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SELF-GOVERNMENT AGREEMENTS AND THE PUBLIC WORKS FUNCTION

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EXECUTIVE SUMMARY

Purpose and Scope

Real Property Services for Indian and Northern Affairs Canada (RPS for INAC) is interested in commencing activities and discussions concerning the development of guidelines or best practices under which governance structures and processes associated with public works functions can be developed by First Nations as they move closer to self-governing status. The Institute On Governance has been asked to provide its expertise in this initiative.

The specific objectives of this exercise are three fold:

1) to advance the thinking of officials in RPS for INAC, Indian and Northern Affairs Canada (INAC) and First Nations on governance issues relating to the public works function so that these officials will be better positioned to advise on self-government negotiations;
2) to work in partnership with First Nations in developing guidelines for the development of governance structures and processes associated with public works functions in First Nation communities to ensure the safety and security of citizens; and
3) to determine if further research or analysis is required and, if so, what might be the priorities and approaches to such research.

The purpose of this paper is to provide background information for a one day seminar on the public works function related to the above objectives. Specifically, the paper will analyze self-government agreements with a view to describing a) the similarities and differences with the tiered governance model developed by the Royal Commission On Aboriginal Peoples; and b) the treatment of the public works function as it relates to the government's Inherent Right Policy.

For the purposes of this paper, the Public works function will be defined quite broadly as follows:

> the planning, design, financing, construction, maintenance, research and related regulatory and redress regimes pertaining to
>
> - public buildings (government buildings, schools, libraries, recreational facilities etc.)
> - roads, bridges and related infrastructure;
> - infrastructure related to housing;
> - systems for providing potable water;
> - systems for collecting, treating and disposing of sewage;
> - solid waste collection and disposal; and
> - the development of community plans and related zoning regimes.

The Approach of the Royal Commission

The Commission answers the question of what is the desirable level for government functions by proposing a four-level model: the local community; the Aboriginal Nation; Multi-nation Organizations at the regional or provincial level; and Canada-wide networks. The fundamental building block within this model is the Aboriginal nation which, across all policy fields, - including

the public works function – would have three fundamental responsibilities: law-making, policy development and resource allocation. Built into the definition of the Aboriginal nation is a notion of having the sufficient size and capacity to assume the powers and responsibilities flowing from a right to govern. The Commission further elaborates on this principle of "sufficient size and capacity" by referring to such factors as the scarcity and cost of skilled personnel, and considerations of scale - for example, having the size and financial strength to act effectively in the global economy. It is also likely that integrity in government was another rationale behind the choice of the nation as the fundamental building block.

The Inherent Right Policy and the Public Works Function

Of particular importance for the purposes of this paper are the sections of the Inherent Right Policy dealing with the scope of negotiations (what jurisdictions will be negotiated for Aboriginal governments) and the relationship of laws (which governments' laws take priority in the event of a conflict).

In terms of the scope of negotiations, the federal policy guide lays out three distinct categories of jurisdiction. The first, which is termed "Aboriginal jurisdiction or authority", is described as extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution. Not surprisingly, many of the functions that fall under or are closely linked to the definition of public works outlined above, are explicitly mentioned in the Policy Guide.

The second category consists of shared areas of jurisdiction that may go beyond matters integral to Aboriginal culture or internal to an Aboriginal group. The third and final category contains subject matter, for which there are no compelling reasons for Aboriginal governments to exercise law-making authority. The following table summarizes the main points of the policy with regards to potential jurisdiction vis-à-vis public works:

JURISDICTION RELATING TO PUBLIC WORKS		
Category #1 **Aboriginal Jurisdiction**	**Category #2** **Shared Jurisdiction**	**Category #3** **Exclusive Federal Jurisdiction**
Examples: • management of public works and infrastructure • zoning, service fees • housing • local transportation	Examples: • Environmental protection and assessment • Emergency preparedness	Examples: • Health and safety of all Canadians
Priority of Laws: • Aboriginal laws or harmonization	Priority of laws: • Federal or provincial laws	Priority of laws: • Federal laws

Self-government Agreements

Building on the analysis of the Royal Commission's approach and the Inherent Right Policy, the Institute summarizes the treatment of the public works function in a number of past and current self-government agreements. The self-government agreements are grouped into four categories that are inspired by the analysis of the Royal Commission.

Comprising this first category are four sets of agreements: the Sechelt self-government agreement, which resulted in legislation in 1986; the agreements respecting six Yukon First Nations; and two recent agreements-in-principle – one relating to the Westbank First Nation and the other, involving the United Anishnaabeg Councils. These agreements place law-making jurisdiction at the community as opposed to the Nation level.

The second category is made up of two recent agreements, both 'sectoral' in nature and concluded in 1997, with a similar governance model. The agreements place law-making authority with First Nation communities but, at the same time, establish a board with central service functions. The first such agreement involves 14 First Nations under the Framework Agreement on First Nation Land Management. The second relates to Mi'kmaq education in Nova Scotia.

Self-government regimes established subject to the James Bay and Northern Quebec Agreement and the Northern Quebec Agreement form a third category where most law-making jurisdiction is vested at the community level but this basic approach is supplemented by a central service body, some central advisory bodies and some special purpose bodies at the Nation level with law-making powers.

The Nisga'a Agreement-In-Principle occupies a fourth category. Under this agreement, two tiers of government will be established by the Nisga'a, one at the Nation level and another at the village level This agreement moves considerably towards the Commission's model whereby most law-making, policy and resource allocation are vested with the Nation as opposed to the local community.

Conclusions

A central conclusion flowing from the above survey of these self-government agreements, specifically in regards to their treatment of the public works function, is that there is little consistency among the agreements. Such a conclusion is understandable in comparing the older and more current agreements. And some of the agreements are sector rather than comprehensive agreements. But even among the current agreements (i.e. those put in place since the adoption of the Inherent Right Policy) there are important differences in the treatment of this function.

In light of this conclusion, a number of issues appear to emerge for discussion at the one day seminar :

Issue # 1: To what extent should future self-government agreements treat the public works function in a more consistent fashion? More precisely, how should such agreements deal with the following:

- The scope of the function, both its operating and regulatory dimensions;
- The type of inspection and enforcement powers required;
- Penalties;
- Redress mechanisms;
- Transfer of assets;
- Harmonization with federal and provincial laws;
- Relevant provincial and federal standards; and
- Priority of laws in the event of a conflict.

Issue # 2: Should future agreements have a separate section that deals with the public works function in a comprehensive manner.

Issue # 3: How should the operating and regulatory responsibilities associated with the public works function best be assigned in self-government agreements – in both single tier and two tier governance systems - so as to avoid a potential for institutional bias (or possible 'under regulation') and which governance system appears best able to handle the divergent nature of these two responsibilities?

Issue # 4: What has been the experience of existing self-governing entities with the public works function and would further research in this area prove fruitful?

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SELF-GOVERNMENT AGREEMENTS AND THE PUBLIC WORKS FUNCTION

1. INTRODUCTION

1.1 Purpose

Real Property Services for Indian and Northern Affairs Canada (RPS for INAC) is interested in commencing activities and discussions concerning the development of guidelines or best practices under which governance structures and processes associated with public works functions can be developed by First Nations as they move closer to self-governing status. The Institute On Governance has been asked to provide its expertise in this initiative.

The specific objectives of this exercise are three fold:

1) to advance the thinking of officials in RPS for INAC, Indian and Northern Affairs Canada (INAC) and First Nations on governance issues relating to the public works function so that these officials will be better positioned to advise on self-government negotiations;
2) to work in partnership with First Nations in developing guidelines for the development of governance structures and processes associated with public works functions in First Nation communities to ensure the safety and security of citizens; and
3) to determine if further research or analysis is required and, if so, what might be the priorities and approaches to such research.

The holding of a one day seminar on the public works function will be the major event around which this study is structured. Participants at the seminar will include officials from RPS for INAC, INAC, Health Canada and First Nation technical organizations and outside experts with experience related to the public works function.

The purpose of this paper is to provide background information for this seminar. Specifically, the paper will analyze self-government agreements with a view to describing a) the similarities and differences with the tiered governance model developed by the Royal Commission On Aboriginal Peoples; and b) the treatment of the public works function as it relates to the government's Inherent Right Policy.

1.2 Scope

For the purposes of this paper, the Public works function will be defined quite broadly as follows:

the planning, design, financing, construction, maintenance, research and related regulatory and redress regimes pertaining to

- public buildings (government buildings, schools, libraries, recreational facilities etc.)

- roads, bridges and related infrastructure;
- infrastructure related to housing;
- systems for providing potable water;
- systems for collecting, treating and disposing of sewage;
- solid waste collection and disposal; and
- the development of community plans and related zoning regimes.

In terms of self-government agreements, the Institute in this paper examines some 'older' agreements – Sechelt, the Cree-Nascapi of Northern Quebec, the Yukon – as well as some more recent agreements – the Framework Agreement on First Nation Land Management, the Mi'kmaq education agreement, the Nisga'a Final Agreement, and two agreements-in-principle: one with the Westbank First Nation and the other with the United Anishnaabeg Councils.

1.3 Organization

The organization of this paper follows from the above discussion of scope. In the section that follows, the Institute summarizes the approach of the Royal Commission to structuring Aboriginal self-governments with a land base. This discussion is then followed by a brief overview of the federal government's Inherent Right Policy as it pertains to the public works function. Based on these sections, the Institute examines self-government agreements, using the Commission's model as a means to categorize the agreements. The paper ends with a short concluding section, the aim of which is to drawn out particular issues or ideas that might form the focus of discussions at the seminar.

2. THE ROYAL COMMISSION'S GOVERNANCE MODEL

2.1 Introduction

The issue of what level of government is best equipped to deal with certain key responsibilities has been prominent in Canada for the last thirty years, if not longer. Indeed, this question is at the centre of the national unity debate with numerous proposals for re-aligning federal and provincial responsibilities.

More recently, this issue has assumed increasing prominence with regards to the distribution of responsibilities between provinces and municipalities and within the municipal level in terms of regional versus 'city' governance units.[1] A variety of factors appear to be at play including the following:

- a desire to simplify urban governance to make it more understandable and accountable;
- the need to ensure some local influence on the make-up and delivery of certain key public programs (e.g. zoning decisions, some matters relating to education);
- a desire to realize cost savings (e.g. witness the reduction in the number of local governance bodies such as school boards);
- a better matching of responsibilities with fiscal capacity;
- the need to ensure improved coordination of certain government functions (e.g. policing services, transportation matters); and
- the importance of having an urban 'environment' conducive to competing in a global economy.

This issue of "who should do what" has had less prominence in the design of Aboriginal self-governments, in part because there have been so few agreements reached in Canada. Nonetheless, there are now over 300 First Nations engaged in some kind of self-government negotiations and there is little doubt that this issue must be addressed. In its treatment of Aboriginal self-government, the Royal Commission On Aboriginal Peoples has made a significant contribution to this issue in terms of its recommendations and proposed governance models.

2.2 The Approach of the Royal Commission

The key role of the Aboriginal Nation

The Commission's approach to the question "What is the most desirable level (or levels) for government functions?"[2] is centred on its distinguishing between an Aboriginal nation, of which

[1]This debate is not confined to Canada. Indeed, one urban expert has recently commented that urban reform in Canada is "puny" compared to the agendas in other countries: "While the debate on local government in Canada seems fixated on whether to have weak municipalities with medium sized populations or weak municipalities with large populations, countries such as South Africa have focused on more substantive concerns. The World Bank says that more than 60 countries are undergoing formal decentralization." Jeb Brugman, "Our Cities are missing the boat", *Globe and Mail*, May 5, 1997

[2]*Report Of the Royal Commission On Aboriginal Peoples*, Volume 2, Part 1, P. 156

there are 60 to 80 across Canada, and a local Aboriginal community, of which there are about 1000. The Commission defines an Aboriginal Nation as having the following three characteristics:

" • the nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland;
• it is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and
• it constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base."[3]

Based on its legal analysis, the Commission concludes that the international right to self-determination, which, according to the Commission, is the "... fundamental starting point for Aboriginal initiatives in the area of governance"[4], is vested in Aboriginal nations rather than small local communities. In addition, Aboriginal peoples possess the inherent right of self-government within Canada, a right guaranteed under section 35 of the *Constitution Act 1982* and that, here too, this right is vested "... in people that make up Aboriginal nations, not in local communities as such."[5]

As a corollary, the Commission maintains that Aboriginal people are entitled to identify their own national units for the purpose of exercising their rights to self-government and that their nations do not have to be recognized by the federal government. Nonetheless, as a practical matter, there is a need for federal and provincial governments to acknowledge the existence of the various Aboriginal nations in order to engage in serious negotiations "... designed to implement their rights of self-determination".[6]

The four-level organization model

Thus, from the Commission's perspective, the fundamental building block for its proposed model of governance is the Aboriginal nation and, consequently, in its treatment of individual policy spheres such as economic development, education, health, culture and language, the Commission recommends that the law-making authority be vested with the Aboriginal nation as well as the capacity to develop policy.

From that starting point, the Commission identifies four levels of responsibility for government functions - the local community, the Aboriginal Nation, the multi-nation level and, finally, the

[3]ibid, Volume 2, Part 1, P. 182

[4]ibid, Volume 2, Part 1, p. 193

[5]ibid, Volume 2, Part 1, P. 236

[6]ibid, Volume 2, Part 1, P.184

Canada-wide level. Table 1[7], on page 7, illustrates the application of this model to the field of education. At the local community level, politicians and officials would be responsible for, among other things, implementing nation policy in local Aboriginal institutions and making decisions on the instruction of local students.

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

The fourth level of organization is what the Commission terms "Canada-wide networks". In the case of education, such networks would take a "... federated form rather than a centralized hierarchy"[8] and would include an Aboriginal Peoples' International University, an electronic clearing house, a statistical clearing house, a documentation centre and associations for standard-setting and accrediting post-secondary programs and institutions.

The governance model and economic development

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

> Responsibility for programming should not be lodged at the level of individual First Nation, Metis, or Inuit communities, where most funding and programming are now directed. There is a strong case for implementing economic development programs at the level of the Aboriginal nation, confederation or provincial/territorial organization, given the scarcity and cost of skilled personnel, among other factors. There are also considerations of scale. Better choices can be made if decision makers can choose from a number of alternatives, encourage linkages that go beyond the boundaries of particular communities, and amass the financial resources to support large projects as well as small ones. In a world of large international trading blocks that are gradually eroding the importance of state borders, Aboriginal people will need to have units of sufficient scale and strength to act effectively in a highly competitive environment.[9]

Based on this rationale, the Commission applied its four-level model and proposed that only the managing of certain economic development personnel be located at the local community level. There may have been one other rationale behind the Commission's identifying the Aboriginal Nation as the fundamental building block and that had to do with integrity in governance. The Commission notes the following:

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[7]This table is taken directly from the Commission's report. See Volume 3, P.564

[8]ibid, Volume 3, P. 565

[9]ibid, Volume 2, Part 2, P. 838

> There is a widespread perception in some communities that their leaders rule rather than lead their people, and that corruption and nepotism are prevalent. Increasingly, Aboriginal people are challenging their leaders through a variety of means, including legal suits brought against leaders by individual members for alleged breaches of public duty. For First Nations people, this situation is traced to the *Indian Act* system of governance and associated administrative policies. Over the past 100 years the act has effectively displaced, obscured or forced underground the traditional political structures and associated checks and balances that Aboriginal peoples developed over centuries to suit their societies and circumstances.[10]

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

2.3 Conclusion

In summary, the Commission answers the question of what is the desirable level for government functions by proposing a four-level model. The fundamental building block within this model is the Aboriginal nation which, across all policy fields, - including the public works function – would have three fundamental responsibilities: law-making, policy development and resource allocation. Built into the definition of the Aboriginal nation is a notion of having the sufficient size and capacity to assume the powers and responsibilities flowing from a right to govern. The Commission further elaborates on this principle of "sufficient size and capacity" by referring to such factors as the scarcity and cost of skilled personnel, and considerations of scale - for example, having the size and financial strength to act effectively in the global economy. It is also likely that integrity in government was another rationale behind the choice of the nation as the fundamental building block.

The question that the Institute addresses in Section 4 is how the Commission's four-level model stacks up against self-government approaches developed in the past or pending approval today. Prior to doing so, the next section examines the relevance of the government's Inherent Right Policy to the public works function.

[10] ibid, Volume 2, Part 1, P. 345-346

Table 1

MODEL OF AN ABORIGINAL EDUCATION SYSTEM

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

3. THE INHERENT RIGHT POLICY AND THE PUBLIC WORKS FUNCTION

Adopted by the federal government in 1995, its policy on implementing the Inherent Right of Self-government has important implications for all governmental functions including public works. Matters spelled out in the policy guide such as the approach to accountability, fiduciary obligations, financial arrangements, transition measures and the jurisdiction over non-members are all relevant to the exercise of a public works function. Of particular importance for the purposes of this paper are the sections dealing with the scope of negotiations (what jurisdictions will be negotiated for Aboriginal governments) and the relationship of laws (which governments' laws take priority in the event of a conflict).

In terms of the scope of negotiations, the federal policy guide lays out three distinct categories of jurisdiction. The first, which is termed "Aboriginal jurisdiction or authority", is described as "…likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution."[11] Not surprisingly, many of the functions that fall under or are closely linked to the definition of public works, outlined in the introductory section of this paper, are explicitly mentioned in the Policy Guide including

- land management encompassing, among other elements, zoning and service fees;
- local transportation;
- housing;
- health;
- the administration and enforcement of Aboriginal laws; and
- the management of public works and infrastructure.

For some matters in this first category, Aboriginal laws would take priority over conflicts with federal law; in other instances arrangements would be necessary for some harmonization of laws to occur.

The second category consists of those areas that may go beyond matters integral to Aboriginal culture or internal to an Aboriginal group. To the extent that the federal government has jurisdiction in these areas, it is prepared to negotiate "…some measure of Aboriginal jurisdiction or authority"[12] with the proviso that primary law-making authority would remain with the federal or provincial governments and "…their laws would prevail in the event of a conflict with Aboriginal laws."[13] Matters included in or closely related to the public works function in this category are:

- environmental protection, assessment and pollution prevention; and
- emergency preparedness.

[11] "Federal Policy Guide Aboriginal Self-Government", Minister of Public Works and Government Services, 1995, P. 5
[12] ibid, P. 6
[13] ibid, P. 6

The third and final category contains subject matter, which, according to the Policy Guide, "…there are no compelling reasons for Aboriginal governments to exercise law-making authority."[14] These can be grouped under two headings – powers related to Canadian sovereignty, defence or external relations and second, other national interest powers such as the management and regulation of the national economy and the protection of the health and safety of all Canadians. In exercising jurisdiction relating to the health and safety of all Canadians, the federal government can affect the public works function of an Aboriginal government – for example, in setting and enforcing standards relating to the treatment and disposal of PCBs under the Canadian Environmental Protection Act.

The following table summarizes the main points of the policy with regards to public works:

JURISDICTION RELATING TO PUBLIC WORKS		
Category #1 **Aboriginal Jurisdiction**	**Category #2** **Shared Jurisdiction**	**Category #3** **Exclusive Federal Jurisdiction**
Examples: • management of public works and infrastructure • zoning, service fees • housing • local transportation	Examples: • Environmental protection and assessment • Emergency preparedness	Examples: • Health and safety of all Canadians
Priority of laws: • Aboriginal laws or harmonization	Priority of laws: • Federal or provincial laws	Priority of laws: • Federal laws

The reference to provincial laws is important with regards to the public works function. The Policy Guide states a strong federal preference to involve provincial governments in the negotiations to achieve self-government in order to effect "…workable and harmonious intergovernmental arrangements."[15] Given the strong provincial presence in the public works function – from building codes and fire regulations to environmental protection regimes regarding solid waste management – their involvement is crucial to achieving the appropriate levels of harmonization among neighbouring Aboriginal and non-Aboriginal governments.

[14] ibid, P. 6

[15] ibid, P.23

4. SELF-GOVERNMENT AGREEMENTS

The purpose of this section is to build on the analysis of the previous sections by summarizing the treatment of the public works function in a number of past and current self-government agreements. The self-government agreements are grouped into four categories that are inspired by the analysis of the Royal Commission, summarized in Section 2: those which are essentially community-based; those which are community-based but with a significant multi-community service body; those that are a hybrid, combining aspects of a community and Nation-based approach and finally, one agreement, the Nisga'a Final Agreement, which appears to be similar to a nation-based approach as proposed by the Royal Commission.

4.1 Community-based agreements

Comprising this first category are four sets of agreements: the Sechelt self-government agreement, which resulted in legislation in 1986; the agreements respecting six Yukon First Nations (Champagne and Aishihik, Nacho Nyak Dun, Teslin Tlingit and Vuntut Gwitchin, confirmed in legislation in 1994[16] and two others – Little Salmon River/Carmacks and Tr'on Dek Hwech') and two recent agreements-in-principle – one relating to the Westbank First Nation and the other, involving the United Anishnaabeg Councils. These agreements place law-making jurisdiction at the community as opposed to the Nation level.

Sechelt

In the case of Sechelt, section 14 of the *Sechelt Indian Band Self-government Act* provides to the Band's council "...the power to make laws in relation to matters coming within any of the following classes of matters..."[17]. The section then proceeds to list some twenty categories including many directly related to the public works function: zoning and land use planning; the use, construction, maintenance and demolition of buildings and structures; the administration and management of property belonging to the Band; expropriation for community purposes; and the construction, maintenance and management of roads. However, missing from this list is a specific authority for an environmental protection regime and for environmental assessments. Further, there appear to be no adequate enforcement or inspection powers for environmental and health-related matters and penalties are low ($2000 or two years imprisonment). Finally, while provincial laws of general application apply, there may be gaps, given that these laws apply to "members" as opposed to the land itself and that the land continues to enjoy 91(24) constitutional status and thus may be immune to provincial laws relating to land issues such as certain environmental laws.

In addition to the above potential shortcomings, there does not appear to be any specific provision in the Act that would provide the authority for the Sechelt government to charge user fees for some services provided under the public works rubric. Nor is there any specific reference to redress

[16] In terms of population, as of December 1996, Sechelt's total on and off reserve population was 961; the six Yukon First Nations ranged in size from 425 to 677. (Source: "Indian Register Population by Sex and Residence 1996").

[17] *Sechelt Indian Band Self-Government Act*, 1986, C. 27

mechanisms (although the Act does provide for law-making for matters related to "…the good government" of the Band, its members or Sechelt land).
The Act also establishes a District Council, the membership of which is identical to the Sechelt Indian Band Council and with jurisdiction over the same land mass. Once recognized by the Government of British Columbia, this District Council can exercise the powers and functions of a municipality. In short, it provides the band with a legal means for accessing the BC legislative framework for municipalities and is not, as some authors have suggested, a "regional tier" of government.[18]

In regards to the framework laid out by the Inherent Right Policy, the Sechelt self-government regime appears to consistent with this framework, with the exception that no Sechelt laws of a local nature are accorded priority over conflicting federal laws. In addition, the manner in which the land is treated – the transfer of fee simple title to the Band while maintaining its 91(24) status - would likely not be allowed in current agreements. Finally, the harmonization of Sechelt laws with those of the Province in certain areas is not specifically addressed.

Yukon Self-Government Agreements

The Yukon regime establishes three categories of law-making authority. In the first category, the First Nation has exclusive power to enact laws relating to the administration and internal operation of the First Nation Council and the management and administration of rights or benefits flowing from the Final Agreement. In the second category, the Yukon First Nations have the right to enact laws relating to a number of matters affecting its citizens anywhere in the Yukon (for example, education, health services, language, marriage etc.) In the final category, and the one relevant to the public works function, the First Nation has the power to enact "...laws of a local or private nature..."[19]. Several of the matters listed relate directly to public works including the control of the construction, maintenance and demolition of buildings and structures; the control of the sanitary condition of buildings or property; planning, zoning and land development; expropriation; the provision and operation of local services and facilities; control over matters related to dangers to public health; and control or the prevention of pollution and protection of the environment. (The lands claims agreement provides for the establishment of an environmental assessment process.)

Territorial laws of general application apply to both citizens and First Nation lands but First Nation laws take priority when there is a conflict. Federal laws of general application apply and have priority in the event of a conflict with First Nation laws. The parties have agreed, however, to enter into a new agreement or amend their existing self-government agreement to indicate where First Nation laws will prevail over conflicting federal laws.

Potential weaknesses from the perspective of the public works function are no specific reference to inspection and enforcement powers either in the health or environmental fields; penalty provisions

[18]See, for example, "What Could Urban Self-Government Look Like?" by Donavon Young in *Aboriginal Self-Government in Urban Areas*, edited by Evelyn Peters, (Institute of Intergovernmental Relations, Queen's University, 1995).

[19]*The Teslin Tlingit Council Self-Government Agreement*, section 13.3

are low ($5000 or six months in jail); there are no innovative measures for pollution control or restitution; there is no specific authority to charge user fees; no specific provision is made for redress mechanisms; and harmonization of laws in certain areas of overlap with federal and provincial jurisdiction is not specifically addressed. (The First Nations and the territorial government, however, are committed to consult one another, prior to enacting any law which may have an impact on the other party).

In comparison to the four-level model of the Commission, these agreements are a single level approach. More significantly, the legislative, policy-making and resource allocation functions that the Commission proposes be placed at the Nation level are found in these agreements at the community or First Nation level.[20] That said, these First Nations have a broad delegatory power to, among others, a tribal council or the Council for Yukon Indians.

With some of the exceptions noted above, the Yukon Agreements appear generally consistent with the Inherent Right Policy in regards to the public works function.

The Westbank First Nation Agreement-in-Principle

This agreement-in–principle, negotiated between the federal government and the Westbank First Nation and signed in July 1998, is one of the few agreements with a section dedicated to public works (the section is entitled "Public works, Community Infrastructure and Local Services"[21]). Among other things, this section provides for inspection powers for health and safety purposes; paramountcy of Westbank laws over federal laws when in conflict so long as "…Westbank First Nation health and safety standards and technical codes regarding public works, community infrastructure and local services are at least equivalent to federal health and safety standards and technical codes"[22]; and jurisdiction respecting the levying and collecting of "development cost charges and development permit fees"[23].

Other sections of the Agreement deal with public works or related functions including jurisdiction over zoning and land use planning and the use, construction, maintenance and demolition of buildings and structures. There are also significant sections of the agreement focusing on environmental assessments and environmental protection[24], sections which include a number of paragraphs outlining inspection and enforcement powers. These sections also contemplate

[20]Echoing the concerns of the Commission about the potential lack of capacity of community level to exercise self-government powers is a case study done for the Royal Commission on one of the four Yukon First Nations - the Teslin Tlingit First Nation - that have a settled claim and self-government agreement, confirmed in legislation. In the case study's concluding section, the author, Sheila Clark has this to say:
"The third area that will require further research, analysis, and action is the problem of achieving the goal of self-government with approximately five hundred Teslin Tinglits. Almost half of the Teslin Tlingit citizens live outside of Teslin. Already, some citizens of the Teslin Tinglit First Nation wear more than one hat, sometimes the case is two or three. The Teslin Tinglit First Nation will have to take an indepth look at how it can most effectively achieve their goals of mature self governance with such a narrow population base."

[21] " Self-Government Agreement-In-Principle Westbank First Nation", July 1998, P. 25
[22] ibid, P. 59
[23] ibid, P. 59
[24] See pages 36 to 44

harmonization of federal and Westbank laws "…with the involvement of the province where the province agrees to participate"[25].

One important aspect of the Westbank Agreement not found in the Sechelt Agreement is the power to delegate any of its jurisdiction to a tribal, regional or national body established by First Nations so long as the delegatee body meets one of two conditions – i.e. that it is acting under an implemented self-government agreement with Canada that provides for the exercise of such jurisdiction or where a court recognizes the right of that delegatee body to exercise such jurisdiction. (These candidates for delegation are much narrower than those in the Yukon agreements.)

According to the self-government agreement, the Westbank Constitution shall provide for appeal mechanisms and presumably such mechanisms could be developed for public works functions. There is, however, no specific power to charge user fees for public works-type services.

United Anishnaabeg Councils

Signed in June 1998, this agreement-in-principle is between Canada and eight First Nations which form the Grand Council of the United Anishnaabeg Councils. Like the Westbank Agreement-in-Principle described above, this one also has a section dealing explicitly with public works and infrastructure and provides for law-making authority over the design, construction, renovation, acquisition, operation and maintenance of facilities or structures dealing with, among other things water and sanitation systems, waste disposal, energy supply and distribution, fire protection, transportation infrastructure and community services. The section also provides for the entering into agreements with other bodies, whether public or private, for the planning and delivery of such activities; states that First Nation codes, regulations, standards and policies shall meet or exceed federal and provincial standards (note that the Westbank agreement refers only to federal standards); and provides for the paramountcy of First Nation laws in this area in the event of conflict with federal laws.

Other sections of the agreement are relevant as well. The section dealing with land, for example, provides for broad powers relating to, among other things, the development, conservation, use and disposition of First Nation land; and for the transfer of fixed assets of Canada on First Nation land. There is an extensive section on environmental assessment but none on environmental protection – this latter matter is one among several listed in the Agreement as subject areas for further discussions between Canada, the First Nations and the Province of Ontario. No powers of inspection, either related to health or the environment, are spelled out in Agreement nor is there any explicit power to collect user fees. The application of provincial laws will be addressed in the final agreement.

Paralleling the Westbank Agreement is a clause which provides for the First Nations to delegate their authority to make laws – in this case to the United Anishnaabeg Councils or to any other entity that has entered into a self-government arrangement with Canada.

[25] ibid, P. 37

4.2 Community-based approaches combined with a central service body

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

Framework Agreement on First Nation Land Management

This agreement was signed in January 1996 by Canada and thirteen First Nations from across Canada - five from British Columbia, one from Alberta, two from Saskatchewan, one from Manitoba and four from Ontario.[26] Legislation to implement this agreement was introduced in the spring of 1997 but died on the Order Paper. A new bill has been re-introduced in the spring of 1998.

The Framework Agreement provides for a First Nation with a land code (a kind of Constitution adopted by the First Nation in a referendum process) to have the powers to make laws, in accordance with its land code, "...respecting the development, conservation, protection, management, use and possession of First Nation land and interests and licences in relation to that land."[27] Included in this broad power is the capacity to adopt laws related to some public works related functions including zoning, land use, subdivision control and land development.

There are also extensive sections dealing with environmental protection and assessment, with a commitment on the parties to work out harmonization arrangements with the affected provinces. The section on environmental protection identifies four areas - solid waste management, fuel storage tank management, sewage treatment and disposal and environmental emergencies - as matters essential for the First Nations to enact laws. This section provides as well for broad powers of inspection for First Nation officials.

In addition to investing law-making and revenue management responsibilities with the individual First Nations, the Agreement calls for the establishment of a Lands Advisory Board with three types of responsibilities:

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

The Agreement also calls for a funding agreement to be negotiated between the federal government and the Board for an initial five year period. The legislation implementing the Agreement will not

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

[27] Framework Agreement On First Nation Land Management, section 18

include the establishment of the Board and its functions. Furthermore, the Agreement has a section indicating how the Board's functions will be handled, should the Board cease to exist.

Mi'kmaq Education

A second agreement with a governance structure similar to that of Land Management agreement concerns Mi'kmaq education in Nova Scotia and involves nine First Nations.[28] Like the lands agreement described above, this agreement, signed in February 1997, assigns the "...power to make and administer laws with respect to primary, elementary, and secondary education on reserve..."[29] to the participating communities, in accordance with a community constitution. Given its educational focus, it has little direct relevance to public works (save for the construction and maintenance of schools) but is included in this survey because of the establishment of a "body corporate" having as its objective "...the support of the delivery of education programs and services by participating communities."[30] The membership of this central service body, to be called Mi'kmaw Kina'masuti, will consist of the participating communities and be governed by a constitution of its own.

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

" a) To assist and provide services to individual bands in the exercise of their jurisdiction over education;
b) To assist individual bands in the administration and management of education for the Mi'kmaq Nation in Nova Scotia.
c) To provide the Mi'kmaq Nation in Nova Scotia a facility to research, develop and implement initiatives and new directions in the education of Mi'kmaq people.
d) To co-ordinate and facilitate the development of short and long term policies and objectives for each Mi'kmaq community in Nova Scotia, in consultation with the Mi'kmaq communities. "[31]

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

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[28] The nine First Nations range in size from 3062 (Eskasoni) to 184 (Annapolis Valley). Total population of all nine First Nations was 8906.

[29] *An Agreement with Respect to Mi'kmaq Eduction,* section 5.1.1

[30] ibid, Section 5.7.1

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

4.3 A hybrid model - the Cree of Quebec

The James Bay and Northern Quebec Agreement (JBNQA), signed in 1975, and the Northern Quebec Agreement (NEQA), signed in 1978 were the first two modern self-government and claims agreements.[32] The JBNQA comprises 31 sections and 12 supplementary agreements and deals with the Quebec Cree nation and the Northern Quebec Inuit. The NEQA consists of 20 sections and involves the Nascapi nation.

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

For the illustrative purposes of this paper, the Institute has chosen to focus on the Cree regime[33], given that there are differences among those established for the Inuit and Naskapi.

Section 45 of the federal act provides that a band "...may make by-laws of a local nature for the good government of its Category IA or IA-N land and of its inhabitants of such lands..." and then proceeds to list a long series of matters including the administration of band affairs, health and hygiene, public order and safety, protection of the environment, taxation for local purposes, roads and transportation and the operation of businesses. Not included in this list was, among other things, education.

Specific jurisdictions relating to the public works function were the following:

- the regulation of buildings for the protection of public health and safety, including the construction, maintenance, repair and demolition of buildings;
- the control or prohibition of activities or undertakings that constitute a danger to public health;
- the construction, operation and regulation of waste disposal systems
- the operation of fire departments;
- protection of the environment and the prevention of pollution;
- maintenance and construction of roads;
- parks and recreation; and
- the construction, operation and maintenance of wharves and harbours etc.

In addition to these powers, there is specific provision in the Act for by-law making power with regards to user charges for local services with the proviso that such by-laws may "…differentiate on

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

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

an equitable basis between different categories of users and different categories of land…"[34]. This power to charge user fees cannot be delegated and the actual user charges cannot exceed the actual cost of the service.

From the perspective of the late 1990s, the Act does not appear to provide for explicit powers of enforcement and inspection, the penalties are low and not "Aboriginally sensitive" and there is no harmonization process established with the Province in such areas as environmental protection.

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

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

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

Other Acts adopted pursuant to the JBNQA by the Quebec government established additional Cree bodies. For example, again in June 1978, the Quebec government passed an Act respecting the Cree Regional Authority, a public corporation with two principal functions: the first being to administer the compensation under the claims agreement; and the second, to "...establish, administer and co-ordinate, at the request of the village corporations (in Category I lands), the services or programs established by a corporation or band".[35] Other examples of nation-wide bodies involve the hunting, fishing and trapping regime established under the Agreement, the environmental regime and the area of health and social services.

In summary, the Cree governance regime is essentially a hybrid. Most law-making jurisdiction is vested at the community level but this basic approach is supplemented by a central service body, the Cree Regional Authority, some central advisory bodies and in the case of education, a Cree school board with law-making powers, albeit subject to the approval of the minister. There is nothing equivalent to the third and fourth levels of the Royal Commission's model, save the Quebec Ministry of Education, which is obviously not an Aboriginally controlled body.

[34] "Cree-Nascapi (of Quebec) Act", 1984, Section 45 (5)
[35] Alain Arcand, op. cit. P. 6

4.4 The Nisga'a Final Agreement

Initialled by the parties on August 4, 1998, the Nisga'a Final Agreement, which is both a self-government and comprehensive claims agreement, merits a category of its own because of the configuration of law-making powers between the local communities and the central government. Among all the agreements surveyed in this paper, it comes the closest to the model proposed by the Royal Commission.

The Agreement defines "Nisga'a Government" as consisting of two levels: Nisga'a Central Government, referred to in the Agreement as the Nisga'a Lisims Government and Nisga'a Village Governments, of which there would be initially four.[36] The central government would consist of at least three officers elected at large, the chief and other councillors of the Nisga'a Village Governments and one representative from each of the Nisga'a Urban Locals (there would be initially three such locals - greater Vancouver, Terrace and Prince Rupert/Port Edward).[37]

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

With regards to the public works function jurisdiction is shared between the two levels. In the Agreement, there is a short section dealing with "Buildings, Structures and Public Works"[38]. Both levels of government may make laws in respect of the design, construction, maintenance and demolition of buildings, structures and public works on their respective lands. (Federal and provincial laws of general application would prevail in the event of a conflict.) Other sections of the Agreement provide for a similar sharing – for example, in the use, management, planning, zoning and development of their respective lands. In this instance, in the event of a conflict, Nisga'a laws would prevail over federal or provincial laws. In other areas of jurisdiction of direct relevance to the public works function, such as health and environmental protection, the Nisga'a Lisims government has exclusive jurisdiction but federal or provincial laws of general application would prevail in the event of a conflict.

In a limited number of instances, the central government is in a hierarchical relationship with the village governments. For example, the Nisga'a Lisims Government can make laws to recover from the village governments own source revenue. Further, the amalgamation, creation or dissolution of villages are powers vested in the central government.

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

[37] See"Nisga'a Final Agreement", August 1998, P.162

[38] ibid, P. 172

One other area of the Agreement is worthy of note: the Nisga'a Government will provide appropriate procedures for the appeal or review of "…administrative decisions of Nisga'a Public Institutions"[39], this latter term referring to a Nisga'a Government body, board, commission or tribunal.

In summary, the Nisga'a Agreement-in-Principle moves considerably towards the Commission's model whereby most law-making, policy and resource allocation are vested with the Nation as opposed to the local community. On the other hand, in some instances, the Agreement appears to raise issues similar to those found in older agreements – whether there should be specific inspection and enforcement powers in the environmental and public health areas and whether provision for innovative orders to deal with environmental problems should be in the agreement are two such examples.

[39] ibid, P. 162

5. CONCLUSIONS

A central conclusion flowing from the above survey of the public works function in self-government agreements is that there is little consistency among these agreements. Such a conclusion is understandable in comparing the older and more current agreements. And some of the agreements are sector rather than comprehensive agreements. But even among the current agreements (i.e. those put in place since the adoption of the Inherent Right Policy) there are important differences in the treatment of this function. Some of the key differences among the agreements are the following:

- some agreements (for example, Westbank and the United Anishnaabeg Councils) have separate sections for the public works function and deal with it in a relatively comprehensive fashion; others have no such section or, if they do (Nisga'a is one such example), there is not the same comprehensive treatment;
- the treatment of the regulatory side of the public works function is very different among agreements: some have explicit inspection and enforcement powers in both the environment and health–related areas (e.g. Westbank); others have such explicit powers but only in the environmental area while still others have no such powers explicitly laid out. Similarly the question of appropriate penalties is handled in remarkably different ways. For example, the *Framework Agreement On First Nation Land Management* provides for a wide range of penalties including "…fines, imprisonment, restitution, community service and alternate means for achieving compliance"[40]) whereas other agreements have just fines and penalties, many of which, by to-day's standards, appear low.
- only one agreement (i.e. relating to the Quebec Cree) provides for an explicit power to levy user fees;
- harmonization of laws with the provinces is often handled in a different fashion. The older agreements tend not to address the issue. Among the newer agreements, some call for harmonization processes with the provinces in such areas as environmental protection (e.g. Land Management and Westbank); others are not explicit on this point. Moreover, the question of provincial standards is not consistently handled (see, for example, the Westbank and the Anishnaabeg agreements.)
- Some agreements deal explicitly with the transfer of fixed assets (for example, the United Anishaabeg Councils agreement); most do not; and
- Most agreements call for some form of redress mechanisms but tend not to be explicit about how these might relate to particular public works functions.

In light of the above, the first issue for consideration is the following:

Issue # 1: To what extent should future self-government agreements treat the public works function in a more consistent fashion? More precisely, how should such agreements deal with the following:

- The scope of the function, both its operating and regulatory dimensions;
- The type of inspection and enforcement powers required;
- Penalties;

[40] op. cit. P. 27

- Redress mechanisms;
- Transfer of assets;
- Harmonization with federal and provincial laws;
- Relevant provincial and federal standards; and
- Priority of laws in the event of a conflict.

One line of argument might suggest that the public works function is part of the inherent right to self-government and therefore self-government agreements do not need to be explicit about jurisdiction in this area. A counter argument is that some aspects of the function are not dealing with matters of solely an internal nature; moreover, some of the required regulatory powers may well affect individuals who are not members of the self-governing entity. These latter arguments would support a more fulsome treatment of the regulatory regimes.

Discussion of the above questions leads to a second issue:

Issue # 2: Should future agreements have a separate section that deals with the public works function in a comprehensive manner.

A third issue relates to the question of "who does what?". As the review of self-government agreements in this paper has demonstrated, there is a wide variety of governance models. Many are community based with a delegatory power to some other self-governing entity or with a central service body. Others have two tiers – for example, the Cree with most of the jurisdiction resting at the community level in comparison to the Nisga'a with most of the law-making authority resting with the central government.

From the perspective of the public works function, this issue has several dimensions. One is the question of capacity to exercise the jurisdiction in an effective manner. Another and equally important dimension is the issue of how best to structure the regulatory-type functions embedded in a public works regime – that is, regulatory regimes relating to construction, fire prevention, zoning, water quality, sewage and solid waste disposal among others. In many of these areas, the public sector has both operating and regulatory responsibilities – for example, it builds and operates sewage systems and is responsible for regulating them to ensure certain environmental and health standards are adhered to. A potential problem – and one hardly unique to Aboriginal governments – is how does a government regulate itself.

The federal government has wrestled with this problem in its application of the *Canadian Environmental Protection Act* (CEPA) and the *Fisheries Act*. The regulatory agency in this regard is Environment Canada and its investigations of some of its sister federal departments have resulted in the laying of charges under these two Acts by the Attorney General. One problem has been to work out how Justice Canada can fulfill its role in providing legal services to both the regulating and operating departments. An interdepartmental committee continues to work at this and other issues and, as yet, no written policy has emerged.

Another type of problem where the operating entity is regulating itself is the potential for what experts in administrative law refer to as "institutional bias" – that is, where positions within an organization are in conflict. The most obvious example of institutional bias occurs when a single

entity acts both as both "prosecutor" and "judge". Thus, there is a growing jurisprudence involving cases in the securities industry, professional organizations with certification powers as well as the regulation of alcohol: one of the key issues in these cases is the extent to which one entity can both investigate behaviour and then make judgments about withdrawing licences or other types of certification.

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

The issue, then, is the following:

Issue # 3: **How should the operating and regulatory responsibilities associated with the public works function best be assigned in self-government agreements – in both single tier and two tier governance systems - so as to avoid a potential for institutional bias (or possible 'under regulation') and which governance system (one or two tier) appears best able to handle the divergent nature of these two responsibilities?**

A final issue has to do with what the experience of self-governing entities has been with the public works function. Sechelt, the Cree and Nascapi of northern Quebec and several Yukon First Nations have had a number of years experience with many of the elements making up this function. It would useful to know their experience – the powers they have actually drawn down; their relationships with other levels of government; how they have built capacity in this area; and what, if any, problems they have encountered.

Issue # 4: What has been the experience of existing self-governing entities with the public works function and would further research in this area prove fruitful?