-tier governments are that they can be inefficient, too complicated to understand, have blurred lines of accountability, and involve too many politicians.

Overall, it should be noted that some models, such as British Columbia's, have an evolutionary character about them. In such cases, the governance structures are established to meet the needs of a particular set of circumstances. However, the legislation creating them is worded so that they are able to grow and adapt as the circumstances facing the constituent governments changes. Thus, such approaches may be very suitable to the First Nations context.

IV   AGGREGATION THROUGH POWER SHARING TREATIES

A   Overview

Power sharing treaties are essentially agreements between nations to aggregate portions of their governance structures, processes and/or functions. The fact that power sharing treaties involve *sovereign* nations is an important distinction from the other examples of aggregation that are examined within this paper. What this means is that nations, unlike municipalites which can be forced to amalgamate by the province that created them, aggregate only on their own volition.

There are a multitude of examples whereby nations have limited their sovereignty through international treaties in order to deal with important problems or provide a benefit such as increased trade. However, amongst these treaties, perhaps the most ambitious are those that have established the European Union. The reason for this is that, included amongst its various powers, the EU has the ability to enact legislation in certain areas that is binding within all of its member states. For this reason, the rest of this section will examine the EU as a model of aggregation through power sharing treaties.

B   European Union

History

The EU has changed dramatically over time. Its origins can be traced to a process begun shortly after the end of World War II, a process that sought to unite European nations economically so another war amongst themselves would be unthinkable. (See Table 4 below.) This process began in 1952 when six countries signed a treaty establishing an independent special purpose body to control the coal and steel resources they had combined into a common market. With the successful completion of this first task, they then set about developing new treaties that would contribute to the creation of a single market in which all goods, services, people and capital would be free to move as if they were in one country. This single market came into being in 1993 with the signing of the Maastricht Treaty.[61]

Principle of Subsidiarity

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[61] European Union. *European Union: EU in Brief*, 1995. <http://www.eurunion.org/profile/brief.htm>

Before discussing the structures that have been created through the various EU treaties, it is important to first understand the principle of subsidiarity, which was enshrined in the 1997 Amsterdam Treaty. Under this treaty, action by the EU is considered appropriate only if:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.[62]

This principle is an integral element of the EU. It prevents the institutions of the EU from usurping powers and responsibilities not formerly delegated to it by its member states.

Institutions

While the EU began as a special purpose body that enforced a common market for steel and coal, the above chronology shows that its roles and responsibilities have increased substantially over the years. In particular, the treaties governing the EU have granted it the capacity to enact binding legislation–a feature unique amongst international organizations–in the areas of foreign trade, agriculture, competition, transport, research and technology, energy, the environment, foreign aid, education and training.[63] To ensure that it effectively exercises its competence within these areas, the EU has developed a number of institutions over the year to govern and administer its expanding duties. These institutions are described below:

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[62] Article 5 of the *Protocol on the Application of the Principles of Subsidiarity and Proportionality, Amsterdam Treaty, 1997.*

[63] European Union, <brief.htm>

Table 4 - Chronology of the European Union's Development[64]	
Year	**Event**
1952	Six countries – Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands – create the European Coal and Steel Community (ECSC) by pooling their coal and steel resources in a common market controlled by an independent supranational authority.
1958	The Rome Treaties set up the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), extending the common market for coal and steel to all economic sectors in the member countries.
1973	The United Kingdom, Ireland and Denmark join the European Community (EC).
1979	The European Parliament is elected, for the first time, by direct universal suffrage and the European Monetary System (EMS) becomes operative.
1981	Greece becomes the 10th member state.
1985	The program to complete the Single Market by 1992 is launched.
1986	Spain and Portugal become the 11th and 12th member states.
1987	The Single European Act (SEA) introduces majority voting on Single Market legislation and increases the power of the European Parliament.
1989	The Madrid European Council launches the plan for achievement of Economic and Monetary Union (EMU).
1990	East and West Germany are united after the fall of the Berlin Wall.
1991	Two parallel intergovernmental conferences produce the Treaty on European Union which EU leaders approve at the Maastricht European Council
1992	Treaty on European Union signed in Maastricht and sent to member states for ratification. First referendum in Denmark rejects the Treaty.
1993	The Single Market enters into force on January 1. In May, a second Danish referendum ratifies the Maastricht Treaty, which took effect in November 1995.
1994	The EU and the 7-member European Free Trade Association (EFTA) form the European Economic Area, a single market of 19 countries. The EU completes membership negotiations with EFTA members Austria, Finland, Norway and Sweden.
1995	Austria, Finland and Sweden join the Union on January 1. Norway fails to ratify accession treaty. EU prepares for the 1996 intergovernmental conference on EU institutional reform.
1996	A European Council is held, which reaches an agreement on the various elements necessary for the introduction of the a single currency.
1997	The Treaty of Amsterdam is signed (to take effect in 1999), setting out the principles for a common foreign and security policy, making the institutions more democratic and accountable, and clarifying citizens' rights.
1999	A single currency is adopted by 11 of the 15 EU countries. The members of the European Commission collectively resign in light of a report alleging fraud, mismanagement and nepotism within the organization.

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[64] For the years 1952-1995, the source is European Union. *European Union: EU in Brief*. http://www.eurunion.org/profile/brief.htm, 1995. For 1996, the source is European Union. *The History of the European Union - 1996*. <http://europa.eu.int/abc/history/1996/1996_en.htm>. For 1997, the source is European Commission. *Treaty of Amsterdam: what has changed in Europe*, Luxembourg: Office for Official Publications of the European Communities, 1999, p. 5. For 1997,European Union. *The History of the European Union - 1999*. <http://europa.eu.int/abc/history/1999/1999_en.htm>.

2003	Negotiations on a new European Constitution begin

The European Commission

The European Commission is the administrative wing of the EU. It is headed by 20 individuals, each of whom are given responsibility for a particular policy area. These people tend to have been either members of their national parliaments, members of the European Parliament, and/or senior ministerial officials. They are appointed by the governments of the member states (2 from each large nation and 1 from each of the smaller nations) and are supposed to be completely independent of their national governments, acting only in the interests of the EU. The process by which these people are appointed begins with the governments of the member states appointing the President of the Commission, subject to the approval of the European Parliament. Following this, the states then select the rest of the members of the Commission, who are then, as a group, subject to the approval of the European Parliament.[65]

The duties of the Commission are "to initiate proposals for legislation, to be the guardian of the Treaties and to execute EU policies."[66] To support the 20 members of the Commission in this work, the Commission employs 16,000 people, one-fifth of whom are translators, through its agencies that are located throughout Europe.[67]

The European Parliament

The European Parliament is composed of 626 members who are directly elected from the countries participating in the EU. Originally the Parliament only had a consultative role, leaving the European Commission to propose legislation and the Council of Ministers to decide whether the legislation should be approved. Since then, the Parliament's powers have been expanded to the point where legislation requires the mutual consent of the Parliament and the Council in order for it to be approved. In addition, Parliament has an important supervisory role: rejecting, amending or approving the EU's annual budget; and calling members of the Commission and Council of Ministers to account for how the Union's policies are being conducted.[68]

The Council of the European Union

Known as the Council of Ministers, the Council of the European Union has no equivalent in the world. As the EU's web site notes, the Council "is a body with the characteristics of both a supranational and intergovernmental organization, deciding some matters by qualified majority, and others by unanimity."[69] In the case of those votes requiring a quality majority (requiring a minimum of 62 of the 87 available votes), votes of the member states carry the following weighting:

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[65] Ibid.
[66] European Union. *Institutions of the European Union*, <http://europa.eu.int/inst/en/com.htm>
[67] Ibid.
[68] Ibid., <ep.htm>
[69] Ibid., <cl.htm>

Table 5 - Weighting of Votes within the Council of European Union[70]	
Germany, France, Italy and the United Kingdom	10 votes each
Spain	8 votes
Belgium, Greece, the Netherlands and Portugal	5 votes each
Austria and Sweden	4 votes each
Ireland, Denmark and Finland	3 votes each
Luxembourg	2 votes
Total	**87 votes**

As for the role played by the Council within the EU, it is described as follows:

The Council enacts legislation binding throughout EU territory and directs intergovernmental cooperation. The Council is composed of ministers representing the national governments of the 15 Member States. Different ministers attend council meetings depending on the agenda. Most decisions are made by majority vote, but some decisions (for instance on foreign policy in the framework of the CFSP [Common Foreign and Security Policy], taxation, and environmental issues) still require unanimity. The Presidency of the Council rotates among the member states every six months. Each Presidency concludes with a **European Council** which brings together the Heads of State or Government of the 15.[71]

Other Institutions

While the primary institutions within the EU are the Commission, the Parliament and the Council, there are also a number of institutions which help to organize and run the EU. These other organizations include:

- The Court of Justice, composed of 15 judges from each member nation, who through their binding ruling ensure that the EU's treaties are interpreted and applied correctly;
- The Court of Auditors (appointed by the Council in consultation with the Parliament), which monitors the EU's financial activities;
- The Economic and Social Committee, which represents employers, employees and other group such as farmers and consumers, and which must be consulted prior to the adoption of a significant number of decisions; and
- The Committee of the Regions, which represents local and regional authorities, and must be consulted before the adoption of decisions affecting regional interests.[72]

The above institutions assist the three primary institutions in ensuring the EU is fair, accountable and responsive to the needs of its citizens.

Summary

Most observers acknowledge the impressive track record of the European Union. Moreover, the list of countries applying for entry into the EU attests to its overall success. That said, the EU is

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[70] Ibid.
[71] Delegation of the European Commission to the United States, <http://www.eurunion.org/profile/brief.htm>
[72] Ibid.

not without its detractors. One of the major arguments against the EU is that its creation has resulted in a significant loss of accountability for those powers delegated to the EU. This loss of accountability is typically referred to in one of two ways, the "bureaucrats in Brussels" or the "democratic deficit". The term, "bureaucrats in Brussels", reflects the fact that the EU is primarily run by the twenty members of the Commission, who are distant from the average citizen not only in spatial terms, but also in terms of the ability of the electorate to hold the Commission accountable for its actions. Closely connected to this is the term, "democratic deficit", which refers to minimal interest and support for the Parliament by the electorate, as well as the minimal powers of the Parliament over the other institutions of the EU. Reflecting on the recent defeat by the Swedish electorate of a proposal to adopt the Euro as its currency, The Economist notes: "…Sweden's referendum has provided a timely reminder of another deep truth about European integration. It is an elite project with very shallow popular support. As the European constitution adds even more floors and features, it shallow foundation may make it increasingly rickety." [73]

Another major issue facing the EU is the clear lack of consensus over the pace and direction of future development. Some countries, notably France and Germany, appear to be directing the Union toward a European federal state. Others, like Denmark and the United Kingdom, appear uneasy even with current developments such as the single European currency. This in turn has led to questions as to whether a multi-layered Europe, that is, different EU countries accepting different degrees of integration, might lead to unexpected complications. For example, is it possible to have closer a closer union in defence and foreign affairs matters while some key countries such as the United Kingdom have not yet adopted the common euro currency?

C   Conclusions

The European Union is a unique international organization, fashioned slowly over a 50 year period by sovereign nations. The features of the EU that are particularly relevant to the First Nations context are the following:

- Sovereignty rests within the member nations;
- Power is shared through treaties that must be ratified by a nation's legislature in order for
- The guiding principle of subsidiarity limits the areas in which the EU exercises power to those that are not effectively handled at a national or local level;
- It has evolved over time, taking on new members, sharing more powers and creating new institutions;
- Legislation is subject to multiple decision rules (i.e. unanimity is required on some issues and on others larger nations have more votes than smaller nations;
- The various institutions and agencies of the EU are distributed throughout its member states; and
- By acting together, member states have enjoyed a greater level of economic success and political "clout" than if they had not been a part of the EU.

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[73] The Economist, "Charlemagne, The Stockholm Syndrome" September" 20th-26th, 2003

V   SPECIAL PURPOSE BODIES WITHOUT SPECIFIC LEGISLATIVE POWERS

A   Overview

Up to this point in this paper, we have looked at aggregation through governments with a wide range of powers including the power to legislate. In this section and the one that follows we examine a less 'ambitious' form of aggregation – that is, aggregation through special purpose bodies that have the following characteristics:

- They usually focus on one area of public concern such as education, policing, child and family services etc.;
- Unlike governments, they do not have the power to legislate. Further any powers they do have are established in legislation of some level of government; and
- The leadership of the body is not necessarily elected by citizens at large.

We believe it useful to consider two categories of special purpose bodies: i) those without specific legislated powers; and ii) those with special powers established by legislation. In this section we focus on examples of aggregation through special purpose bodies without any real powers. Thus, their functions, which may or may not be set out in legislation, tend to be advisory or advocacy in nature, and in many instances they provide services to governments.

B   Sectoral Self-Government Agreements Calling for a Central Service Body

There have been two self-government agreements, both 'sectoral' in nature and concluded in 1997, with a similar governance model. The agreements place law-making authority with First Nation communities but, at the same time, establish a board with central functions.

The first of these is the Framework Agreement on First Nation Land Management, signed between the then Minister of Indian and Northern Affairs, Ron Irwin and thirteen First Nations from across Canada - five from British Columbia, one from Alberta, two from Saskatchewan, one from Manitoba, four from Ontario and, finally, one from New Brunswick.[74] Legislation to implement this agreement was passed in 1999.

The Framework Agreement provides for a First Nation with a land code (a kind of Constitution adopted by the First Nation in a referendum process) to have the powers to make laws, in accordance with its land code, "...respecting the development, conservation, protection, management, use and possession of First Nation land and interests and licences in relation to that land."[75] Included in this broad power is the capacity to collect and manage revenue from the First Nation lands with the exception of revenues and royalties from oil and gas. In addition to investing law-making and revenue management responsibilities with the individual First Nations, the Agreement calls for the establishment of a Lands Advisory Board with three types of responsibilities:

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[74] A fourteenth First Nation, St. Mary's First Nation in New Brunswick, subsequently signed the agreement. Siksika has the largest total population as of December 31, 1996 - 4706, the Mississaugas of Scugog Island, the smallest with 138. Total population for all fourteen First Nations was 21,768.
[75] *Framework Agreement On First Nation Land Management*, section 18

- providing services to First Nations - for example, in developing and implementing their land codes, putting into place environmental management regimes, establishing a resource centre and developing training programs;
- acting as an advocate for First Nation interests; and
- serving as a central repository for land codes.

The Agreement also calls for a funding agreement to be negotiated between the federal government and the Board for an initial five year period. The legislation implementing the Agreement did not include the establishment of the Board and its functions. Furthermore, the Agreement has a section indicating how the Board's functions will be handled, should the Board cease to exist. Thus, it is possible to dissolve the Board at some point in the future, if it is no longer needed.

The chiefs of the First Nations signing the agreement make up the Board. They choose a chairperson, who may or may not be one of the chiefs. (The first and only chair of this board to date is Mr. Robert Louie, a former chief of one of the First Nations signing the agreement.)

The primary rationale for establishing the Board was to provide the First Nations in the Agreement with a capacity – both advocacy and policy – that they could not provide themselves, at least in a cost-effective manner.

The second agreement, signed in February 1997, concerns Mi'kmaq education in Nova Scotia and involves nine First Nations.[76] Like the lands agreement described above, it assigns the "...power to make and administer laws with respect to primary, elementary, and secondary education on reserve..."[77] to the participating communities, in accordance with a community constitution. The Agreement also calls for the establishment of a "body corporate" having as its objective "...the support of the delivery of education programs and services by participating communities."[78] The membership of this central service body, to be called Mi'kmaw Kina'masuti[79], consists of the participating communities and is governed by a constitution of its own.

Specific objectives of this central service body are described in the organization's draft constitution:

- To assist and provide services to individual bands in the exercise of their jurisdiction over education;
- To assist individual bands in the administration and management of education and management of education for the Mi'kmaq Nation in Nova Scotia.
- To provide the Mi'kmaq Nation in Nova Scotia a facility to research, develop and implement initiatives and new directions in the education of Mi'kmaq people.

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[76] The nine First Nations range in size from 3062 (Eskasoni) to 184 (Annapolis Valley). Total population of all nine First Nations was 8906.
[77] *An Agreement with Respect to Mi'kmaq Education*, section 5.1.1
[78] Ibid, Section 5.7.1
[79] The name of this body has subsequently been changed to Mi'kmaw Kina'matnewey

- To co-ordinate and facilitate the development of short and long term policies and objectives for each Mi'kmaq community in Nova Scotia, in consultation with the Mi'kmaq communities.[80]

In summary, the lands management agreement and Mi'kmaq education agreement establish a two-level approach with legislative, policy and resource management responsibilities vested with the community. Nonetheless, the establishment of a central board under each agreement provides the opportunity to realize at least some of the economies of scale that so concerned the Royal Commission on Aboriginal Peoples.

C   Northwestern Ontario's School Boards' Cooperative Services Program

The Cooperative Services Program (CSP) is another example of a special purpose body created by its members, in this case the school boards in Northwestern Ontario, to provide services that are either too expensive or too inefficient for them to offer individually.

The purpose of the CSP is "to provide a variety of administrative and curriculum services for members and clients, in northwestern Ontario who, because of their small size, cannot economically meet all needs internally on their own."[81] A full list of the services provided under this program are listed in Box 1 on the next page.[82]

School boards that wish to purchase some or all of the CSP services can do so in one of two ways. The first option is that they can purchase these services for a price of cost plus 30 per cent. The other alternative is that they can enter into three year service agreements for which they must give at least six months notice if they wish to terminate the arrangement. The benefit of this latter option is that the board purchasing the services only has to pay cost plus 20 per cent. In addition, entering into a service agreement with the CSP enables a school board to appoint one of their board members to the CSP's Board of Directors.[83]

The primary advantage of this particular model of aggregation is that it preserves local autonomy. Member boards are able to come together to provide services more efficiently and effectively, but it is up to these boards to individually decide which services they require and under what conditions.[84]

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[80] Taken from a consultation document sent to each community, dated February 1996

[81] Archibald, Joanne, Eber Hampton and Earl Newton, *Organization of Educational Services in Sparsely Populated Regions of Canada*, Ottawa: Research & Analysis Directorate, Indian and Northern Affairs Canada, June 1995, p. 39

[82] Ibid., p. 40.

[83] Ibid.

[84] Ibid., p. 42.

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│                            Box 1                                  │
│      Services Provided by the Cooperative Services Program        │
│                                                                   │
│  ·    business/financial/accounting;                              │
│  ·    educational consulting in areas such as curriculum,         │
│       computers, language arts,                                   │
│       primary and special education;                              │
│  ·    professional (staff) development;                           │
│  ·    supervision;                                                │
│  ·    teacher recruitment;                                        │
│  ·    capital project assistance;                                 │
│  ·    Territorial Student Program - counselling and contact       │
│       for those who leave small                                   │
│       communities to go to secondary school (usually in           │
│       Thunder Bay);                                               │
│  ·    a First Nations Educational Transitions Project, funded     │
│       by DIAND, to assist 6                                       │
│       communities as they move towards reserve status and         │
│       having their own                                            │
│       infrastructures for education; and                          │
│  ·    joint projects in relation to employment equity and         │
│       transition into work.                                       │
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D   The Canadian Municipal Experience

As Peter Diamant observes, "there has been a great deal of study and talk about consolidation, and very little action. Because of this there has been a proliferation of joint agreements amongst municipalities and special purpose agencies and commissions to deliver specific services. This has been accompanied by a re-allocation of responsibilities between provinces and their municipalities."[85]

This type of special body takes on so many different forms and functions that to describe them all would be impossible. The boards of these bodies can be made up of any combination of elected representatives from the participating municipalities, administrators from the municipalities, and/or representatives appointed by the municipalities. Moreover, individuals may be appointed or "elected at an annual meeting or, as in the case with most school board, in a public election at the time of municipal elections."[86]

Advantages of these Bodies

Andrew Sancton notes that "in the everyday world of Canadian municipal government, especially in the rural areas of the smaller provinces, intermunicipal problems are not solved by establishing new tiers of government or by drastically altering municipal boundaries."[87] Diamant agrees with this sentiment when he states that:

> There is a certain attractiveness to joint agreements and special purpose
> commissions or agencies. Local municipalities can remain distinct and
> responsible for the things that they do best on their own. At the same time they
> can join with other municipalities to undertake the delivery of services that are
> better or more efficiently done in concert. Protection service such as fire and

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[85] Diamant, p. 8.
[86] Ibid., p. 10.
[87] Sancton, Andrew. *Local Government Reorganization in Canada since 1975*, Toronto: ICURR Press, 1991, p. 35.

ambulance, sewage and waste disposal, planning services, and libraries are examples of services delivered by joint agreements. In many instances these agreements can provide an expanded level and variety of services to rural residents.[88]

Other reasons for municipalities to find this aggregation attractive are that they can save on costs by either sharing expensive services or by obtaining volume discounts. Furthermore, "joint hiring practices allow smaller municipalities to recruit and share professional and technical staff."[89]

Disadvantages of these Bodies

While there are certainly a number of good reasons for municipalities to make use of special purpose bodies, there are also a number of cogent arguments as to why they should not exercise this option. In particular, Diamant observes that:

> Some see these as band-aid solutions and a symptom of an inadequate municipal structure. Smaller municipalities may risk becoming dependent on their neighbours, accountability may be blurred and fiscal control lost. The end result of such agreements may be that some municipalities are effectively subsidized by the tax base of their neighbours.[90]

Furthermore, he notes that:

> To the extent that these boards are administered independently and do not have an identifiable political unit monitoring and co-ordinating their activities, they may develop a life of their own that becomes out of touch with the public they serve. The vacuum created by lack of political control can result in the administrators of these agreements or agencies taking on a policy role more appropriately the responsibility of elected representatives.[91]

Further difficulties arise in a First Nation context. Many of these bodies – Tribal Councils are good examples – receive funding directly from the federal government for delivering services to First Nations. This type of arrangement can be problematic for a variety of reasons. First, lines of accountability become twisted as the service body tries to be accountable simultaneously to the government and its First Nation members. (An indicator of this problem is the high degree of non compliance that Tribal Councils have with the terms and conditions of Indian and Northern Affairs' funding agreements.) A second problem is that there appear to be few incentives for efficiencies and high quality service, given the monopolistic nature of the service provider and the fact that these services are free.

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[88] Diamant, p. 9.
[89] Ibid., p. 10.
[90] Ibid.
[91] Ibid.

Summary

As can be seen from the arguments above, there is no consensus on the desirability of regional special purpose bodies without legislated powers. Values of ease and effectiveness appear to compete with political accountability and responsiveness. That said, Allan O'Brien does observe in his discussion of municipal consolidation and its alternatives that "intermunicipal agreements are most effective in the provision of regional services in either of two situations: they are effective in predominately rural areas where services are limited and there is economic and demographic stability; [or] they are effective where a second tier of municipal government takes responsibility for them."[92]

E   Conclusions

Special purpose bodies without legislated powers are probably the least "ambitious" form of aggregation, especially if the services can be purchased voluntarily. That said, it is a model with which First Nations are very familiar, especially those who are active members of tribal councils. Thus, the lessons learned from a survey of the literature on this type of aggregation are highly applicable to the First Nations context.

The primary benefits of establishing special purpose bodies without legislated powers are that they are easy to create and modify, and that they experience economies of scale leading to improved capacity (e.g. the ability to create higher quality education curriculums). This aside, the chief problems with this type of aggregation are: i) its limited accountability to the electorate (a problem faced by all special purpose bodies); ii) the ease with which members may decide to leave the arrangement makes it potentially unstable; and iii) there are questions concerning the ongoing quality of services given the quasi-monopolistic nature of many of these organizations.

VII   SPECIAL PURPOSE BODIES WITH SPECIFIC LEGISLATED POWERS

A   Overview

In contrast to the special purpose bodies outlined in the section above, in this section we examine special purpose bodies with legislated powers that have a direct impact on citizens. The legislation that creates these bodies and provides them with their powers can arise from a self-government agreement, existing legislation, or new legislation passed for this purpose. Some examples follow:

B   Cree School Board

The James Bay and Northern Quebec Agreement (JBNQA), signed in 1975, and the Northern Quebec Agreement (NEQA), signed in 1978 were the first two modern self-government and claims agreements.[93] The JBNQA comprises 31 sections and 12 supplementary agreements; it is

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[92] O'Brien, p. 98.

[93] Much of the information in this section is based on a paper prepared by Alain Arcand, from DIAND's Claims and Indian Government Sector, and entitled "Legislation Respecting Implementation of The James Bay and Northern Quebec Agreement (JBNQA) and The Northeastern Quebec Agreement (NEQA)".

over 700 pages long and deals with the Quebec Cree nation and the Northern Quebec Inuit. The NEQA consists of 20 sections, is 245 pages in length and involves the Naskapi nation.

To implement the two agreements, the federal passed two laws, one in 1977, which, among other things, approved the JBNQA, and a second in 1984, which focused on the establishment of a local, self-government regime for the Cree and Naskapi as well as the administration and control of certain categories of land under the agreements. In contrast, the Quebec government passed over 20 acts, mainly in the mid to late 1970s, to implement the agreements.

For the eight Cree First Nations[94] that signed the Agreement, the regime established a form of self-government in which most powers were vested with them rather than the Cree nation as a whole. Thus, Section 45 of the federal act provides that a band "...may make by-laws of a local nature for the good government of its Category IA or IA-N land and of its inhabitants of such lands..." and then proceeds to list a long series of matters including the administration of band affairs, health and hygiene, public order and safety, protection of the environment, taxation for local purposes, roads and transportation and the operation of businesses. Not included in this list was, among other things, education.

With regard to education, the Quebec Government passed an act in June 1978 amending the provincial Education Act. In the case of the Cree, these amendments provided for the establishment, organization and operation of a Cree school municipality and a Cree school board. This board was given jurisdiction for elementary, secondary and adult education, had all of the powers and responsibilities of a school board within the province and was granted additional powers such as the capacity to enter into agreements with the federal government, determine the school year, make agreements for post-secondary education, hire Native persons as teachers and select courses and teaching materials designed to preserve and transmit the language and culture of the Cree.

In carrying out its responsibilities, the school board can adopt by-laws but these require the approval of the Minister of Education. The Board is composed of nine members, one from each of the eight Cree communities, and an additional member designated by the "Cree Native party". Election procedures are set out in regulations pursuant to the Act.

At the community level, the Act provides for the establishment, at the discretion of the Board, of an elementary school committee and a high school committee for each community in which such schools are located. The board, according to the Act, must consult these committees on such matters as the selection of teachers, the school calendar and year, and changes in curriculum.

In summary, the Cree governance regime is essentially a hybrid. Most law-making jurisdiction is vested at the community level but this basic approach is supplemented by a number of special bodies, chief among them being the Cree school board with law-making powers, albeit subject to the approval of the provincial minister of education.

C   Aggregation through Co-Management

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[94] The eight Cree First Nations which signed the Agreement have a total population of 12,142 as of December 31, 1996 and range in size from 3132 (Mistissini) to 438 (Nemaska).

Aboriginal groups have had almost three decades of experience with co-management regimes, that is joint organizations established by legislation to manage a resource for the benefit of the participating parties. The rationale for co-management is not so much to increase capacity through joint action – although this may be one result. Rather, co-management is often driven by a desire by participating parties to resolve an outstanding jurisdictional dispute in a manner that is amicable and where costly, 'winner take all' litigation is avoided.

A recent non-Aboriginal example of applying co-management principles in a powerful manner is the management of the off shore oil and gas resources by the federal and provincial governments. Following a number of Supreme Court judgments stretching between 1967 and 1984, the federal government negotiated two co-management regimes, one with the province of Newfoundland and Labrador in 1985 (the Atlantic Accord) and a second with the province of Nova Scotia in 1986 (the Nova Scotia Accord). Among other things, the Accords lay out a formula for determining the share of oil and gas revenue that each party is entitled to.

To implement the Accords, the federal and provincial governments have enacted mirror legislation to safeguard against future constitutional challenges. Further, the Acts establish two boards – the Canada-Newfoundland Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board - to regulate the offshore petroleum resources. These boards have broad powers, including:

- The authority to establish a competitive process to award exploration licences to oil and gas companies;
- The approval of "benefit plans" that ensure that industrial and employment benefits are maximized for Canada and the respective provinces;
- The monitoring and enforcement of oil and gas operations off-shore to ensure safety and environmental standards are adhered to;
- The management of all offshore assessments under the Canadian Environmental Assessment Act.

Members of these Boards are appointed by the federal and two provincial governments.

As one author notes, "the Accords mark a departure from the adversarial relationship between Canada and the provinces. The Accords demonstrate a cooperative approach to resolving jurisdictional disputes and jointly sharing in offshore petroleum resources."[95]

D   First Nations Policing

Policing is another area where First Nations have established special purpose bodies to provide services directly to citizens. Federal government involvement is guided by its First Nations Policing Policy and Program that was established in 1991.

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[95] Davis, Tracy, *Federal Oil and Gas Regimes in Canada: The Role First Nations*, unpublished LLM Thesis, Ottawa: University of Ottawa, 2000.

First Nations Policing Policy

The goals of the First Nations Policing Policy (FNPP) are:

- to provide First Nations with professional, effective and culturally responsive First Nations police services;
- to improve safety and security in on-reserve communities;
- to ensure that First Nations police services are accountable to the communities they serve; and
- to give First Nations communities a strong voice in the administration of justice as they assume greater control and responsibility for matters that affect their communities.[96]

Under this policy, a range of policing options are made available to First Nations communities, including: "stand-alone police services; developmental policing arrangements designed to smooth the transition from one type of policing to another, and special contingents of First Nations officers within an existing provincial or municipal polices service..."[97] With regard to the actual selection of a police service model for a given community, the FNPP indicates that "First Nations communities should have access to at least the same police service models that are available to communities with similar conditions in the region" and that the selection of a particular model "should balance the need for cost-effectiveness and the particular policing needs of First Nations communities."[98]

Funding for First Nations police services is made available through a cost-sharing agreement between the federal governments, which pays 52 per cent of the cost of establishing and maintaining First Nations police services established under this program, and the provincial governments, which pay the remaining 48 per cent.[99]

The governance of First Nations police services should, according to the policy, be "founded on a legislative framework that enables First Nations to establish, administer and regulate their police service and to appoint police officers, consistent with provincial norms and practices."[100] The policy also specifies that there should be "mechanisms for impartial and independent review of allegations of improper exercise of police powers and violations of codes of conduct; and mechanisms for grievances and redress on matters related to discipline and dismissal."[101] To this end, the FNPP notes that:

> First Nations communities should have an effective and appropriate role in directing their policing service. Therefore, First Nations policing services should include police boards, commissions and advisory bodies that are representative of

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[96] Aboriginal Policing Directorate, Solicitor General Canada, *First Nations Policing Policy and Program*, <http://www.sgc.gc.ca/whoweare/aboriginal/epolicy.htm>.
[97] Ibid.
[98] Aboriginal Policing Directorate, Solicitor General Canada, *First Nations Policing Policy*, <http://www.sgc.gc.ca/whoweare/aboriginal/efnpp.htm>.
[99] Ibid.
[100] Ibid.
[101] Ibid.

the communities they serve. In addition to police management and accountability, these bodies should ensure police independence from partisan and inappropriate political influences.[102]

As for the effectiveness of the First Nations Policing Policy, "an independent review of the first five years of operation of the FNPP found the policy framework to be 'relevant, sound and on-track'. The review also found that provincial, territorial and most First Nations partners believe the tripartite process is the most effective way to address First Nations policing at this time."[103]

Dakota Ojibway Police Services

Of the 52 self-administered Aboriginal police service organizations that have been developed under the FNPP,[104] several organizations police two or more First Nations. There include the Dakota Ojibway Police Service (DOPS), the Nishnawbe-Aski Police Service, the Anishinabek Police Service, and the Unama'ki Police Service.[105] Of these, the one with the greatest amount of literature on it is the DOPS.

The DOPS was originally established in 1977 as the Dakota Ojibway Tribal Council Police Department. It is the longest operating First Nation police service in Canada and is recognized as a stand-alone police agency in southwestern Manitoba, providing policing services to four First Nation communities.[106] The service employs twelve police officers who are stationed at one of the four detachments and three administrative officers who are located in Brandon, Manitoba. All police members of DOPS are sworn peace officers within the Province of Manitoba and have jurisdiction throughout the Province.[107] As such, they investigate all major crimes and enforces band by-laws where applicable.[108]

To govern this police service, a police commission was been established in 1997 by the Council of Chiefs of the Dakota Ojibway Tribal Council.[109] The role of this commission in governing the police August 27, 2000 service is explained on DOPS web site as follows:

> The DOPS is directed by the DOPS Police Commission, which consists of one member from each of the Local Police Committees. Local Police Committees have been established in each First Nation community policed by DOPS and consist of one chairperson and three or more representatives chosen by the community. The Local Police Committee identifies local policing needs, develops community-based strategies, including crime prevention programs, liaises with

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[102] Ibid.
[103] Ibid.
[104] Aboriginal Policing Directorate, Solicitor General Canada, *First Nations Policing Update*, March 2000, No. 9, p. 1.
[105] Discussion with Ellen Healey, Senior Advisor within the Aboriginal Policing Directorate of the Department of the Solicitor General of Canada, August 4, 2000.
[106] Dakota Ojibway Police Service Online <http://www.dops.org/default.htm>
[107] Ibid., <personnel.htm>
[108] Ibid., <default.htm>
[109] Ibid., <overview.htm>

the local DOPS Corporal and makes representation on the regional Police Commission on matters under its jurisdiction.[110]

Thus, we see an example of how a special purpose body can be established that combines the ability to provide regional direction and oversight with a strong capacity for local accountability and responsiveness.

E First Nations Child and Family Services Agencies

In 1991, the Department of Indian Affairs and Northern Development adopted a new Program Directive that seeks to transfer control of child and family services in First Nations communities from the provincial governments to the First Nations. The overall goal of the FNCFS Program is "to ensure that Indian children and families living on-reserve have access to culturally sensitive child and family services in their communities...”[111] To support this program, the Department created a governance framework wherein "the funding comes from the federal government, the responsibility for service standards and the legal framework originate from the provinces and the administration and delivery of services is under the responsibility of First Nations."[112]

One of the elements of the Program is that the Department now encourages the development of First Nations Child and Family Services (FNCFS) agencies that serve at least 1,000 children.[113] As a result of this and provincial laws and regulations governing the creation of such agencies, many of the FNCFS agencies are special purpose bodies that serve more than one First Nation.[114] As such, analyses of the costs and benefits of the FNCFS Program will shed some light on the costs and benefits of aggregation through special purpose bodies with legislated powers.

In 1995, an evaluation of the FNCFS program was conducted. Of the evaluation findings relevant to this paper, one of the most significant was that:

> Larger and multi-community agencies were found often to have university-trained social workers on staff. In other cases, sometimes in smaller communities, the FNCFS agencies wanted to hire staff from on-reserve to ensure the provision of culturally-appropriate services. They saw the benefits of this hiring practice to outweigh potential problems. The evaluation found, however, that such a hiring practice often puts such staff members in potential conflict of interest situations, particularly in small communities. In such communities, the likelihood of knowing or being related to a child potentially at risk is high. In addition, smaller communities and more isolated communities wishing to hire staff on-reserve are less likely to find accredited social workers or professionals in related fields.[115]

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[110] Ibid., <overview.htm>
[111] Departmental Audit and Evaluation Branch, Department of Indian Affairs and Northern Development, *First Nations Child and Family Services Program*, November 1995, p. i.
[112] Ibid., p. ii.
[113] Ibid., p. ii.
[114] Ibid., p. 14.
[115] Ibid., p. v.

Thus, despite the fact that aggregation may result in a loss of some of an agency's cultural sensitivity, the gains in the integrity of its services through the diminished potential for conflicts of interest are important. Moreover, while the evaluation noted that agencies serving a single community enjoyed the benefits of increased awareness, accessibility to services and trust of the agency, they were also observed to suffer the disadvantage of having higher costs than agencies serving multiple communities, which were able to centralize their financial resources, administration, training and some specialized services.[116]

With respect to FNCFS agencies servicing multiple communities, the evaluation observed this model to be quite flexible. In Nova Scotia, for instance, the Mi'kmaq Family and Child Services is a centralized organization that provides services for all 13 First Nations communities within the province, and is considered comparable to other provincial agencies. However, the evaluation noted that a common criticism of centralized models is that their administrative structures mirror provincial agencies. In contrast to this, there is the highly decentralized Meadow Lake Child and Family Service agency that serves nine communities. It has a "central agency", which supports agencies in each of the communities in their development of services for their respective communities. As the individual agencies develop, it is intended that the central agency will slowly be phased out of existence.[117]

In summary, the example of First Nations Child and Family Service agencies demonstrates the conundrum of aggregation: clear benefits in terms of cost effectiveness, increased professionalism of the services and reduced potential conflict of interest juxtaposed with the disadvantages of reduced accessibility and cultural sensitivity. Some models, however, appear to incorporate enough flexibility to reduce or minimize these advantages.

F   Municipal Finance Authority of British Columbia

The Municipal Finance Authority of British Columbia (MFA) is the central borrowing agency for municipalities, regional districts, and a number of other authorities and special service districts within the province of British Columbia. It was created through provincial legislation in 1970 in light of the difficulties experienced by municipalities, especially in rural areas, in obtaining capital financing. In particular, the MFA web site notes that "it was not unusual for them to be unable to sell their bond issues until years after the projects had been completed. This left them vulnerable to rising interest rates and difficult market conditions. It also upset bankers who had agreed to fund the projects on an interim basis, but then were obliged to extend credit years after the projects were finished.."[118] As such, "it made economic sense for individual municipalities and regional districts to borrow together as a group to guarantee each others' credit."[119]

In creating the MFA, the province placed a requirement on all municipalities borrowing through the MFA that they contribute to a debt reserve fund whenever they borrow. This contribution is returned to them once each loan is repaid and, if unfortunate circumstance that the reserve fund

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[116] Ibid., p. 15.
[117] Ibid., p. 16.
[118] Municipal Finance Authority of British Columbia web site. <http://www.mfa.bc.ca/detail.H%page.htm>.
[119] Ibid.

is drawn down by one or more defaults, the MFA has the power to replenish it by a province-wide tax. However, to date, this fund has never been drawn upon.[120]

The success of this special purpose body can be seen in the improvement of its debt rating from AA to AAA, which is a better rating than that of the province. Furthermore, through its expansion into optional services such as capital financing, short-term investment opportunities, interim financing, and pooled leasing for members, the MFA has been able to produce dividends in excess of its levies, thereby eliminating its burden upon the tax roll.[121]

This model of obtaining financing is applicable to the First Nations context. Indeed, in 1995, the First Nations Finance Authority (FNFA) was established in British Columbia and began to operate through a contract with the MFA in which the MFA and a charter of investment policies, objectives and guidelines governs the investment activities of the FNFA's funds. Under this regime, participating First Nations, either through their tribal councils or on their own behalf, present their requests for capital financing to the FNFA. "Taking into account market and economic conditions, the member of the Authority [FNFA] may authorize the issue and sale of securities in an amount sufficient to meet the requests."[122] Similar to municipalities participating in the MFA, First Nations participating with the FNFA are required to meet specific borrowing standards to ensure safeguards on indebtedness are retained. These safeguards include "the requirement that the debt and user charges, if any, are sufficient to service the debt" and that "the total indebtedness which a First Nation would be able to contract would be limited to a percentage of the assessed value for general governmental purposes of the taxable land and improvements within their First Nation and the value of the utility system and other First Nation government enterprise."[123]

The federal government in co-operation with the FNFA is attempting to provide a firmer footing to this body through the introduction of legislation.

G   Conclusions

This is another model with which First Nations already have a high degree of familiarity. It is also a model with a long history in non-Aboriginal settings in both Canada and abroad. In general, it enjoys the same advantages and disadvantages as special purpose bodies without legislated powers. There is, however, one major difference between these two models. Because the special purpose bodies discussed in this section have real powers that affect citizens directly, their establishment requires a legislative footing. As such, the participating government have less flexibility in terms of their capacity to leave these arrangements or "buying" the services elsewhere.

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[120] Ibid.
[121] Ibid.
[122] First Nations Finance Authority, *1996 Annual Report*, p. 12.
[123] Ibid. p. 13.

PART TWO: IMPLICATIONS FOR FIRST NATIONS

The purpose of this concluding part of the paper is to explore what the experience and theory canvassed in this paper might mean specifically for First Nation governance and aggregation in the years ahead. In particular we address the following questions:

- Why does aggregation matter for First Nations and whose issue is it?
- What are the main reasons for aggregation in a First Nation context and how do these reasons relate to the models canvassed in this paper?
- Does the evidence point to some common design principles for structuring First Nation self-government initiatives?
- And if such principles exist, what are the implications for more immediate initiatives that First Nations and the federal government have underway or are contemplating?

Question #1: Why does aggregation matter?

As we noted earlier in the paper there is evidence throughout history of Aboriginal peoples collaborating to provide better services, protection and representation to their citizens. So what has changed?

The answer is a great deal over the past five decades. There is no country in the world that has developed local governments as we have in First Nation communities that, on the one hand, serve so few citizens and, on the other, have such a wide range of responsibilities. (The only close parallel are tribal governments in the United States.) 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 sewer.[124] No countries assign such small communities responsibilities in the 'big three' areas of education, health, and social assistance, let alone a vast range of other responsibilities including policing, natural resource management, economic development, environmental management and so on. Moreover, there is empirical evidence to suggest that the highest costs for providing local services are found in governments serving very small and very large populations.

But more is at stake than just costs. We are in the midst of 're-confederating Canada', of creating a third order of government with constitutional protection. So it is imperative that we collectively get the issue of the proper configuration of First Nation governments right.

This goes part way to answering the second part of this question – whose issue is it? One response is that the issue of aggregation is an internal one to First Nations themselves and they and only they have the responsibility of sorting this out. There are at least three responses to this assertion. The first is costs. The federal and in some instances provincial governments will be footing much of the bill in the foreseeable future for self- government and therefore cannot be indifferent to an issue which has profound funding implications.

Second, aggregation, as this paper has pointed out, involves not just the provision of services but

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[124] See for ecxample, Harry Kitchen and Enid Slack, "Providing Public Services in Remote Areas", publication forthcoming

a range of other government instruments such as regulation. This brings the matter squarely into the domain of health and safety. Should anything go wrong – for example another Walkerton, this time in a First Nation self-governing community – the political ramifications would be significant[125]. Furthermore, and this leads to the third point, the federal government might be open to legal action if it did not show due diligence in the configuration of First Nation governments in agreements to which it was a party. So for all of these reasons, the issue of aggregation is not solely one belonging to First Nations.

Question #2: What are the principal reasons for aggregation within the First Nation context?

As the summary box below illustrates, there are at least six reasons for arguing for forms of aggregation in the First Nation context. The first two – better advocacy and economies of scale – are common arguments. The next four are less common and all relate to some extent to the issue of 'good governance'.

Reasons for Aggregation in a First Nation context

- Effecting better advocacy
- Achieving savings or improved service through 'economies of scale'

Good Governance arguments

- Developing effective regulatory systems that separate the regulator from operations and managing other provincial-like responsibilities such as certain kinds of redress, revenue equalization, administration of the courts, property tax assessment, intergovernmental relations etc.
- Managing with integrity funding programs directed at families or individuals
- Ensuring sustainable and effective 'core' governance capabilities such as political and senior administrative leadership
- Making the federation work effectively

We look at each of these reasons in turn and relate them to the five models of aggregation canvassed in this paper.

Advocacy

Increased 'clout' is a long standing reason why Aboriginal groups have collaborated in the past. Indeed, Tribal Councils in some parts of the country existed long before the federal government provided Tribal Council funding beginning in the mid 1980s. The AFN, Provincial/Territorial organizations (PTOs) and special purpose bodies like the Indian Taxation Advisory Board and the Lands Advisory Board are key examples of this type of aggregation. Special purpose bodies

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[125] In analyzing the recent defeat of the Ontario Tories in the October 2003 election, Rex Murphy, the noted political commentator and journalist, said the following in reference to the role played by the Walkerton tragedy: "The Ontario Tories were chastened this week. Chastened? More like whipped, purged, routed and given the boot. Governments should never fool with the really basic stuff. Water and lights. Don't mess with the power. Don't mess with the water." Globe and Mail, "Mess with Water – You get Soaked" October 4, 2003

without specific legislated powers (there are incorporated bodies under federal or provincial 'not for profit' legislation) are the form most of these organizations take on.

A key issue is how these organizations are funded. With advocacy funding coming primarily from the federal government, accountability relationships become tangled as these organizations, whose raison d'etre is to serve their members, must also meet federal funding conditions. Further, there is a major issue around independence. How critical can an organization be of its principal funding source? In the non-Aboriginal world, for these and other reasons, federal funding of advocacy organizations has switched from 'core' to project-related.

The long term direction for this type of aggregation appears to be clear: it should be voluntary and funded by the participating FN entities. How to get there, however, will present significant challenges – political and economic.

Economies of Scale

This argument for aggregation may be the one most commonly heard. The assumption is that most First Nations are too small to carry out many of their service-related functions in a cost-effective manner. Collaboration among First Nations, therefore, will either save money (do more with less) or at a minimum get a bigger bang out of existing funds. All five forms of aggregation canvassed in this paper could presumably accomplish this objective.

Surprisingly, the evidence at least in the non-Aboriginal world suggests some skepticism is warranted with regard to these claims. Consider the following points canvassed in Part One:
- 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, developing service agreements with neighboring municipalities, contracting with provincial of federal Crown agencies.
- 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 drive innovation
- When collaboration is voluntary such as in the Regional Districts of BC, then participating governments tend to break down functions and services into component parts and look for innovative solutions around these smaller elements (for example, they will collaborate on building an arena but run their own recreation programs for children)
- There is strong evidence to suggest that citizens prefer smaller governmental units so as to preserve local control and choice.

The BC experience with its Regional Districts suggests that aggregation of local service delivery can occur in a voluntary manner albeit with a few caveats:
- avoid combining regulatory with service delivery functions (this might poison the

relationships necessary for voluntary collaboration)
- have clear agreements that deal with withdrawal
- invoke mediation before withdrawal and
- provide modest funding to the local governments to discuss and create plans for collaboration.

That said, it is important to be cognizant of certain features of current First Nation governments that will tend to dampen voluntary collaboration. The first and most critical is that First Nation citizens do not pay taxes to their government and as such will not be nearly as demanding as their non-Aboriginal counterparts for efficient, high quality services. Pressures from citizens who are concerned about tax levels move politicians to look for cost savings that might be realized through collaborative solutions. Second, given that the public sector is the biggest employer in most First Nation communities, there is strong motivation to create local jobs instead of realizing cost savings. With these disincentives in mind it might be wise to employ countervailing incentives such as the ability to redirect cost savings to other areas as is the case with AFA type agreements.

From the above analysis, it is clear on what to avoid – for example, the establishment and funding of aggregated service agencies by the federal government, agencies that provide free services to a group of First Nations all in the name of economies of scale. Tribal Council funding for the five advisory services is good examples of this tendency.

Further, to rest the case for aggregation principally on the achievement of economies of scale appears shaky at best. Stronger, more cogent arguments lie elsewhere and it is to these that we now turn.

Provincial-like responsibilities

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. The table below illustrates this point with some examples:

Examples: Law Making Authority – Self-government Agreements		
Municipal-like	**Provincial-like**	**Federal-like**
- Provision of basic public works – e.g. water, sewage treatment, roads - Delivery of education, social assistance, some public health services	- broad regulatory powers – public works, environmental protection, natural resource management - administration of justice - broad taxation powers - certain redress mechanisms - property tax assessment - land registry systems - revenue equalization among municipalities	- administration of certain federal acts - co-management arrangements

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. Therefore, it is not clear how the combining of these regulatory and operating responsibilities in a single tier Aboriginal government would work.[126] 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.

The combination of conflicting functions within an organization is what experts in administrative law refer to as "institutional bias". The most obvious example of institutional bias occurs when a single entity acts as both "prosecutor" and "judge". This is reflected in a growing jurisprudence involving cases in the securities industry, professional organizations with certification powers and agencies regulating the purchase and use of alcohol. One of the key issues in these cases is the extent to which one entity can both investigate behaviour and them make judgements about withdrawing licences or other types of certification.

In the case of public works and other functions in the context of Aboriginal self-government, the reverse side of the coin might present itself: instead of "overzealous" pursuit of the law there is the potential for under enforcement through discouraging rigorous inspections, cutting budgets or appointing "soft" regulators. This problem may be especially acute in governments that are relatively small. Unfortunately, there appears to be little jurisprudence bearing on this type of institutional bias, jurisprudence which might be helpful in the design of Aboriginal governments.

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

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[126] It would be possible, of course, in a self-government agreement to assign the regulatory responsibility to the province, assuming the concurrence of both the Aboriginal party and the province to the agreement.

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 far too unstable and put important health and safety concerns at risk, should the delegation be withdrawn
- 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.

Other 'Good Governance' Reasons for Aggregation

There are three other 'good governance' rationales for supporting a case for aggregation in a First Nation context. The first has to do with 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. Examples of such programs include social assistance, economic development funding, post secondary education, housing and any program with coercive powers such as policing, child and family services and leasing and permitting systems. The Royal Commission pointed to this problem and used it as a basis for arguing for larger First Nation governments based on nation groupings. And many others have pointed to similar problems.

A second 'good governance' rationale has to do with core capabilities of a government – political leadership, senior administrative competence, capabilities which can't 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. It is no accident that the United States as a federation with some 52 states has evolved in a much more centralized manner than has been the case in Canada. The classic pattern in the US is for the federal government to develop a legal framework for a functional area (potable water is a good example) leaving the

states to do most of the implementation. So the number of governments matter. A federation with say 600 Aboriginal governments is going to work much differently (and likely less co-operatively) from, say, a federation with 60 Aboriginal governments.

These last three arguments for aggregation, while compelling, are not as helpful as the good governance argument around separating provincial-like and local type responsibilities in pointing to a specific set of directions for how aggregation might occur. Moreover, one can point to exceptions to these arguments – for example, small communities with highly competent leaders or small communities that manage family relationships well.

Question #3: Common design principles for structuring First Nation self-government

To a significant degree, the above section has addressed this question. The critical points are the following:

- the principal arguments for aggregation in a First Nation context should be based on 'good governance' principles and not the realization of savings or better service through economies of scale
- First Nations' taxing their citizens is likely the best, long term incentive for prompting innovative solutions to economies of scale issues
- the combination of provincial-like and local law-making responsibilities strongly points to the need for a two tier system of First Nation government.
- Among other things the provincial-like tier would be responsible for regulatory matters, major tax powers, revenue equalization among lower tier governments, certain redress functions, intergovernmental affairs and the administration of justice.
- The local tier, made up of a number of First Nations, would have a range of law-making powers dealing with service delivery responsibilities and other local matters such as zoning etc.
- There could be a number of special purpose bodies (e.g. school boards, policing commissions, child and family service agencies) responsible to the provincial-like tier.
- The provincial-like tier would not have delegated powers but would have separate 'constitutional' standing; further it would not need to encompass all First Nations in a single province but could be regional in nature
- Political leaders in the two tiers would be different.

Question #4: Short and medium term implications

If the above design principles have some validity, then a number of shorter term implications follow.

- The government and First Nations should phase out 'forced' attempts at achieving economies of scale such as the Tribal Council funding program for advisory services; rather attention should be focused on using existing incentives (AFA funding agreements) or developing new ones for encouraging innovative and voluntary solutions to economies of scale problems
- Future initiatives using the same Tribal Council rationale for realizing economies of scale - that is, the federal government funding some central service agency which provides free

services to First Nations - should be avoided. For example, there is a proposal for a new governance institute for First Nations in the proposed *First Nation Governance Act*. Such an organization, if established, should be on a fee for service basis after an initial start-up phase.

- Combining regulatory and operational responsibilities in a single tier, self-governing entity should be avoided unless the First Nation participants are willing to be subject to existing provincial regulatory regimes where no federal regime exists
- The federal government and the First Nation signatories to the First Nation Land Management Initiative should make significant efforts to devise an approach that separates regulatory responsibilities from operations in such areas as potable water, sewage treatment, solid waste management and environmental protection
- For those negotiating sectoral self-government agreements, there should be efforts among the parties to make the proposed regime compatible with an eventual move to the two tier government structure described above.
- For those self-government agreements where there are delegatory powers from participating First Nations to a regional government, the federal government and First Nations should identify provincial-like and local powers, ensure the regional government is assigned the provincial-like powers and provide strong disincentives for First Nations to opt out of the regional government. Some examples of various approaches for providing such disincentives are summarized in the box below:

Possible Approaches For Ensuring greater Stability in Delegated Regional FN Governments

- Establish a high 'bar' (e.g. a referendum with 75% in favour) for a FN to withdraw from a regional regulatory system
- Ensure that there is a sufficient transition period (2-3 years) when First Nations withdraw to deal with any changes
- Establish a rule in that a majority of the FNs in the Agreement must agree to any withdrawal
- As part of any withdrawal process, require a FN to distribute information to its citizens on how it proposes to ensure the health and safety of its citizens in a manner comparable to surrounding communities, specifically for drinking water, treatment of sewage and the other Public Works and environmental protection functions
- As part of any withdrawal process ensure there is in place a process for mediating differences

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Finally more research is required to fully understand the existing complex relationship between provinces and municipal governments, the principles underlying the distribution of responsibilities between these two levels and the subsequent implications for designing First Nation governments.

Summary Comments

The proposals in this concluding section – especially on the future shape of First Nations governments - bear a strong resemblance to those proffered by the Royal Commission, despite the fact that our reasoning differs in some important respect from that of the Commission. Further, we have also been more detailed in our proposals.

Our proposals also owe a debt to the much-maligned ideas of Tom Courchene and Lisa Powell in their call for an Aboriginal province. We differ in significant ways with their proposals but nonetheless share their basic premise that a two-tiered system with something akin to a province-like entities, albeit at a regional rather than provincial or national level, are required. Further, their concern for how the federation can ultimately operate, once it has been 're-confederated', is one we share.

The Europeans have also been inspirational. For example, the two tier, local government structure found in the Scandinavian countries has impressive characteristics, not the least of which is the lengths they have gone to in attempting fiscal and expenditure equalization and in lining up local responsibilities with appropriate taxation powers – characteristics worth emulating. Further the manner in which the European Union accommodates large and small nations through a variety of decision-making rules is also worthy of close study.

And finally, the experience of First Nations with whom we have had the privilege to work on self-government issues has also been a critical contributor to the ideas in this paper.

Ultimately, however, we take full responsibility for our proposals relating to aggregation and look forward to the debate they may engender.

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