



REVIEW OF LITERATURE ON FISCAL RELATIONSHIPS

Research & Analysis
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A report prepared for the
Research and Analysis Directorate
Department of Indian and Northern Affairs Canada

Submitted by
Danalyn MacKinnon
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EXECUTIVE SUMMARY

The purpose of this paper is to review literature regarding fiscal relationships to determine common themes and opinions, and to provide further review of arguments for change. The elements of fiscal relationships which are examined are accountability, governance, tax and non-tax revenues and data exchange.

The author suggests that there are six features which must be evident in fiscal relationships for success. Fiscal relationships must be *functional, contextual, measurable, flexible but certain, resourced and be based on mutual respect and benefit.*

The paper also reviews how fiscal relationships can support self-government, and the steps necessary for planning a new self-government initiative.

An annotated bibliography is included which reviews sixty-seven papers and texts on the subject of fiscal relations.

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1.0 INTRODUCTION

In the simplest definition, fiscal relationships are "connections or associations" "of public revenue". ¹The connections between the federal government of Canada and the people of the First Nations have a history based on constitutional, traditional and legislated perceptions of the status and relationship between the two governments. The Government of Canada has recognized the inherent right of self-government of First Nations and First Nations are desirous of realizing that goal. This intent is expressed in the recent release of the plan of the Federal Government, "Gathering Strength-Canada's Aboriginal Action Plan". This approach will support increased autonomy and self-reliance for First Nations through new transfer mechanisms, resource revenue-sharing and the development of own source revenues.

As the underlying political relationship between the parties is poised to move into a number of new and unique formats, so too the fiscal component of the relationship must be conducive to the known and unknown challenges of the new arrangements.

This research project attempts to review some of the literature dealing with fiscal relationships, other than those submitted to the Royal Commission on Aboriginal People. The review is based on specific questions established in the statement of work.

¹The Pocket Oxford Dictionary, Oxford University Press, 1992.

2.0 WHAT IS THE CURRENT BODY OF LITERATURE?

The examination of self-government by the Penner Commission in 1983², highlighted the necessity for a complete re-thinking of the national approach to the autonomy and development of Aboriginal communities. The subsequent failures of the federal-provincial ministerial meetings on Aboriginal constitutional matters and the Meech Lake Accord, signaled that serious and convincing analysis and research was needed to buttress any concepts of change. Since 1987, there has been an increasing research base with regard to self-government and financing by the Department of Indian and Northern Development and independent academics.

In truth, most assessments of self-government models and research have been conducted at the departmental level. Specific literature on fiscal relationships has tended to be scant, especially from academics. However, many authors and researchers have included a fiscal element to their analysis of self-government systems. More recently as self-government agreements and fiscal restraints have both been realities, there has been an increase in literature dealing with own source revenues, particularly taxation.

Sally Weaver in her review of the development of the self-government initiative, suggests that there has been little public debate among First Nations regarding governance structures and ideas are rarely shared. As a result, she suggests, the Department of Indian and Northern Affairs has gained power by becoming the “clearinghouse” for ideas. Further, at the national level she argues that there is no Aboriginal monitoring of self government agreements.³

² House of Commons. (1983) Indian Self-Government in Canada: Report of the Special Committee Ottawa: Minister of Supply and Services.

³Weaver, Sally Self-Government Policy for Indians 1980-1990: Political Transformation or Symbolic Gestures. (Undated) University of Waterloo, page 24.

3.0 WHAT COMMON THEMES, OBJECTIVES AND OPINIONS CAN BE FOUND?

A number of themes emerge from a review of the literature about fiscal relationships. The literature reveals that there are six features of effective fiscal relationships.

Fiscal relationships must be functional.

There must be a reason for the development and implementation of fiscal relations between two groups. These objectives must be clear to both parties. In the self-government context, the enhancement of the economy and decreasing the dependence of First Nations may be objectives.

Fiscal relationships must be contextual.

The history, culture and views of the Aboriginal community must form the basis from which the self-government model and subsequently the fiscal model evolves. The fiscal regime and its equitable principles, already developed and tested in the Canadian federal system, can provide the starting point for the evolution of new fiscal relationships, but cannot be imposed.

Fiscal relationships must be measurable.

In order to ascertain the success and deficiencies of fiscal relationships, there must be qualitative and quantitative data relating to the objectives of the fiscal relationship, assessed in the context of national and Aboriginal fiscal objectives.

New fiscal relationships must be flexible but certain.

The interrelationship between various governmental jurisdictions must be specifically delineated for the clear functioning of the governments, but for effective changes to any system, accommodation and cooperation have to be available. This is particularly difficult during a time of fiscal restraint by all governments. The role of the provinces must be clarified. There must

also be provision for fundamental and comprehensive reviews, particularly in the early years, which could lead to major restructuring of the relationship without resulting in uncertainty.

Resources are essential to success.

In the initial start-up phase there must be sufficient resources to set up the monitoring, accountability, financing, economic development, institutional infrastructure development, and skills training necessary to a new fiscal relationship. The degree of financial aid and the time required for the objectives of fiscal independence to be achieved will depend on the level of development needed in each community.

In addition to financial resources, a range of natural resources can support the development of own-source revenues including taxation.

Time is the essential ingredient which must be taken and given in the proportion necessary. Timing may be contingent on the political schedules of the various parties.

Fiscal relationships are based on mutual respect and benefit.

The most effective fiscal relationships are not grounded on the duty of one party to another as this denotes an unequal relationship. Rather, both governments, as in the case of the provinces and the federal government, respect and trust the institutions and abilities of the other and believe that the system works to the benefit of each party. Conflict may still exist but is dealt with in a positive and progressive atmosphere.

4.0 WHAT ARGUMENTS AND COMMENTS ARE FOUND IN THE LITERATURE ?

Throughout the literature, threads of the characteristics of fiscal relationships continue to be demonstrated. However, specific elements of fiscal relationships have caused debate and concern, those being accountability, governance, tax and non-tax revenues and data exchange.

4.1 What does the literature say about accountability?

As a component of any fiscal relationship, accountability is important to ensure that the objectives of the funding are met, and to provide measurability in that context. Accountability is a desirable part of fiscal relationships, but to be an effective mechanism for fiscal relations, accountability must firstly be understood.

Accountability is when one is in the position of having to answer for, explain or "account" to another for one's conduct.⁴ Accountability in the fiscal context may include reporting on the use of funds, the implementation of processes and policies and recording of transactions. The degree and type of accounting is relative to the relationship already established between the parties or the one that develops from the fiscal transaction. Inherent in such relationships is an imbalance in power between the parties.

How can accountability be required of a recipient of funds? Accountability does not happen in a vacuum. To be accepted, the duty to account must arise from the acknowledgment of a foundation of agreed principles or be established in a contract.

⁴ The Pocket Oxford Dictionary, Oxford University Press, 1992.

In terms of government to government financial arrangements, is the federal government required in any event to fund First Nations, or does the funding arise from a different contractual basis which can compel accountability by First Nations?

The development of fiscal relations between the federal, provincial and municipal governments has been predicated on a number of different bases including the constitutional framework, tax capacities and need. The federal system of transfer payments to the provinces does not require the same degree of accountability as has been required by First Nations.⁵ The constitutional protection of equalization payments, and the lack of ministerial responsibility for the spending of the provinces, are posited as the reason for the lack of accountability requirements for the provinces to the federal government.⁶ There appears to be a trust that the mirrored democratic processes of the provinces, assures accountability to their citizens, the very ones whose tax dollars fund both governments.

The provision of fiscal resources to First Nations can arise from three types of obligation; contractual, constitutional/legal or moral obligations. This determination is important as it establishes the degree and type of accountability which may be required and the likelihood of acceptance of an accountability regime.

⁵Cassidy, Frank and Bish, Robert L. Indian Government Its Meaning in Practice, Institute for Research on Public Policy, Morriss Printing Co., Victoria B.C., 1989, page 128.

⁶Hawkes, David C. and Maslove, Allan M. "Fiscal Arrangements for Aboriginal Self Government" essay in Hawkes, David C. (ed.) Aboriginal Peoples and Government Responsibility, Carleton University Press, Ottawa Canada, 1995, page 108.

Contractual Obligations

A contract is an agreement between two parties which includes an offer, an acceptance and consideration. Consideration is the flow of some benefit or value to each party. The terms of a contract are binding on the parties and can include a duty to account.

In some common contractual scenarios, there is no duty to account. The employment contract does not force employees to account for how their pay cheques are spent, but only to perform duties in advance of payment. The employer is required to pay the amount owing. The employee who attends a conference funded by the employer, may have to account to his employer for the use of the funds. The question is whether the payment must be made as an obligation of the employer, or whether the payment is made by the employer for a specific purpose for a benefit of its own or a mutual benefit. A benefactor who has no obligation to provide funding will have control over the use of funds including the terms of accounting.

Constitutional/Legal Obligations

In the case of a constitutional requirement for provision of funds, the underlying constitutional framework may provide that the federal government must ensure that certain services are provided to First Nations as a duty of the government's mandate. This fiduciary situation would not ordinarily include a corresponding duty on the part of First Nations to account unless the underlying constitutional framework required accountability for the funds. All terms of the relationship flow from the constitutional or legal documents but are difficult to change.

Moral Obligations

Governments may recognize a moral obligation to provide a standard of living for all citizens which will require funding. As no contract or constitutional arrangement is involved, except perhaps a "social contract", funding may attach any requirements which are reasonable and aimed at common public objectives.

As is clear in Canada, the relationship between the federal government and First Nations may include a combination of all three bases for funding. However, it is very important that the source of the funding relationship be agreed upon in order to characterize the type and degree of accountability which can be imposed and may be accepted.

Accountability to the Federal Government

Accountability in the context of fiscal arrangements with First Nations has focused on the relationships between the First Nation and the federal government which involves ministerial responsibility, and between First Nation people and their local First Nation governments. There are therefore two separate compacts from which accountability can flow, one in the government to government association, and the other from the recipient government's connection to its own people. If the expectations in these two arenas are contradictory, there will be conflict which will diminish the likelihood of success, as the recipient government tries to deal with competing interests. Conversely, when both compacts are strengthened and dedicated to the objectives of the fiscal relationships, there is a greater likelihood of success. Strong accountability between the recipient government and its citizens may reduce the need for onerous accountability to the funding agency.

Accountability and the Source of Authority

The problems in this area arise from the differences between the views of the First Nations and the federal government as to the source of authority of each government, the status of the bargaining parties and the extent of the duty to account. Are First Nations obliged to report to the federal government?

First Nations see themselves as independent nations who have negotiated agreements with another government. There have been numerous commissions and considerable literature on the issue of whether Aboriginal people are members of independent nations negotiating on a government to government basis or, as characterized in the United States, as "domestic dependent nations".⁷ The provision of funds by a superior government to a subordinate member group, and the imbalance of such a situation can affect other issues of authority, accountability, and legitimacy.

The provision of funds by one nation to another is based on a contract stemming from a constitutional, commercial or other mutual benefit. Treaties between First Nations and the Canadian government have buttressed the concept of nation-to-nation contractual relations. Lands are exchanged for certain rights, status and services. These contractual obligations have been awarded constitutional legitimacy by the protection of the Constitution Act 1982.

In 1987 at the First Ministers Conference in Halifax, the Assembly of First Nations articulated that the First Nations were recipients of funds by virtue of government to government negotiations. It was submitted by First Nations that they had jurisdiction over their own citizens, territories, lands and thus derived their fiscal powers from the original ownership of land and

⁷ Churchill, Ward. "Fact, Fantasy and Prospects for the Future" essay in Legters, Lyman H. and Lyden, Fremont J.(eds.) American Indian Policy: Self-Governance and Economic Policy, Greenwood Press, 1994, page 38.

the continuity of their governments.⁸ The participation by First Nations in fiscal relations, it was argued, meant more than fiscal authority but included control over policies.⁹ This was a rebuff to the idea that fiscal authority was granted to First Nations by the federal government in the contractual provision of fiscal resources. The position suggests that the federal government had an obligation to provide fiscal resources pursuant to the original agreement and fiduciary duty. Control over policies by First Nations was recognized as an area of fiscal sovereignty.

The AFN also stressed the constitutional and legal duty of the federal government to provide direct payments and services at levels comparable to those of other Canadians and to fund First Nations so that self-government could be exercised. This fiduciary duty stems from the constitutional jurisdiction of the federal government and the historic obligations of the Crown. The unilateral policies of the past, coupled with the designation of federal jurisdiction over Indians in the Constitution have reinforced the perception that the federal government is compelled in any event to provide funded services.

The fiduciary duty was further extended by the First Nations to the provinces when they stated:

When we insist on primary federal fiscal responsibility this implies that provinces have no fiscal obligations. This perception ignores the fact that traditional Aboriginal lands and resources are the source of provincial fiscal capacity.¹⁰

In his paper on hegemonic and counter-hegemonic discourse, Brian Stevenson suggests that Aboriginal communities have had all necessary authority prior to and after initial contact with Europeans. From the parliamentary perspective authority comes from the central

⁸Assembly of First Nations, Self-Government and Fiscal Relations, Federal-Provincial Meeting of Ministers on Aboriginal Constitutional Matters, 1987, page 3.

⁹ *ibid*, page 1.

¹⁰ *ibid*, page 5.

government and the central government creates authority. This is true for the federal, provincial and municipal governments which did not exist and did not have authority until they were created legislatively.¹¹ However, Aboriginal governments have authority which predates the central government.

Stevenson further suggests that the hegemonic view of authority as "top down" is contradictory to the Aboriginal view of authority rising from the local level to higher levels.¹²

The importance of clarification in this area is evident from Stevenson's comparison of the Sechelt and Gitsan - Wet'suwet'en self-government agreements. While the agreement for the Sechelt may have been a practical solution to problems of local authority, the passing of legislation to allow "Self-Government" and the municipal government level of authority requested by the band, fail to recognize any prior self-governing abilities or authority. In other words, if the authority exists, it does not need to be requested. If it is requested, there is a danger that the authority "granted" may be significantly less than actually existed.

By comparison, the Gitsan-Wet'suwet'en band sued the provincial government for control over the 22,000 acres of its land claim and did not seek municipal model powers. The settlement of this matter, nation to nation, reinforced the traditional governmental structure and Aboriginal title without requiring a surrender of the inherent government to the federal government.

¹¹Stevenson, Brian J.R. Political Integrations and Indian Self-Government: Hegemonic and Counterhegemonic Discourse, M.A. Thesis, University of Victoria, 1986, page 64.

¹²ibid. page 66.

Similarly, the Cree-Naskapi agreement, for any of its other deficiencies, has also been lauded for being a stronger statement of Aboriginal government, as the authority of the government was recognized in the nation-to-nation negotiations, was not essentially diminished in the agreement and preserved its authority in the land claims settlement.¹³

A reliance on the fiduciary obligation of the federal government may itself create an imbalance between parties and contradict the assumption of equality in negotiation of fiscal relations. This phenomena has been described by Professor Weinrib when he states, "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."¹⁴

More recently, the AFN resolved that new fiscal relationships must be developed between the federal government and First Nation governments which are, "based on the principles of flexibility, choice, fairness, certainty of government service delivery to comparable jurisdictions, clarity of revenue raising jurisdictions, economic incentives, cost effectiveness and efficiency..."¹⁵

¹³Cassidy, Frank and Bish, Robert L. Indian Government Its Meaning in Practice, Institute for Research on Public Policy, Morriss Printing Col, Victoria B.C., 1989, page 144, and

Lemieux, John F. Indian First Nation Economic Development and Federal Self-Government Policy prepared for the Canadian Bar Association, March 1990, page 15.

¹⁴Hawkes, David C. and Maslove, Allan M. "Fiscal Arrangements for Aboriginal Self Government" essay in Hawkes, David C. (ed.) Aboriginal Peoples and Government Responsibility, Carleton University Press, Ottawa Canada, 1995, as quoted on page 80.

¹⁵ Assembly of First Nations, Resolution No.5/96 (Revised July 23, 1998) National Indian Brotherhood, 1998.

New contractual relations with First Nations can incorporate the necessary accountability terms which are necessary to successful enterprises.

There is no constitutional requirement for the federal government to fund self-government nor a positive duty to legislate on Aboriginal issues. The Indian Act does not require accountability by band governments to the federal government nor to band members for the use of federal funds.¹⁶

The accountability between the federal government and the First Nations has generally been in the nature of fiscal rather than political accountability. The political framework was established pursuant to the Indian Act and political accountability is required by the electorate in a democratic system.

Regardless of the type of fiscal relationship, accountability has loomed as a complex and frustrating factor. In order to meet its own accountability to Parliament, DIAND has structured the policies and procedures and the reporting mechanisms at the First Nation level. First Nations have not always been agreeable to the degree of control set out by the Department and not always compliant.

¹⁶DIAND A Description of Financing and Financial Administration for Bands Under the Indian Act and Existing Self-Government Legislation, Policy and Constitution Branch, Self Government Sector, 1987, page 10.

Accountability to the Constituency

As Stephen Cornell states in his paper on accountability, there must be legitimacy in the government for accountability to exist, which is a "perceptual relationship between sets of institutions on the one hand and groups of persons on the other. The people governed by a particular set of institutions have to view those institutions as appropriate for them".¹⁷

As the federal government seeks to provide greater authority to First Nations and encourage greater accountability to their communities, the same principles would apply. In fact, Cornell sets out two foundations of local government legitimacy;

- 1) The more the institutions of governance match the cultural conceptions of their constituent communities, the greater the legitimacy they are likely to enjoy.
- 2) Over the long run, the more effective those institutions are in the pursuit of community objectives, the more legitimacy they are likely to enjoy (and notably vice versa: the greater their legitimacy the more likely they are to be effective.).¹⁸

¹⁷Cornell, Stephen, Paper, Accountability, Legitimacy, and the Foundations of Native Self-Governance Harvard Project on American Indian Economic Development, J.F. Kennedy School of Government, Harvard University, January 1993, page 10.

¹⁸ibid. page 15.

Leadership in Aboriginal Communities

The issue of leadership, its development and recognition is a fundamental factor in assessing the readiness of First Nations for self-government.

In Custom, Tradition and Aboriginal Self-Government within the Context of Canadian Constitutional Principles and Federal Government Practise - Final Report, the authors suggest that corporate groupings are inherent in native cultures.¹⁹ In the broad definition of corporate bodies, the "band" is not a free-standing level of corporate organization.²⁰

In the discussion of the type of governance in bands, the writers assess bands from both a rank and egalitarian view. Some differences between Aboriginal and federal expectations are evident. The process for leadership in First Nations communities that develops is a subtle process which slowly creates a collective consensus as to leadership. When achieved, leaders are able to influence but not direct others.²¹ The authors also suggest that to codify forms of custom and tradition may "fossilize" the forms of government.²²

In fact, there is a tremendous diversity across the country as to models of governance and the local accountability mechanisms which have evolved in different communities. An excellent examination of accountability among the Cree is found in the paper by R.F. McDonnell, "Prospects For Accountability Among the Cree of James Bay". While it does not

¹⁹Scott, Colin et al Custom, Tradition, and Aboriginal Self-Government Within the Context of Canadian Constitutional Principles and Federal Government Practice, Indian and Northern Affairs Canada, Self Government Sector, 1988, page 71.

²⁰ibid. page 75.

²¹ibid. page 77-78.

²²ibid. page 118.

purport to be a comprehensive analysis, the author nonetheless is able to review the primary cultural influences on accountability and reveal the complexity and difficulty of applying non-Aboriginal traditional views of accountability. Even within the Cree communities there are differing views of traditional accountability. As the author states:

There are, in consequence, contending modalities of accountability circulating in virtually everyone's mind and the question for Cree is how to sort them out. From the outside it would seem, that no non-Cree could possibly be in a position to rationalize an adequate process with any confidence...But...things are not greatly advanced by listening too intently to any single voice from the inside...²³

In assessing the way in which accountability mechanisms can be developed at a local level, it is appropriate to consider the concept of fiscal equivalence. Fiscal equivalence is the idea that citizens who pay the cost of government should receive the benefits.²⁴ As Robert Bish suggests, the correlation between cost and benefit create an incentive for the citizen to want to influence decision-makers and hold them accountable.²⁵

²³McDonnell, R.F. Prospects for Accountability Among the Cree of James Bay, prepared for DIAND, November 1992, page 29.

²⁴Bish, Robert L. Financing Indian Self-Government: Practice and Principles, School of Public Administration, University of Victoria, 1987, page 25.

²⁵ibid.

There has been some suggestion of a First Nation parliament which would govern and administer programs on a national level.²⁶ Current federal supervision would be replaced by that of a national government of First Nations. Even if Canadians are in favour of such a political structure, how such a structure can be created is unclear at present. The same considerations for effective accountability at the local level would apply to such a national body.

4.2 What does the literature say about tax and non-tax own source revenues?

Tax Revenues

Marc Malone has stated that, "A government that does not tax is not a government".²⁷ While many Canadians may wish for the tides of taxation to recede, the re-distributive and self-governing characteristics of taxation are appealing in this climate of self-government.

In their paper, The Strategically Positioned First Nation, the authors suggest that, "The design and implementation of a taxation type system is not a luxury for First Nation Governments. It is a sovereign necessity for First Nations in order to accomplish their essential governmental functions".²⁸

²⁶Courchene, Thomas J. and Powell, Lisa M. A First Nations Province. School of Policy Studies, Queen's University, January 1992.

²⁷Malone, Marc Financing Inuit Institutions: The Constitutional and Political Challenges, Inuit Committee on National Issues, 1987, page 18.

²⁸Sixdion. The Strategically Positioned First Nation. Prepared for the Department of Indian Affairs and Northern Development and the Indian Taxation Advisory Board, Kanata, January 1997, page 11.

Governments have long recognized that a range of tax approaches can render revenues for their operations. These tax bases can include property taxes, sales taxes, income taxes and value-added taxes. The revenues from these sources far outweigh the benefits received from "own source" revenues such as licensing, user fees or the issuance of bonds and loans. Even the creation and operation of community-based enterprises have not had the resultant revenues that taxation can offer. However, there are obviously other benefits which can arise from these activities including job creation, skill development, further economic growth and control over natural resources.

Since 1988, First Nations have been able to generate revenues from property taxation, and many bands have chosen to utilize this means. Other individual tax negotiations have resulted in First Nations taking some of the sales tax room of the federal government related to alcohol, fuel and tobacco.

This practical function of government taxation is gaining some acceptance in First Nation communities and is often part of extensive self-government discussions. Nonetheless, tax exemption has long been one of the cornerstones of Aboriginal rights. First Nations have become protective of this right and see it as one of the last vestiges of nation status, the right not to be taxed by others.

It has long been the perception that Aboriginal people do not pay taxes. Of course, tax leakage results in considerable taxes being paid through GST and provincial tax levies on commodities bought off reserve. Sixdion in their paper suggest that millions of dollars of taxes are paid by First Nation people and cite as examples: a survey of Innu Takuaihan Uaashat mak Mani-Utenam in Quebec calculated they contributed \$8M per annum in taxes to the federal and provincial governments. A study at Six Nations in 1993 showed about \$8.75M per annum was

paid in GST and income tax and if off-reserve members were included it would add \$10M-\$15M to the total.²⁹

Robert Bish has suggested that taxation might better be referred to as "sharing" so as to be acceptable in the context of Aboriginal tradition.³⁰ While he acknowledges that the traditional practice must have had a redistributive purpose, he finds that "the very use of the word 'tax' prevents careful analysis of the basic phenomenon of participatory sharing for group benefits".³¹

The area of income taxation is legislatively occupied by the federal government. It is difficult to identify exactly what type or extent of taxing powers the First Nation governments will desire.³² Linked inexorably to the issue of taxation is the issue of the control of resources and the jurisdiction of Aboriginal governments, particularly in regard to other governments. In the current climate of government fiscal restraint, there must be a willingness by both federal and provincial governments to open up territory in the tax room for First Nation governments.

Property Taxation

Acceptance of property taxation by many Aboriginal communities has been slow. The system used by municipalities and provinces presumes private ownership of identifiable

²⁹ibid. page 12.

³⁰Bish, Robert L. Aboriginal Government Taxation and Service Responsibility: Implementing Self-Government In A Federal System, Centre for Public Sector Studies, School of Public Administration, University of Victoria, March 1992, page 1.

³¹ibid. page 14.

³²Boisvert, David A. Forms of Aboriginal Self-Government. Background Paper Number 2, Institute of Intergovernmental Relations, 1985, page 55.

parcels of land which contrasts with the communal and public nature of many reserve lands. In isolated and small communities the taxation of the property of band members may be onerous when the personal income level is so low.

The problems of the jurisdiction of First Nations and taxation have been highlighted in British Columbia in regard to property taxation. Robert Bish has set out the situation in his paper, "Aboriginal Government Taxation and Service Responsibility: Implementing Self-Government in a Federal System". The province taxed non-Aboriginal leaseholders of reserve lands outside of municipal boundaries and municipalities and other local governments levied taxes against leaseholds held by non-Aboriginal people within their boundaries.³³ The leasehold taxation created significant revenues but only provided 25% of the services received by other taxpayers.³⁴

This inequity resulted in amendments to the Indian Act to allow taxation on conditionally surrendered lands and set up the Indian Taxation Advisory Board (ITAB), but did not limit the taxation jurisdiction of other governments.³⁵

Generally Bish found that the provincial ministries facilitated the development of the taxation ability of the bands and helped to coordinate these efforts with the local municipalities.³⁶ The underlying differences, however, appeared to be the issues of the relationship between taxation and services and "taxation without representation". Non-

³³Bish, Robert L. Aboriginal Government Taxation and Service Responsibility: Implementing Self-Government In A Federal System, Centre for Public Sector Studies, School of Public Administration, University of Victoria, March 1992, page 4.

³⁴ibid. page 5.

³⁵ibid. page 6.

³⁶ibid. page 10.

Aboriginal leaseholders paid taxes for services enjoyed by non-tax paying band members, while the leaseholders did not have voting rights.

ITAB seems to have provided a dynamic and relevant vehicle for the development of the taxation abilities of First Nations and to identify and resolve problem areas. While the initial impetus related to the lucrative leasehold areas of B.C., the Board has gone on to investigate other potential property taxation sources.³⁷

Public utilities such as railways, highways, hydro and telephone have had use of reserve lands without consent and sometimes without compensation. In addressing this taxation source there have been problems with Crown corporations that have declared tax immunity and questions about the nature of the title held by these users of reserve lands.³⁸ The reality that property tax represents less than 10% of the "total tax pie" is pointing the Board in other directions.³⁹

Aside from the jurisdictional questions and the implementation of property taxation in situations of leaseholds, property taxation is not such a clear issue in the context of band members themselves. In cases where the band levies taxes on the property of band members, is the property subject to seizure for non-payment? On reserves where all land is public, should a levy against band members based on an average per family acreage be utilized? What are the property entitlements of non-resident band members?

³⁷Native Investment and Trade Association and Cascadia Pacific Communications Inc. First Nations Taxation II, National Conference Materials, October 13, 14, 1994, submission by ITAB, page 6.

³⁸ibid. page 8.

³⁹ibid. page 11.

Many of these policy concerns are canvassed in the paper prepared for DIAND by C.N. Watson and Associates Ltd. entitled, Consulting Study Concerning: Indian Property Taxation System Development. The questions posed by the authors could be utilized as a test for any potential property taxation scheme as it suggests solutions to various problems such as appeal provisions, duplication of services by jurisdictions, taxation without specific services, and taxation of non-Aboriginal residents based on income.⁴⁰ In addition the paper also highlights the primary elements of a property taxation system.⁴¹

Income Taxation and s.87

The Canadian tax system began as joint occupation of the tax fields by the federal and provincial governments. In 1917 the personal income tax was instituted and the overlap of the jurisdictions here caused problems until 1941 when it was agreed that the federal government alone would occupy the income tax field and the provinces would receive “rental payments”. In 1962, the federal government and all provinces except Quebec entered into Tax Collection Agreements which provided for the federal government to collect income taxes and remit to the provinces in exchange for the provinces agreeing to a specific single rate of income tax.⁴² Residency is the determining factor as to which province collects the personal income tax of a taxpayer. Corporate income tax is determined on a formula of allocation based on the location of income.⁴³

⁴⁰C.N. Watson and Associates Ltd. Consulting Study Concerning: Indian Property Taxation System Development, prepared for DIAND Economic Development Program, 1987, page 4-8 to 4-28.

⁴¹ibid. page 3-1.

⁴²Department of Finance, Canada. A Working Paper on Indian Government Taxation (Draft). Ottawa, March 1993, page 5.

⁴³ibid. page 6.

The primary focus of discussions about taxation of income of Aboriginal people is the tax exemption under s.87(1) of the Indian Act. The section provides that:

87(1) Notwithstanding any other Act of Parliament or and Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

(a) the interest of an Indian or a band in reserve lands or surrendered lands; and (the personal property of an Indian or a band situated on a reserve.⁴⁴

An excellent review of the exemption and its judicial interpretation is found in the materials provided for the conferences, First Nations Taxation (1993) and First Nations Taxation II (1994).⁴⁵

Jack Woodward suggests in his address notes to the first conference, that the exemption was assumed and existent prior to the Indian Act provisions. In other words the Indian Act legislated in an area preserved by common law.⁴⁶ It was legislation without representation.

⁴⁴Native Investment and Trade Association and Cascadia Pacific Communications Inc. First Nations Taxation II, National Conference Materials, October 13,14, 1994, page 5.

⁴⁵Native Investment and Trade Association and Cascadia Pacific Communications Inc. First Nations Taxation II, National Conference Materials, October 13,14, 1994, and

Native Investment and Trade Association and Price Waterhouse Aboriginal Services Division, First Nations Taxation: Dynamic Strategies -Emerging Issues-, National Conference Materials, December 2,3, 1993.

⁴⁶Native Investment and Trade Association and Price Waterhouse Aboriginal Services Division, First Nations Taxation: Dynamic Strategies -Emerging Issues-, National Conference Materials, December 2,3, 1993, page 2.

The Supreme Court interpretation of the s.87 exemption had, until recently, protected Aboriginal people from outside intrusion for paternalistic rather than sovereignty reasons.⁴⁷ The Nowegijick⁴⁸ decision set out the requirement for application of the exemption which was, in summary, that the employment income of a reserve resident Indian, if it was earned on reserve, was "property" situate on the reserve, and thus protected from taxation.⁴⁹

The Supreme Court subsequently in the Williams⁵⁰ case caused concern and confusion when it appeared to move from the residency criteria for exemption to provide a "connecting factors" test including other factors such as the residency of the debtor, the place where the benefits are paid and the location of the employment income. It has been argued that the Court attempted to give a broader interpretation to the requirements but in fact Revenue Canada interpreted the case as narrowing the situations in which the exemption applied, to those where First Nations reside and work on the First Nation territory for a First Nation employer.⁵¹

Recently the Sechelt Band voiced its outrage over the moves of the federal government to require the removal of the tax exemption within 12 years as part of a larger land

⁴⁷ibid. page 4.

⁴⁸Nowegijick v. The Queen [1983] 1 S.C.R. 29.

⁴⁹Native Investment and Trade Association and Cascadia Pacific Communications Inc. First Nations Taxation II, National Conference Materials, October 13, 14, 1994, conference notes of Lesley M. Little, page 2.

⁵⁰Williams v. Canada [1992] 1 S.C.R. 877.

⁵¹Native Investment and Trade Association and Cascadia Pacific Communications Inc. First Nations Taxation II, National Conference Materials, October 13, 14, 1994, Speech of Tony Mercredi, page 5.

claim and in consideration of land and cash and changes to the governance agreement.⁵² In response the band suggested a larger payment of land and cash, the extension of the exemption to band members also off of the reserve and a phase out period of 50 years.

The removal of the exemption has long been sought by the government as it remains a rationale for some anti-First Nation sentiment among the electorate. Negotiating the removal of the exemption is no easy feat. Tax exemption has always been seen as a clear acknowledgment of First Nations as independent nations who cannot be taxed, according to international law, by a foreign power. It was at times the only obvious retained right. Further, the very nature of the exemption is reinforced by the previous position that Indians who wished to have the franchise in order to become full Canadian citizens were required to relinquish taxation exclusion and seizure rights under the Indian Act. In other words, its value is established as the price that had to be paid.⁵³

The movement of Aboriginal people from reserves to urban centers creates problems of fiscal equity among band members. The lack of employment or business opportunities on reserves has caused leakage of skilled and qualified Aboriginal people to non-reserve areas even though the tax exemption is lost. Courchene and Powell have addressed this problem in the context of their suggested First Nation "province".

⁵²Globe and Mail, "B.C. Band Claims Betrayal - Ottawa, Province Criticized by Sechelt", Thursday, February 13, 1997, page A7.

⁵³Native Investment and Trade Association and Cascadia Pacific Communications Inc. First Nations Taxation II, National Conference Materials, October 13, 14, 1994, speech of Professor Sanders, page 7.

It has been suggested that the income taxes collectible from Aboriginal people residing off-reserve could be returned to First Nations as own source revenues. Similarly, the income tax of non-Aboriginals residing and working on reserve could be collected and considered as provincial/federal funds.⁵⁴

The designation of these funds as own source revenues would allow their deduction from any equalization or formula-financing system.⁵⁵ The authors cite the Ontario differentiation of public and Separate school taxation, the “citizenship” model, as an example of how this distinction based on affiliation can be accomplished.⁵⁶

The reverse could also be created where off-reserve Aboriginals pay income tax to the province or federal governments but non-Aboriginals employed on reserves pay to the band. The difficult collateral of this suggestion is that off-reserve Aboriginals would receive greater services in the urban area than those individuals working on reserve. Again, the hope would be to stop the drain from the reserves and allow continued involvement of off-reserve Aboriginals by on-reserve investment through taxation. The controversy continues as to whether this would mean, again, taxation without representation, depending on the eligibility of off-reserve band members to vote in reserve elections.

These discussions about personal income tax do not include significant research on the effect of income tax payments by off-reserve Indians or the anticipated effect of various self-governance models on them.

⁵⁴Courchene, Thomas J. and Powell, Lisa M. A First Nations Province. School of Policy Studies, Queen's University, January 1992, page 13.

⁵⁵ibid.

⁵⁶ibid. page 15.

Perhaps one of the greatest areas of difficulty has been the taxation of Aboriginal owned corporations which do not qualify for s.87 exemption. In cases where the business profits of a wholly or partially Aboriginal-owned corporation are earned on the reserve, those profits are fully subject to income tax.⁵⁷ This is a disincentive to development of the economy of the reserve and limits the choices of the form of the Aboriginal business. Some Aboriginal corporations may be eligible for the same exemptions under the Tax Act as non-profit organizations.

Another impetus to bands to accept the Sechelt style of municipal government is the tax-free status of municipalities, and their corporations if owned by them up to 90%. However it could also be argued that the interpretation by Revenue Canada of a "municipality" is broad enough to include almost any form of Aboriginal self-government.⁵⁸ In the case of Otineka Development Corporation Limited v. The Queen⁵⁹, the revenues of the band earned off reserve were protected by virtue of their function to provide municipal type services.⁶⁰

There are useful submissions at the two First Nation taxation conferences dealing with the variety of commercial arrangements with First Nation communities and groups including joint ventures, partnerships and trusts and tax implications.⁶¹

⁵⁷Native Investment and Trade Association and Cascadia Pacific Communications Inc. First Nations Taxation II, National Conference Materials, October 13,14, 1994, "Creative Strategies to Minimize Tax when Structuring a Reserve-Based Deal" by Ross Tunnicliffe, page 6.

⁵⁸ibid. page 11.

⁵⁹ Otineka Development Corporation Limited v. The Queen [1994] 2 C.N.L.R. 83 (Fed.C.A.).

⁶⁰ibid. page 12.

⁶¹ibid. pages 12 to 25.

Sales Tax

If the estimates referred to in The Strategically Positioned First Nation (see above) are representative, the provinces and federal government are collecting a tremendous amount of revenue from sales off reserve to Aboriginal people. Each province has its own rules regarding the sales tax exemption, often narrowing it to the proof that the item is to be consumed on the reserve.⁶²

The more recent case of the Union of New Brunswick Indians⁶³ clearly indicates that the paramount location of sales tax attachment is at the time of sale, regardless of the location of consumption. The Supreme Court found that the exemption in s.87(1)(b) did not apply to goods purchased off-reserve.

The development and implementation of a sales tax system by First Nations would require cooperation with other tax jurisdictions such as the provinces. The provinces could collect the sales tax, receive a fee for the collection and remit the balance to the appropriate First Nation.⁶⁴ What, however, would be the incentive to the purchaser to report his status?

The National Revenue Generation Project looked at the issue of the federal sales tax. In April of 1997, First Nations in Cowichan and Westbank were granted the right to levy a tax identical to the tobacco tax to both Aboriginal and non-Aboriginal purchasers, and the

⁶²For the different provincial tests for exemption, see Bartlett, Richard H. Indians and Taxation in Canada (3rd Ed.), Native Law Centre, Saskatoon 1992, p.100.

⁶³ Union of New Brunswick Indians v. New Brunswick (Minister of Finance) [1998] 1 S.C.R. 1161.

⁶⁴Courchene, Thomas J. and Powell, Lisa M. A First Nations Province. School of Policy Studies, Queen's University, January 1992, page 34.

federal government would vacate that tax room.⁶⁵ The provincial government and First Nation government of the Cowichan Tribes have agreed that the province will collect the new tobacco tax which is comparable to the tax on non-Aboriginals, on behalf of the Cowichan.

Non-Tax Revenues

The development of own source revenues, especially non-tax revenues, is an area of great challenge. The United Anishnaabeg Councils (U.A.C.) has suggested that, on some reserves, own source revenues may be as low as 0%.⁶⁶ Also, the authors suggest that in some areas such as Southern Ontario, the land base has gradually been reduced to an insufficient level to generate non-tax revenue.⁶⁷ Lands are held privately or by the Ontario Crown, making it difficult to add to the land base.⁶⁸ The potential of land based revenue has been further reduced by the loss of off reserve resources such as hunting.⁶⁹ Many of the problems cited by the UAC may be reflective of those on many reserves.

⁶⁵Fiscal Realities The National Revenue Generation - First Nation Taxation Project presented to the Indian Taxation Advisory Board and the Research and Analysis Directorate Policy and Strategic Direction Branch, DIAND, page 1.

⁶⁶United Anishnaabeg Councils (The). Research Project on the Non-Tax Revenue Generation Capacity of the United Anishnaabeg Councils First Nations. prepared for the DIAND's Research and Analysis Directorate, December 1996, page 60.

⁶⁷ibid. page 58.

⁶⁸ibid.

⁶⁹ibid.

Tim Davis has noted some of the impediments to the development of own source revenues to be the small size of reserve populations, isolated locations, limited access to markets, low levels of education and the lack of skills and means to develop resources.⁷⁰

Royalties, Fees and Licenses

Royalties are payments based on the quantity of resources extracted by outsiders for which a payment is made to the owner of the resource or to the government. Royalties are already collected and held in trust by the federal government. This source of revenue is considered unreliable.⁷¹ However, the inclusion of these funds in the Nunavut agreement increased the revenues raised from 10% to 20-30% over a period of ten years.⁷² Many of the royalties could not be collected as the land was held in trust by the federal Crown and was therefore exempt.⁷³

The UAC found that fees and licenses did not produce significant revenues in their communities in relation to the cost of monitoring the service.⁷⁴

⁷⁰Davis, Tim Aboriginal Self-Government: Is This the Answer?, Kingston Ontario, National Defence College, page 29.

⁷¹ibid. page 32.

⁷²ibid.

⁷³Native Investment and Trade Association and Cascadia Pacific Communications Inc. First Nations Taxation II, National Conference Materials, October 13, 14, 1994, "Additional Taxes and Levies" by Shepard and Dumoulin, page 5.

⁷⁴United Anishnaabeg Councils (The). Research Project on the Non-Tax Revenue Generation Capacity of the United Anishnaabeg Councils First Nations. Prepared to the DIAND's Research and Analysis Directorate, December 1996, page 54.

Investment

In The Strategically Positioned First Nation, the authors suggest six possible areas of development and provide some analysis of the fit and potential return on such sources. The possible areas of development are: natural resources/eco tourism, information technology, international/inter-tribal trade, domestic sources of capital, off-shore investment/capital sources and community economic development.⁷⁵

Economic development and any related revenue sources are dependent on accessibility to resources and in some cases sharing or divestiture of control over resources by the provinces. These are political issues which impact on self-government initiatives. There would likely need to be enhancement of skills by the First Nation and some initial reliance on outside expertise.

Financing

A significant problem for Aboriginal groups and individuals has been the lack of capital to finance business and resource development. The traditional lending institutions have refused financing due to the lack of collateral and the unique protections of the property of Indians from seizure. The flip side of this coin is that, should Aboriginal lands and property be available as security, they must also be available for seizure.

In his text, Indian Finance Law: Alternative Mechanisms and Strategies for Financing Reserve Public and Private Ventures, Robert Reiter sets out the basic law in regard to business arrangements, tax exemptions, financing and international ventures. In many ways the

⁷⁵Sixdion. The Strategically Positioned First Nation. Prepared for the Department of Indian Affairs and Northern Development and the Indian Taxation Advisory Board, Kanata, January 1997, page 34.

text is a detailed handbook for business operations of First Nations and even provides tips on the rationale and use of financial statements. However, he also has some concrete suggestions including that bands could follow incorporated bodies such as municipalities who can raise capital by the sale of debentures, a security with a specific return on investment.⁷⁶ While in many respects a more difficult read, his approach does offer an interesting proposal for reserves to become economic zones. Economic zones would be reserve areas free of taxation and regulation where business would be encouraged and the economy stimulated.⁷⁷ This relief from government interference would encourage entrepreneurship and business investment and last for a specified number of years.⁷⁸

This approach may be difficult to apply in situations where First Nations are attempting to exert authority over their own land and where any concerns over the environment may exist.

4.3 What does the literature say about data exchange?

There is little research on the extent and nature of necessary data exchange. Generally the data requirements have flowed from the fiscal accountability and the formula funding factors. Data can be in the form of reporting as a tool of accountability or general data necessary for planning.

⁷⁶Reiter, Robert A. Indian Finance Law: Alternative Mechanisms and Strategies for Financing Reserve Public and Private Ventures First Nations Resource Council, 1993, page 32.

⁷⁷ibid. Chapter 8, page 1.

⁷⁸ibid. page 3.

Reporting Data

Preparation of data for the purpose of reporting on the use of funds or for requesting funds, uses valuable hours of staff time. There have, however, been comments about the DIAND requirements for accounting information from First Nations pursuant to fiscal arrangements. The report by Coopers and Lybrand which formed the foundation for comments by the Penner Commission stated that:

The Department is giving relatively little attention to the controls imposed by Parliament through the vote structure, and Treasury Board through allotments, but program managers are increasingly tying strings to `their' funds...The Department is constantly changing coding and the format of forms to be filled out by the band. This introduces inconsistency in the format of financial information and results in band staff having to constantly learn new approaches...The requirement of fund accounting introduces complexity in daily bookkeeping.⁷⁹

Even when the federal government has attempted to provide more flexibility in funding it has not always been able to create an appropriate system of reporting. For example, the AFA's as a form of funding were intended to be more flexible by allowing band discretion, but in fact they required more onerous reporting.⁸⁰

⁷⁹ House of Commons. (1983) Indian Self-Government in Canada: Report of the Special Committee. Ottawa: Minister of Supply and Services, p.91.

⁸⁰Weaver, Sally Self-Government Policy for Indians 1980-1990: Political Transformation or Symbolic Gestures. (Undated) University of Waterloo, page 21.

More recently in the Kativik Regional Government's annual report, the issue of multi-source funding is addressed;

As the KRG's funding is provided by several ministries, the Finance Department must not only manage the four funds of an organization in full expansion with very little room to manoeuver, but must also satisfy the various requirements of each ministry. There exist marked differences between the various ministries regarding, among others, the collection methods and dates, the vouchers to produce, and particularly the conditions tied to expenditures. The Department must ensure that the funds received from one ministry serve only the intended purposes contained in the agreement signed by this ministry and the KRG....Ideally, all the funds should not come from one source and should not be allocated to one fund only. It would be preferable that KRG and the various ministries which fund it take the necessary measures in the near future to rationalize the current method of financing.⁸¹

These criticisms point to the need for simplicity in the reporting process and some syntheses of the various demands of different funding departments. An overly demanding process of reporting can reduce efficiency and deflect the energies of the governments from the primary objectives of the funding.

⁸¹Kativik 1994 Annual Report, Kativik Regional Government, Kuujjuaq, page 76.

Planning Data

In 1987, Marc Malone stated that, " One of the reasons why econometrics has proved so inconclusive is lack of good data."⁸²

In The National Revenue Generation - First Nation Taxation Project, the ITAB concluded from its literature review that the "lack and poor quality of data" made estimations of tax revenues difficult.⁸³ They also proposed that First Nations must have tools to conduct their own revenue projections and that those tools should focus on immediate resources.⁸⁴ The report also repeated Le Dressay's point that community based research is more accurate than an aggregate approach.⁸⁵

In the same report the authors indicate that even basic statistics in regard to Aboriginal people are suspect. As the allocation of land and financial resources was often based on population, and due to the general atmosphere of suspicion between First Nations people and the Crown, many First Nations have refused to participate in activities such as the Census.

This lack of attention to the issue of data can be critical to the planning and development of self-government initiatives.

⁸²Malone, M. Financing and Implementing Aboriginal Self-Government, 22 Propositions, Ottawa, 1987, proposition #9.

⁸³Fiscal Realities The National Revenue Generation - First Nation Taxation Project presented to the Indian Taxation Advisory Board and the Research and Analysis Directorate Policy and Strategic Direction Branch, DIAND, page 20.

⁸⁴ibid.

⁸⁵ibid.

In Case Studies of Results-Oriented First Nations Organizations, the authors quote from a Price Waterhouse study which indicates that evaluations of the CAEDS program found that it was difficult even at the Departmental level to identify results achieved in “employment creation, business development and organizational capacity.”⁸⁶

In a developmental process such as self-government, the acquisition of relevant data for projections and planning is essential. The question is how this data can be collected with the least intrusion on the resources of Aboriginal institutions or governments.

In summary, there is little research in the area of data collection.

4.4 What does the literature say about governance?

In the true sense of governance structures, there has been little research. Some components of governance systems are jurisdiction, executive and legislative authorities, civil delivery services, elections, the right to vote, process of governance, and membership. As various designs are utilized in self-government initiatives, careful assessment of these aspects of governance within the models must be made.

The self-governing units established and assessed to date bear resemblance to the structures already existent in Canada. These structures include democratic municipal, regional and provincial models. The American experience in Alaska offers some direction in regard to a corporate model.

⁸⁶Price Waterhouse. Alternative and Approaches to Maximize Benefits from Major Capital Projects - Draft Report. (Undated), page 36.

The research in regard to fiscal relationships and general governance structures has focused on those few models utilized in settlement of claims with the Sechelt bands and the Cree-Naskapi of Northern Quebec. Using a chart format, the document Self-government on Essential and Optional Subject Matters developed by DIAND⁸⁷ sets out a comparison of the various components of these two agreements.

The municipal model used in the Sechelt Indian Band self-government has received much criticism including the following:

- 1) It fails to recognize the basis of self-government as an inherent rather than a delegated authority.⁸⁸
- 2) The need for provincial legislation such as the Sechelt Indian Band Self Government Act creates a climate of instability for economic development, particularly as it contains a 20 year sunset clause.⁸⁹

This tenuous provincial authorization has received comment from the Union of B.C. Indian Chiefs who stated, "Perpetual vulnerability is the quicksand upon which Indian People will be standing if they choose the municipal model of Indian Self-Government."⁹⁰

⁸⁷DIAND Self-government on Essential and Optional Subject Matters, Policy and Constitution Branch, Self-Government Sector, 1987.

⁸⁸Lemieux, John F. Indian First Nation Economic Development and Federal Self-Government Policy prepared for the Canadian Bar Association, March 1990, page 28.

⁸⁹ibid 28.

⁹⁰Cassidy, Frank and Bish, Robert L. Indian Government Its Meaning in Practice, Institute for Research on Public Policy, Morriss Printing Col, Victoria B.C., page 141.

- 3) The funding of Sechelt using AFA's has provided wider discretion for the band council but the AFA's require certain governance structures (Bish and Cassidy) and reporting. In fact, Sally Weaver suggests that the AFA's maintained significant government intervention and required more reporting than other forms of government.⁹¹ She argues that AFA's are not only inadequate for self government but they reinforce that self government may mean no more than self regulation.⁹²

The Cree-Naskapi agreement of Northern Quebec created a regional government with municipal status. Criticisms of this method of governance have included that:

- 1) It fails to provide security of tenure of lands and this causes lack of stability for economic development.⁹³
- 2) The development of a native bureaucracy has created an unwanted class distinction and undermined traditional hierarchies.⁹⁴

⁹¹Weaver, Sally Self-Government Policy for Indians 1980-1990: Political Transformation or Symbolic Gestures. (Undated) University of Waterloo, page 21.

⁹²ibid. page 26.

⁹³Bartlett, Richard Subjugation Self-Management, and Self-Government of Aboriginal Lands and Resources , Background Paper Number 11, Institute of Intergovernmental Relations, Queen's University, Kingston, 1986, page 41.

⁹⁴Davis, Tim Aboriginal Self-Government: Is This the Answer? Kingston, Ontario: National Defence College, 1992,page 29.

- 3) The diversity of funding sources and varying requirements for applications and compliance have required intensive administrative time. In fact as late as 1995, the Kativik government indicated that 58% of revenues were used for operations while 42% was retained for programs.⁹⁵

A tribally owned corporation is a structure which may respond to some of the beliefs of Aboriginal people when all members are shareholders. The Alaskan native land claim was settled on a basis which included a governance structure of regional and local corporations. Some of the tribal corporations had the responsibility of managing or receiving royalties from oil and gas resources.

A study conducted by ARA Consulting Group Inc. for the Federal Treaty Negotiation Office found that the corporate structure, as the primary mechanism for governance and fiscal management in the Alaskan Land Claim, did not meet the needs of the tribal groups. Particularly, these structures did not meet the social and economic needs of the tribal groups, and they had to be addressed by the development of non-profit organizations.⁹⁶ These and other concerns raised in the study are worthy of review if a decision has been made to base a self-government unit on corporations.

⁹⁵Kativik 1995 Annual Report, Kativik Regional Government, Kuujjuaq, page 87.

⁹⁶ibid.

The U.S. Secretary of the Interior found numerous difficulties with the settlement strategy of the Alaskan land claim. In a study by the department, some problems were: the interpretation of the complex Settlement Act and the time and money needed in its negotiation; delays in the transfer of land, which handicapped the corporations; a lack of formal assistance in management skills training; the inability to trade stock which denied corporations a primary tool for raising capital; and the disincentive to invest due to a revenue-sharing scheme among the Corporations.⁹⁷

The settlement included a “sunset” clause which provided a deadline after which the shares in the respective corporations could be sold to non-natives⁹⁸. The potential thus existed for the corporations to fail in an essential characteristic of self-government, that of maintaining control by native people over governing structures and resources.

Under the Alaskan model there was conflict among native groups themselves in regard to fiscal equity. Corporate bodies were established based on the tribal groupings and the land they controlled. As a result, some corporations represented 'have' tribal groupings with gas and oil resources, and others were 'have-not' corporations who did not have such substantive resources. There was no mechanism for the sharing of revenues between these two types of corporate bodies, and many groups were dissatisfied with the inequity which developed among them. Some native groups have requested to return to an IRA (Indian Reorganisation Act) governance model of bands and tribes, partly to ensure that there is no loss of control over land if the corporate shares are available for non-native investors. The result of the corporate structure experiment has been a renewal of the tribal sovereignty movement.⁹⁹

⁹⁷ibid.

⁹⁸ibid page 8.

⁹⁹ibid. page 9.

Governance structures can replicate traditional models or develop from the culture and history of the First Nation. The governance system can be imported from other realms such as the corporate world. Some governance schemes may be innovative and particular to a First Nation. In any setting, the features of good fiscal relationships must be incorporated and activated to ensure the ability of the governance system to deliver the promise of self-government. In circumstances where the governance model differs significantly from that of the national format, some consistency will be achieved through the application of the Canadian Charter of Rights and Freedoms.¹⁰⁰ First Nation governments must juggle culture, history, fiscal features, personal rights and public objectives to create balance and good government.

5.0 HOW DO DIFFERENT AUTHORS AND SOURCES PRESCRIBE THE FISCAL RELATIONSHIP TO CHANGE BETWEEN FIRST NATIONS AND THE FEDERAL GOVERNMENT?

If there were no problems with the current fiscal relationships, no changes would be necessary. However, each area of fiscal relationships has problems. The opportunity is available now through self-government agreements to create fiscal relations based on the principles set out through the common themes of experience. Those principles are:

1. Fiscal relationships must be functional.
2. Fiscal relationships must be contextual.
3. Fiscal relationships must be measurable.
4. Fiscal relationships must be flexible but certain.
5. Resources are essential to success.
6. Fiscal relationships must be based on mutual respect and benefit.

¹⁰⁰ Federal Policy Guide - Aboriginal Self-Government, Government of Canada, 1995, p.4.

Each component of a positive fiscal relationship must include some or all of the principles. In totality, however, all principles must be evident. The authors have described aspects of fiscal relations which can enhance those principles.

Changes Regarding Accountability

Mechanisms of accountability between the federal government and First Nations can only be effective when the objectives of the funding are clear. These objectives may be national or local in scope. The function of the arrangement must be understood and agreed.

It is not agreed between First Nations and the federal government that the requirement for accountability flows from the historical relationship between the parties. However, the development of new governmental relations opens the door to the creation of new fiscal contracts. These contracts must still be cognizant of the historical and cultural context of the First Nations, with greater autonomy as the consideration.

No government is able to operate without some range of certainty of funding. The novelty of the arrangements to be entered into, mean that they must be certain but flexible enough to allow critical changes to be made to the fiscal scheme when necessary.

The traditional Aboriginal position nationally has been that the federal government cannot avoid accountability to First Nations as long as the federal government remains in possession of the land and constitutionally bound by fiduciary duty. In addition the concept of 'ministerial responsibility' wherein the Minister of Indian and Northern Affairs is accountable to Parliament, has created hesitancy and concern surrounding change even from the government perspective.

The federal government's desire to shift accountability from DIAND to band members so that monitoring is done on a local level is problematic. This is a move from government to government accountability to accountability between First Nations and their own constituency.

In order to accomplish this, as Cornell has suggested, there must be legitimacy in the local government. This legitimacy cannot be imposed but develops from the cultural expectations of the people and must be given a flexible environment. Each band is unique regarding the type of government and accountability and a national approach may be difficult.

In summary, to redirect accountability from DIAND to First Nations the federal government could:

1. Grant provincial status to First Nations and provide transfer payments similar to the provinces which do not require accountability by the federal government.
2. Reduce the degree of accountability to the federal government by decreasing government funding and facilitating the development of own source revenues.
3. Establish direct accountability mechanisms for First Nations to other federal departments by the transfer of finances to those bodies.
4. Assist and support the development of strong and legitimate local governments.

5. Provide a constitutional means of relieving federal responsibility in the context of self-government agreements.
6. Support, as a component of the governance structure, strong First Nations institutions with funding disbursement powers.

Changes Regarding Governance

The shifting of accountability from the federal government to First Nation governments can occur if there is strengthening of local governance institutions. The establishment of legitimate governance institutions lays the groundwork for a shift of greater accountability to the local level.

If the local government is contextual and based on cultural governance models, there may be special problems for the functioning of the fiscal relationship. In his review of the situation of the Yakima and Crow tribes in the U.S., Cornell identifies some problems which are associated with the establishment and maintenance of institutional legitimacy based on culture, namely:

1. There may be a conflict between efficacy and cultural fit. In the case of the Crow tribe, a weak executive branch and a factionalized and highly political General Council, made up of all voting age adults, created a destabilized and volatile government. However, the form of government had been developed over a period of time and was accepted by the tribe.¹⁰¹

¹⁰¹Cornell, Stephen, Paper, Accountability, Legitimacy, and the Foundations of Native Self-Governance Harvard Project on American Indian Economic Development, J.F. Kennedy School of Government, Harvard University, January 1993, page 22.

2. Cultural fit can be difficult to determine. Cultures change over time. Communities may try to identify themes in the culture which can be incorporated into new institutions but must keep in mind the practical needs of modern governance in the context of enduring community conceptions of power, leadership etc.
3. Legitimacy requires a relatively solid community on which to build. The treaty-making process sometimes put divergent tribes and cultures together and the differences may have become emphasized over time, thus impeding the development of legitimate institutions.¹⁰²

There may also be problems with the compatibility of the culturally based models with current institutional mechanisms of national governance. The contextual element cannot be allowed to over-ride the prime functioning of the fiscal relationship. A comprehensive analysis of the impact of the various cultural elements of the governance model on the fiscal contract is essential.

Changes Regarding Tax and Non-Tax Own Source Revenues

In the Working Paper on Indian Government Taxation from the Department of Finance, they suggest that the purpose of the development of a tax system is to “generate the required revenue while minimizing the administrative costs and the negative effects a tax may have on individuals, the economy and the society as a whole.” The particulars of their recommendations in three areas are:

¹⁰²ibid. page 25.

1. Tax exemption - no change suggested except that a portion of federal revenues raised off reserve from Indians on reserve should be redirected to the First Nation;
2. Taxation of Indian governments and institutions - governments do not generally tax each other and Aboriginal governments should not be subject to tax when carrying on government activities - there should be special tax treatment for Aboriginal corporations and agencies.
3. Tax powers - Aboriginal governments should have the same authority to decide whether to exercise their taxation powers and to what extent and to levy direct taxes - Aboriginal governments should be able to tax non-members on reserve lands provided that there are sufficient controls on the political elements and appeal mechanisms to the courts.¹⁰³

In sum, they recommend a geographically based tax system.

In A First Nation Province, Thomas Courchene and Lisa Powell suggest that such a fiscal relationship should mirror the self-government model of provinces. However, the jurisdiction of the First Nation Province would be based on citizenship rather than territory. The First Nation province could easily join the tax collection agreements with the federal and provincial governments and allow Ottawa to collect and administer tax credits, and redirect the appropriate funds to the First Nations.¹⁰⁴ In the initial stages, the failure of the government to provide start-up costs, expertise and a "tax-free" period to the new First Nation tax collectors, could result in maximum reliance on transfer payments.¹⁰⁵ Even if the "provincial" status is too

¹⁰³Department of Finance Canada. A Working Paper on Indian Government Taxation (Draft). Ottawa, March 1993.

¹⁰⁴Courchene, Thomas J. and Powell, Lisa M. A First Nations Province. School of Policy Studies, Queen's University, January 1992, page 34.

¹⁰⁵ibid. page 36.

difficult to negotiate politically, similar functions could be performed by a national body with necessary authority.

The demographics of the Aboriginal community must be considered in any discussion of geographic versus citizen- based fiscal relationships. In some provinces the increase in the off-reserve residency of Registered Indians can have a tremendous impact on the availability of own source revenues from taxes.

It is estimated that there will be 822,200 Registered Indians in Canada in the Year 2010. Of this figure 376,400 are anticipated to be living off reserve (or 45.7%).¹⁰⁶ This figure does not include other groups such as non-Status, Metis or Innu. There does not appear to be any research in regard to the implications of these demographic trends of Aboriginal people on taxation revenues. Certainly the fiscal relations must respect the contextual trends.

To generate tax revenues from property, the current non-native methods of taxing of private and identifiable property using a mill rate may be appropriate but could cause an upheaval on many reserves where property is communally held. Courchene and Powell caution that the impact of any change from communal property to private property is a dilemma which has not yet been untangled by the Russians or the East Germans.¹⁰⁷ Intrinsically tied into this issue of property are the cultural values, traditions and views of land which may not accommodate the systematic carving and valuing of the Canadian property tax format.

¹⁰⁶Four Directions Consulting Group. Implications of First Nations Demography - Final Report. Prepared for the Department of Indian Affairs and Northern Development, August 1997, page 40.

¹⁰⁷Courchene, Thomas J. and Powell, Lisa M. A First Nations Province. School of Policy Studies, Queen's University, January 1992, page 35.

If the decision has been made to tax property and the necessary identifiers are present, Bish suggests that the ideal way to implement property taxation is to:

- * estimate potential revenues
- * negotiate an agreement to purchase services from local governments where needed
- * draft a by-law and submit it to ITAB for approval
- * provide formal notice to the provincial government to enable them to notify all local governments that their tax jurisdiction on reserve has ended¹⁰⁸

This approach assumes that there are local governments in close proximity.

Andre Le Dressay, in his paper at the 1993 First Nations Taxation Conference “Judgement Day - First Nation Taxation and Economic Development” considers certainty as one of the essential factors for economic development. For investment and partnerships in business, there must be certainty in regard to the s.87 exemption, the method of tax calculation, the impact of other jurisdictions and their taxes.

¹⁰⁸Bish, Robert L. Property Taxation and the Provision of Government Services on Indian Reserves in British Columbia, Center for Public Sector Studies, School of Public Administration, University of Victoria, Victoria, March 1987, page 11.

6.0 DOES THE LITERATURE DEVELOP ARGUMENTS ABOUT HOW FISCAL RELATIONSHIPS WOULD BEST SUPPORT SELF-GOVERNMENT? IF SO, WHAT ARE THESE ARGUMENTS?

The dilemma, of course, in answering this question is, what is self-government? Does each band across the nation represent a different model of self-government? Is there a consensus as to the meaning and form of self-government?

As a result of this quandary there is no concise and simple analysis of the best way to support self-government initiatives because the content of the initiatives is unknown and likely diverse. In addition, the starting point for the creation of real self-government is controversial. Should a sound economic basis be necessary before any divestiture of control to a local band? Should the decision about the form of the self-government unit, whether it be regional or corporate etc, dictate the type of fiscal relationship? Should the type of fiscal relationship be developed from the needs of DIAND or should it develop from the needs of the community?

In their approach to the problem of fiscal relationships and self-government, Hawkes and Maslove approach the problem from a principled dynamic. As the variety of self-government arrangements may be innumerable, the writers suggest a set of principles to be considered when formatting a new fiscal relationship, including:

1. Financing must suit the model of self-government arrangements or institutions and the degree of non-conditionality must reflect the degree of autonomy;
2. Fiscal relationships must fit the economic characteristics of the community and the ability to be self-supporting;

3. Fiscal arrangements should encourage Aboriginal governments to move toward their own revenue raising by creating incentives for economic development.
4. Fiscal arrangements should incorporate means to ensure equity among Aboriginal communities and between Aboriginal and non-Aboriginal communities.
5. The overall design of the components of a fiscal transfer should reflect the characteristics of the public services in question. In areas of national concern, funding by conditional grants as opposed to unconditional grants for issues of local concern.¹⁰⁹

Robin Boadway, in his 1991 paper, "Mechanisms for Financing Native Self-Government" sets out some general principles to be considered when financing self-government. He suggests that the principle of equity, indeed vertical equity, should guide the financing of self-government. In other words, the goal must be to create a situation where Aboriginal people have the same economic rights of citizenship as other citizens. While he admits that it is sometimes difficult for governments to treat all citizens equally, he suggests that fiscal equity means that, while all governments need not behave the same, they must have equal capacity to treat all citizens equally.¹¹⁰ The concept of fiscal equity in intergovernmental fiscal relations removes incentives to leave the reserve.¹¹¹

¹⁰⁹Hawkes, David C. and Maslove, Allan M. "Fiscal Arrangements for Aboriginal Self Government" essay in Hawkes, David C. (ed.) Aboriginal Peoples and Government Responsibility, Carleton University Press, Ottawa Canada, 1995, page 22.

¹¹⁰Boadway, Robin Mechanisms for Financing Native Self-Government, Queen's University, 1991, page 65.

¹¹¹ibid. page 66.

Further, in his evaluation of fiscal relationships in Canada, Boadway states, "The essence of a federal system of government is precisely the decentralization of decision-making to levels of government which can best serve individual citizens."¹¹²

Bish and Cassidy suggest that there are four critical questions and answers which must be considered in fiscal relationships with First Nations, namely,

1. What incentives do Indian government decision-makers face in expenditure decision-making and to whom are they accountable?

Ideally, decision-makers should be responsible to constituents.¹¹³

2. What role should equalization play in the financing of self-government?

Equalization is income and wealth related and is a constitutional entitlement with no ministerial responsibility. There are two primary difficulties with the concept of equalization in self-government. One barrier is the notion of tax exemption and whether such an exemption can be accommodated in the self-government scheme. If there is tax exemption, how will this affect revenue generation by the government unit, and thus the availability of funds for equalization? Secondly, another difficulty is the development and implementation of a formula which will facilitate equalization when there exists such a diversity of wealth and income among Aboriginal communities.¹¹⁴

¹¹²ibid. page 65.

¹¹³Cassidy, Frank and Bish, Robert L. Indian Government Its Meaning in Practice, Institute for Research on Public Policy, Morriss Printing Co, Victoria B.C., 1989, page 126.

¹¹⁴ibid pages 128-129.

3. How do individual Indians relate to the Canadian system in regard to finance and taxation?

Tax exemptions create resistance to any tax even imposed by the band.¹¹⁵

4. Who is really responsible for financing Indian governments? How do aboriginal rights relate to this issue?

As the right to self-government has been recognized, does this create a right to financial resources to meet this objective? How could this issue be approached?

There are two approaches to this issue, fiscal paternalism or a system based on recognition and accommodation.¹¹⁶

Under the first approach the federal responsibility continues including ministerial responsibility for expenditures to the exclusion of other principles. The mandate of self-governing units, resources and control remain with the federal government.

In the second approach, the government would recognize Aboriginal government and assist in the creation of an institutional and legal framework to achieve economic development.¹¹⁷

¹¹⁵ibid. page 130.

¹¹⁶ibid. page 131.

¹¹⁷ibid. page 132.

In their paper "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations", Cornell and Kalt set out a process for reservations to reach the goal of economic independence. From their point of view, the primary pre-requisite to success in self-government is sovereignty. By "sovereignty" they mean, "genuine decision-making control over the running of tribal affairs and the use of tribal resources".¹¹⁸ The authors admit that decision-making does not guarantee success, but it does tighten the link between decision-making and its consequences.¹¹⁹ This approach is not without criticism, as the authors admit,

...it is frequently asserted that if tribes wish to be sovereign, they must first establish sound, non-dependent economies. Our research indicates that, for two basic reasons, this reasoning is backwards. First, as we have said, sovereignty brings with it accountability...Second, the sovereign status of tribes offers distinct legal and economic market opportunities from reduced tax and regulatory burdens for industry to unique niches for gaming and the commercial use of wildlife.¹²⁰

Cornell and Kalt add, however, that many other factors are necessary to support sovereignty, primarily formal and informal institutions of self-government.¹²¹ These institutions must be innovative and meet two criteria: they must be effective and adequate and they must be appropriate and fit into the informal or cultural and community norm based institutions.

¹¹⁸Cornell, Stephen and Kalt, Joseph P. Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations. John F. Kennedy School of Government, Harvard University, March 1992, page 14.

¹¹⁹ibid. page 15.

¹²⁰ibid. page 15.

¹²¹ibid. page 16.

Against this backdrop the authors recommend that an economic development strategy can be implemented.¹²²

Other approaches are based on the model of self-government chosen.

Courchene and Powell suggest that a provincial model of government based on citizenship would meet the needs of self-government. These authors prefer the same approach as that utilized in the Yukon agreement. The Gross Expenditure Base is formula financing which meets the objectives of the equalization method used with the provinces. The GEB is based on historical spending estimates which responds to population growth and inflation in order to achieve "reasonably comparable levels of public services".¹²³ It is submitted that this approach is generous and flexible and that the formula can offset with funding from other sources including own source revenues. The placement of First Nations as a province in the scenario proposed by them would satisfy the need for constitutional recognition of the status of native people and the entrenchment of fiscal rights. Whether the national will to create such a "province" exists or whether the necessary components of unitary cultural values can underpin such a system, remains to be seen.

The difficulties of such a proposal are that the development of a First Nation Province may not enhance local accountability and may not be able to respond to the diversity of language, culture and values of the Aboriginal population. A careful assessment would have to be made as to the intergovernmental agreements necessary to support such a system.

Regional governments have had some success and centralization of resources may have assisted small bands. However, the administrative costs and the lack of constitutional status

¹²²ibid. page 64.

¹²³Courchene, Thomas J. and Powell, Lisa M. A First Nations Province. School of Policy Studies, Queen's University, January 1992, page 30.

impair the ability of such a system. Caught also in the middle ground, such a government may have onerous accountability requirements both to local band levels and federal or provincial governments.

The land claim model allows for an influx of capital and this assists in the development of training and institutions. It is however, land-based and therefore restrictive regarding off-reserve members. It allows, however, an opportunity for harmonization of various factors and some security for long-term planning.

The Alaskan experience suggests pitfalls to the settlement of land claims through corporate structures. Corporations are known and accepted quantities in the larger Canadian context, but the lack of success in such structures as supportive in community growth and fiscal equity make their application limited to certain profit-motivated circumstances.

It is also argued that the fiscal relations between First Nations and the federal government should mirror those between the federal government and the provinces. The advantages of such an imposition are that the components of this type of fiscal relationship are known and tested. The accompanying transfer mechanisms are identified and the model fits with other government programs. The issues of policy control, ministerial accountability, the inter-relationship between institutions and the constitutional framework of such a system are well worn paths. Yet, it must be acknowledged that the federal-province governmental systems derive from British and European cultures and traditions. First Nation people have expressed a desire to put in place self-government regimes that reflect their own cultures, traditions and beliefs and which will ensure the legitimacy of these new governing institutions. Simply tinkering with the current fiscal regime to make it apply to First Nations will create a system which is irrelevant and unsatisfactory.

7.0 SUMMARY - PLANNING AHEAD

One of the critical foundations of self-government is a viable fiscal framework. How can the issue of fiscal relations be approached in the creation of the overall self-government model to ensure success? What is success? In its broadest terms, success is achieved when the First Nations unit is autonomous and independent, with self-supporting institutions that meet the needs of their constituency.

A preliminary consideration is whether the approach to a new fiscal relationship should be advanced nationally or on a case-by-case basis. First Nations seeking greater autonomy through self-government initiatives will be those who see the process as an opportunity to improve the situation of their members and to solve pre-existing problems. These units have the impetus for change. However, it would be contrary to the self-evolving nature of the process to impose a national blueprint, and would defy the basic principles of the development of government. The federal government must carefully analyze the individual self-government initiatives to determine an overall strategy which could be applied nationally.

Fiscal arrangements must have the features of being *functional, contextual, measurable, flexible but certain, resourced*, and based on *mutual respect and benefit*. The elements of a fiscal relationship including governance, accountability, tax and non-tax revenues and data exchange must contain, as a whole, all of the features. How can this best be achieved?

There are four stages in the development of the fiscal component:

1. Identify the existing governmental structure of the First Nation unit.

An inventory must be undertaken to determine the characteristics of the existing governmental structure and the history of fiscal relations with the First Nation unit. This analysis must review the current construct of the fiscal elements of governance, accountability, tax and non-tax revenues and data exchange. The history of the development of the existing government, its institutions, its current fiscal status and prior accountability record must be reviewed.

2. Analyze the effectiveness of the existing governmental structure.

In the determination of effectiveness, the context of the existing governance construct must be assessed to determine the source of the authority of the governing body and the degree of its legitimacy. This will create an understanding of the underpinnings of the current governance structure which the First Nation may wish to transfer to the new self-government model, and identify those aspects which are unable to support the other fiscal elements, particularly accountability. In the final analysis, the governance structure may or may not have been able to deliver effective services through the institutions it had developed.

As the literature has demonstrated, there are two arenas of accountability to consider.

In relation to the federal government, the recognition by the First Nation of a general duty to account in the past may eliminate some of the problems of creating that obligation in new fiscal arrangements. In the event that such recognition is not evident, it is still necessary to analyze the circumstances of prior fiscal relations to determine the position taken by the First Nation. In regard to the basis of the fiscal relationship in the past, the recognized status, prior obligations and authority of the two governments which have formed the foundation of previous

fiscal arrangements may establish a starting point for new contracts. The viewpoint of the First Nation as to the reason for the provision of fiscal resources, whether it is a result of contractual, constitutional/legal or moral obligation must be determined.

The second area of accountability is the link between the First Nation and its own members. How satisfied are band members with their own government? It must be identified whether there is legitimacy in the government, and what accountability mechanisms have been effective. The method of determining the effectiveness of current accountability must include input from the members themselves.

The extent to which the First Nation has been able to capitalize on tax and non-tax revenue opportunities, and difficulties encountered in jurisdictional parameters will be excellent indicators of potential future problems. The resources currently available and utilized by the band, and the accompanying skill levels in fiscal management may reduce the need for extensive funding in a new fiscal agreement.

A tremendous limitation in this investigation may be the lack of relevant data. At a time when energies are being routed to the development of a self-government model, it is doubtful that many resources may be applied to collection of data from the past structure. However, without knowing where the First Nation and the federal government have been, it is difficult to identify an appropriate footing for the new relationship.

3. Review the suggested self-government structure.

Assuming that a model has been developed or suggested for self-government, a comparison with the prior paradigm should be conducted to identify the elements of fiscal relations and the features which will be transferred or adopted. Elements which are grounded

in the cultural and social expectations of the constituency may assist in the transitions necessary through the process of self-government realization. Inevitably, the shortcomings of the prior construct which may also be transferred must be assessed.

Governance

Is the model municipal, regional or corporate in nature? The creation of the executive and legislative branches of the government must reflect the democratic principles of the country at large. Regardless of the scope of the governing body, there must be a method for control by the electorate.

The authority of the new government must be clearly delineated and must be established geographically and jurisdictionally. It may be necessary to negotiate with the provincial government or other governments for jurisdictional room. The demarcation of the authority of the new government will also involve specification of the land base, the constituency, the natural resources, and the legislative purview. This will capture the tax and non-tax revenues which may be available.

In consideration of the feature of mutual respect and benefit, it is to be remembered that much of the authority of the First Nation units is already existent from their historical sovereignty and flows from the inherent right to self-government.

Legitimacy of the new government structure will ensure that the energies of the constituency are supportive of the difficult road ahead, and that they will be part of any solutions to unforeseen problems. There must be considerable study of the process of legitimization of the new government. As the literature has shown, there is a greater potential for success if the authority and form of the government are recognized and accepted by the constituency. In this way, the fiscal relations which will be intrinsic to the process of self-government will be contextual and respectful of the culture and history of the First Nation unit.

Legitimacy is a principle that crosses between the concepts of governance and accountability. Accountability at both the governmental and constituency levels must be assessed.

Accountability

Accountability to the Constituency

As previously discussed, the new government must be legitimate and also respectful of the process of leadership in First Nations communities. Both aspects enhance accountability within the unit.

At the constituency level, there must be recognized objectives for the self-governing institutions to fulfill. The authority of these institutions will be accepted if their roles in achieving greater community goals are understood and defined. The fiscal relationships associated with these community dynamics become functional when the objectives are clear.

Fiscal equivalence, the concept that the citizen who pays the cost of government should receive the benefits, is also a tool to create accountability. This principle could be incorporated through the pursuit of tax revenue.

The inter-relationship of the governance structure and accountability at the constituency level is an aspect of fiscal relations which requires more research including a closer assessment of the self-government schemes already in place. This evaluation has been ably commenced by a recent report to DIAND, "Municipal Government Accountability Regimes: A Benchmark for First Nation Government Accountability?"¹²⁴. The writers review the municipal accountability regimes currently in place and the applicability of their components to First Nation governments. The principles of accountability are assessed in relation to political accountability, financial accountability and administrative accountability.

Accountability to the Federal Government

The first determination is the source of the obligation of the federal government to provide fiscal resources to the First Nation Unit. Does it arise from a new contract in which the objectives of the funding are clearly agreed and the accountability mechanisms understood? What are the benefits and consideration flowing to each of the parties?

The development of a requirement to account to the federal government must not contradict the essence of the self-government initiative or any previous arrangements. This contradiction could impact on the legitimacy of the new government.

¹²⁴Chowdhury, Tapas and Seguin, Lisa with Froot, Peter Municipal Government Accountability Regimes: A Benchmark for First Nation Government Accountability? Prepared for Fiscal Relations, Department of Indian Affairs and Northern Development, Centre for Municipal-Aboriginal Relations, November 30, 1998.

Constitutional obligations are not likely to be abrogated by contractual relations. New fiscal arrangements must be examined to determine whether they have an effect on the fiduciary duty of the federal government, and to determine if there is any reduction of the duty. An understanding between the parties which identifies the changes to the fiduciary duty in the new contract may be prudent. There is a need for research in this area.

Tax and Non-tax Revenues

This is an element of fiscal relations which will need to be addressed at a national level. There is a need for inter-governmental tax agreements between First Nation, municipal, provincial and federal governments and a movement out of the tax rooms in order to facilitate the new First Nation government. In addition, recognized principles of tax revenues such as fiscal equity and vertical equity must be addressed at a national level. Appropriate legislation should be passed to facilitate such agreements.

On a micro level, the individual self-government agreement must assess the potential tax revenues for the new government. Agreements at this level can still be negotiated with other governments to address the issues of tax revenues, sales tax, royalties, fees and licenses. The authority of the First Nation government to tax its own constituency both on and off-reserve, and the authority to tax non-Indians must all be incorporated into any new fiscal regime. Residency is an important component of the scheme.

The clear definition of the taxing authority of the First Nations at a national and local level will create some certainty of the revenue source and smooth the transition to a role similar to other governments. Tax revenues must be estimated.

The constituency of the First Nation unit and their role in governance will establish the person to whom the new local tax revenue parameter will apply. The principle of, "no taxation

without representation” must be evident in the fiscal framework. Further research is needed as to the rights of off-reserve First Nation people, and thus their potential as a tax revenue source. Any downloading by provincial governments must be evaluated. There is little research regarding the current changes in other governments and the potential consequences for First Nation units.

Property taxation, and the establishment of identifiable land parcels, is an issue which directly conflicts with the community ownership concept on many reserves. Changes to this structure must arise from an understanding by the membership as to the benefits to the community. The question remains as to the implications for individual members of not paying taxes on the land. If a band member were granted a parcel of land on which property taxes are charged, but fails to pay the taxes, is the First Nation government prepared to seize the land for non-payment of the tax? If so, what duty does the First Nation government still owe to the band member? The reversion of the land to the band would contradict the process of privatization, and yet the band and the federal government may continue to have an obligation to provide housing and other services to members. Can the land be used as security for banking purposes? Can it be sold to non-band members? These issues need more research and focus.

A further research inquiry is needed into the implications on own-source revenues of First Nations without a land base, or with a land base that has little or no potential for economic development.

As the Sechelt situation has shown, the First Nation person as a taxpayer and the s.87 exemption is a delicate issue, deserving of further research as to options available as an alternative to the exemption. In contractual terms, what is the incentive to release this exemption? The continued deterioration of this right, such as in the Union of New Brunswick Indians case (supra, Footnote 63), creates a stronger will to hold to the exemption, which

symbolizes a historic recognition of the independence of First Nations.

The agreement, and ancillary inter-governmental accords must address the issue of whether the First Nation government and its institutions, including corporations, will be subject to taxation by others. Such taxation may impact on the First Nation unit by affecting the growth of economic development and reduce the attraction of investment on First Nation territory. It also represents a drain of financial resources to external powers perhaps without reciprocation or services.

As an adjunct to the evaluation of the above issues in the individual self-government proposal in terms of tax and non-tax revenues, the views of the individual members of the First Nation should be canvassed to ensure that the taxation method is acceptable and will be viewed as legitimate. The historic disapproval of taxation can be changed if the essence of the collection is seen in cultural terms, and the revenues are viewed as necessary to the greater objectives of self-government. Taxation by one's own government is not as objectionable as taxation by another power, particularly when the benefits of the revenues generated can be exhibited in the communities themselves.

Data Exchange

A new government requires both reporting and planning data. The purposes of collecting data should clearly be articulated and formulated, not as a tool of accountability, but as a tool for planning. This should be the primary purpose of reporting data.

The secondary purpose of reporting data, is to report to the constituency as to the efficacy of the government's actions. The greater the accountability to the electorate, the less necessity for accountability mechanisms to the federal government.

Data collected in the context of the goals of the self-government agreement, must be able to identify when specific targets have been met. There must also be evaluation from a sociological point of view as to the effects of the agreement on the individual members. A trend, for example, of more members moving off-reserve, may signal a problem in the fiscal arrangement's impact on the individual band members.

4. Establish and prioritize the clear purposes of the fiscal relationship.

It is important to ensure that both the federal and the recipient governments recognize the purposes of the fiscal relationship and the ranking of the purposes. This prioritizing must be done in a cooperative manner with respect for each party. It must also clearly appreciate the skills and resources which may be lacking. From this ranking there will develop an implementation plan.

The process to self-government will uncover many problems not anticipated. It is essential that the federal government and the First Nation governments be candid, flexible, cooperative, and operate in an atmosphere of trust. This type of underpinning of the fiscal relationship will facilitate the incorporation of the features into particular fiscal relations, namely those of being functional, contextual, measurable, flexible but certain, resourced and with mutual respect and benefit.

Like a patchwork quilt, the number of self-government models across the country can be unique and colourful, but bound together by common and sensible threads. This is particularly necessary in the establishment of new fiscal relations, the foundation for the success of self-government. All participants must recognize the need for fairness and accountability. The new fiscal relationship must be woven with careful planning, research and review at each step for the individual First Nation and for the evolution of First Nation people across Canada.

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