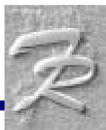
Final
July 19, 1999

Indigenous Peoples and Fiscal Relationships - *The International Experience*

Presented to:

The Indian Taxation Advisory Board
and
The Research and Analysis Directorate
Policy and Strategic Direction Branch
of
The Department of Indian Affairs
and Northern Development



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List of Figures v

Executive Summary vi

1 Introduction 1—1

1.1 Background 1—1

1.1.1 Flaws with Current Fiscal Relationship 1—1

1.1.2 The Challenge of a New Fiscal Relationship 1—1

1.1.3 Proposed Agreement for the Council of Yukon First Nations 1—3

1.2 Study Purpose 1—3

1.3 Study Methodology 1—4

1.3.1 Scope 1—4

1.3.2 Unique Attributes of Fiscal Relationships for Indigenous Government 1—5

1.3.3 Context - Parallels between First Nations and other Indigenous Peoples 1—6

1.3.4 Context - Differences 1—7

1.4 Summary 1—7

2 The Maori of New Zealand 2—8

2.1 Introduction 2—8

2.2 History 2—9

2.3 New Zealand Government 2—10

2.4 Modern Fiscal Relations 2—12

2.4.1 Contextual Differences Between the Maori and First Nations 2—13

2.4.2 Maori Self-government 2—14

2.4.3 Services to the Maori 2—14

2.4.4 Revenue Sources and Tax Status 2—15

2.5 Issues and Developments of Interest 2—15

2.5.1 Tanui Settlement 2—15

2.5.2 Emergence of Self-government 2—16

2.6 Summary of Maori 2—16

3 The Indians of the United States 3—18

3.1 Introduction 3—18

3.2 History 3—18

3.3 American Fiscal Framework 3—19

3.4 Modern Fiscal Relations 3—21

3.4.1 Modern Treaties and Land 3—21

3.4.2 Public Services 3—22

3.4.3 The Evolution of Self-Determination for Tribal Government 3—23

3.4.4 Self Government 3—27

3.4.5 Taxation and Own -Source Revenues 3—28

3.5 Emerging Issues and Developments of Interest 3—29

3.6 Summary 3—32

4 The Aboriginals of Australia 4—34

4.1 Introduction 4—34

4.2 History 4—34

4.3 Australia's Fiscal Framework 4—36

4.4 Modern Fiscal Relations 4—38

4.4.1 Treaty and Land 4—38

4.4.2 Services 4—39

4.4.3 Aboriginals' Two Options for Improving Services 4—42

4.4.4 Self-government Initiatives in Aboriginal Communities 4—44

4.5 Emerging Issues and Developments of Interest 4—45

4.5.1 Regional Agreements 4—45

4.5.2 Northern Territory Statehood 4—46

4.5.3 Pressure for A New National Fiscal Framework 4—46

4.6 Summary 4—48

5 Conclusions 5—49

5.1 The Common Challenge – A Fiscal Relationship Which Supports Political Reconstitution and Improved Outcomes 5—49

5.2 Understanding Self-Government 5—50

5.3 The Transformation Challenge. 5—51

5.4 Define Financial Requirements 5—55

5.4.1 Clarify tax powers and service responsibilities 5—55

5.5 Develop an Implementation Process 5—55

5.5.1 Federal Government Must Lead 5—56

5.5.2 Anticipate Resistance 5—56

5.5.3 Accountability 5—57

5.5.4 Build Supporting Institutions 5—58

5.6 Broad Strategic Considerations 5—59

5.6.1 Focus on Economic Growth 5—59

5.6.2 Transfers 5—60

5.6.3 Link to Land Issues 5—61

5.7 Final Summary 5—61

References I

Appendix A I

Appendix B I

Statistical Background to Research Countries I

Geographic Characteristics I

Demographic Characteristics I

Economic Characteristics I

Trade Characteristics II

List of Figures

FIGURE 1.NEW ZEALAND'S FISCAL FRAMEWORK. .... 2—10
FIGURE 2.USE OF PRIVATE SECTOR DELIVERY AND EVALUATIONS TO PROMOTE MAORI VALUES .... 2—11
FIGURE 3.THE FISCAL FRAMEWORK FOR TRIBALINDIANS .... 3—20
FIGURE 4.NO AUTONOMY – SERVICES DELIVERED DIRECTLY BY THE FEDERAL GOVERNMENT .... 3—25
FIGURE 5.LIMITED AUTONOMY – TRIBAL GOVERNMENTS DELIVER SERVICES UNDER FEDERAL DIRECTION .... 3—25
FIGURE 6.NEAR AUTONOMY – TRIBAL GOVERNMENTS USE FEDERAL FUNDS ACCORDING TO THEIR OWN PRIORITIES .... 3—26
FIGURE 7. UNDEFINED FISCAL RELATIONSHIP ELEMENTS CAN SHRINK TRIBAL SOVEREIGNTY .... 3—32
FIGURE 8.FISCAL FRAMEWORK FOR ABORIGINALS .... 4—37
FIGURE 9.OPTION 1 - IMPOSE NEW CONDITIONS ON FEDERAL TRANSFERS. .... 4—42
FIGURE 10.OPTION 2 - CREATE A NEW FISCAL RELATIONSHIP FOR ABORIGINAL GOVERNMENT. .... 4—43
FIGURE 11.CANADA'S FIRST NATIONS FISCAL FRAMEWORK .... 5—53
FIGURE 12.CANADA'S TRANSFORMATION CHALLENGE .... 5—54

Executive Summary

This study summarizes the recent experiences of New Zealand, Australia and the United States with fiscal relationships for indigenous people. It outlines the context in which fiscal relationships are developing as well as the issues and policies that are emerging as result of their development. It then synthesizes this information into conclusions and recommendations pertinent in the Canadian context. In order to make the comparisons more meaningful a brief analysis of how these fiscal relationships compare to the proposed fiscal relationship for the Council of Yukon First Nations is also included.

There are a few caveats. First, there is no full functioning fiscal relationship model in another country for Canada to emulate. Fiscal relationships for indigenous people are evolving. Their importance to economic prosperity and self-determination has only begun to be recognized. At present, their specification is sometimes ambiguous, subject to change and confusing. They are never as clearly specified through formulae as are fiscal relationships between national and sub-national governments. Second, while there are striking similarities among the indigenous peoples, each group faces a unique political context and hence may undertake initiatives that are not pertinent to the Canadian situation.

Despite these caveats, if the context is understood and properly interpreted, the international experience provides many relevant lessons. Different indigenous peoples face common challenges and circumstances. Their socio-economic characteristics are virtually identical – widespread poverty, high unemployment, high rates of suicide and substance abuse, and substandard infrastructure and public services on reserves. The causes of disadvantage are also similar – blurred lines of accountability between government service agencies, unsettled claims, lack of political power, deliberate policy choices, and the ongoing effects on their confidence, expectations and political power of the relatively recent trauma of colonization.

The chief lessons for Canada are as follows:

- **Special attention must be paid to the process in which a new fiscal relationship is developed and implemented.** In every country studied, *any* developments in the fiscal arrangements for indigenous people were subjected to close scrutiny and deep suspicion from both within and without the indigenous community. Many unfair criticisms were made, especially concerning management of funds and whether the arrangements were equitable vis-a-vis arrangements for non-indigenous people. Opponents exploited any dissension within indigenous communities. This problem points to the need to pay close attention to the next few points:

- **Fiscal relations must evolve within a uniform and easily understandable national framework.** These conditions will reduce unfair criticisms and/or the exploitation of misunderstandings. This framework should be developed by a nationally mandated First Nation organization in conjunction with the federal government, interested third parties and all provinces that wish to participate. It should require common financial reporting requirements and practices, specify principles for transfer entitlements, and create exclusive tax jurisdictions.

- **A new fiscal relationship should simultaneously clarify service responsibilities, tax powers and transfer entitlements.** Service responsibilities and tax powers between state and tribal governments have not yet been clarified in the United States. Many tribal tax jurisdictions are concurrent with those of state governments and service responsibilities are also unclear. This has created many problems. The possibility of facing double taxation is deterring many investors. There are frequent and costly legal disputes between the two authorities. The sovereignty of tribal governments has been undermined. Long term planning is constrained by the reduced financial certainty. Most importantly, the simmering disputes are poisoning relations between tribes and surrounding communities.

- **The American "compacting" model for devolving services from the federal government to tribal governments should be emulated.** Their model has accountability provisions which do not prevent tribal governments from exploring ways to deliver services more efficiently or cheaply. They have done this by shifting the emphasis of evaluation. First, tribal governments wishing to assume service responsibilities must meet qualifying requirements and complete a qualifying process. These conditions ensure that the government is ready to assume the new responsibilities. Second, the focus of evaluation has been shifted. Whereas, formerly it focused on monitoring how funds are expended, it now focused on what sort of results are achieved with program funds. If a Canadian version of the qualifying process is developed, it should be developed and enforced by First Nation institutions with the assistance and support of credible third party agencies.

- **New arrangements must be based on substantial consensus within First Nations.** If this does not happen, the new arrangements will be hamstrung by suspicion. Suspicion will create political difficulties and make new arrangements more difficult to implement.

- **Measures should be undertaken to develop the institutional and administrative capacity needed to manage new fiscal relationships.** At present, many communities lack the capacity to administer all aspects of self-government. A fiscal relationship should allow these communities to assume responsibilities in stages rather than all at once. First Nation governing institutions should oversee the assumption of new responsibilities by First Nations. These institutions would also deal with technical issues as they arise. Ideally, governing institutions would have representation from First Nations across the country.

- **The federal government must develop the legislative capacity for a new fiscal relationship.** This capacity must offer appropriate tax room to First Nation governments and encourage provincial governments to do the same. It should develop framework legislation, that would allow First Nation governments to assume new powers and responsibilities at their own pace. First Nation governments should not have to await federal legislation each time they wish to assume another increment of authority under this legislation.

- **The federal government must champion the process.** Federal influence is needed to keep the process moving and to avoid becoming bogged down by federal-provincial disputes. Federal influence will help First Nations clarify service responsibilities, transfer entitlements, and tax powers between themselves and provincial governments.

- **The fiscal relationship process should be linked to Delgamuukw**. The Delgamuukw decision will pressure provincial governments to participate in developing a new fiscal relationship. They will wish to make a deal with First Nation governments that creates greater certainty over land title and thereby promotes investment. Many issues require their involvement including resource revenue sharing, settlement of outstanding claims, the development of exclusive tax jurisdictions, and clarification of service responsibilities versus transfer entitlements. Provincial governments must deal with the Delgamuukw decision because they must resolve the uncertainty regarding Aboriginal title in order to maintain their investment climates.

1 Introduction

1.1 Background

The Royal Commission on Aboriginal Peoples (RCAP) called for significant changes in Canada's relationship with Aboriginal peoples. The aim, among other things, was to provide Aboriginal peoples with improved public services, economic opportunity and control over their social and political futures.

The Government of Canada responded to the RCAP recommendations by developing the framework document, ***Gathering Strength - Canada's Aboriginal Action Plan***. This document recognizes that First Nations have an inherent right to self-government. It commits the Government of Canada to negotiating self-government arrangements on a government-to-government basis, and in a way that is consistent with Treaty rights, Aboriginal title and section 35 of the Constitution Act, 1982.

1.1.1 Flaws with Current Fiscal Relationship

True self-government requires a new fiscal relationship. The current relationship between First Nations and the federal and provincial governments does not allow for significant autonomy due to the following:

- Financial transfers to First Nation community governments are too conditional. They do not provide for sufficient flexibility or decision making power.
- Current transfers are insufficient to meet the growing needs of First Nations citizens.
- Current transfers are too uncertain. Funding is too short term and discretionary to allow for long term planning.
- First Nation governments don't control sufficient own-source revenues. Taxes leak to surrounding jurisdictions and First Nations are wholly dependent on other governments for financing.
- First Nation governments don't have the financing authority they require to secure capital projects.
- Services and infrastructure provided to First Nations tend to be substandard.
- Accountability for services is diminished because of blurred lines of responsibility.

1.1.2 The Challenge of a New Fiscal Relationship

Gathering Strength called for the development of new fiscal relationships, "*to support First Nations governments in developing fiscal autonomy and the financial capacity to support governance responsibilities and agreed upon public services at levels reasonably comparable to the relevant local, regional, or national standard*". The AFN had earlier

called for the development of a new fiscal relationship in Resolution 5/96. Accordingly, the Government of Canada is now pursuing initiatives to support this.

The aims of a new fiscal relationship are to:

- provide more culturally sensitive services to First Nation citizens;
- improve decision making and give First Nation governments and citizens greater control over their destinies;
- provide First Nation citizens with better opportunities;
- allow First Nations to promote their unique cultures, socially, economically and politically; and
- make service and infrastructure quality equal to surrounding jurisdictions.

The federal government also recognizes that a new fiscal relationship will improve the national economy, reduce national unemployment, create greater tax revenues, reduce pressures on social costs and promote equity.

Elements of a fiscal relationship include:

- financial transfers among governments and their accompanying conditions;
- the division of tax authorities;
- the division of service responsibilities;
- the availability of other revenue sources; and,
- the specification and limits of financing authority.

The challenge for the federal government and First Nations is to combine these elements in a way which best meets the aspirations of First Nations. It must do so while recognizing the following constraints: controlling costs; promoting the social and economic union; maintaining the integrity of the transfer system; ensuring accountability, promoting equity; coordinating with the provinces; and addressing political criticisms.

This is no simple challenge. First Nations have many aspirations. There are many interactive elements to a fiscal relationship and there are many shifting constraints. There is no magic formula. The existing model and public finance theory provide only limited guidance because indigenous government has a different logic than does territory-based government.

The Indian Taxation Advisory Board (ITAB) and the Department of Indian Affairs and Northern Development (DIAND) have undertaken research to help guide development of a new fiscal relationship. This has included research into developing tax and non- tax own source revenues. This study builds upon that work.

1.1.3 Proposed Agreement for the Council of Yukon First Nations

The Council of Yukon First Nations Agreement was a tripartite agreement struck between the Government of Canada, the Government of the Yukon and fourteen Yukon First Nations. Four First Nations have signed self-government agreements under this CYFN umbrella agreement. These self-government agreements *partially* specify a new fiscal relationship. Much remains to be negotiated. The fiscal relationship is outlined below.

- Section 87 of the Indian Act which exempts the interest of an Indian or band in reserve or surrendered lands and the personal property of an Indian or band situated on reserve from taxation will eventually be terminated for CYFN. Termination will be phased in. First Nations will share jurisdiction over property tax on their settlement land. The Yukon government is committed to compensating Yukon municipalities for any financial losses they suffer as a result of new First Nation taxes. First Nations will share jurisdiction over the direct taxation of their Citizens on settlement lands. There is provision for future agreement regarding the direct taxation of other people and entities on settlement lands. However, other governments will retain the authority to tax on these lands.

- The Government of Canada will provide a self-government financial transfer agreement to the self-governing First Nations. The principle behind the transfer will be that First Nations should be able to provide services reasonably equivalent to those prevailing elsewhere in the Yukon at reasonably comparable levels of taxation. The entitlement formula will consider the own-source revenue potential of the First Nations, differences in the costs of providing services and finally the fiscal situation of the Government of Canada. Transfer entitlements will be reduced by less than the amount of own-source revenues created although precisely how much must still be negotiated. The transfer formula may include a base year with adjustment factors and may be based on the Formula Financing Agreement between Canada and the Yukon. Any transfer agreement will run for five years.

- The Government of the Yukon and First Nations have committed themselves to negotiating as necessary for the efficient delivery of local services and programs. First Nations are committed to providing programs roughly equivalent to existing programs. First Nation governments are committed to coordinating service delivery with other governments so as to enhance administrative efficiency.

- Adjustments will be made to the federal transfer to the Government of the Yukon. These adjustments will reflect savings as a result of First Nations taking over service responsibilities, the possible loss of administrative efficiency and adjustments to reflect the transfer of any tax revenues that are used in determining the Yukon's transfer entitlements.

1.2 Study Purpose

This document is intended to help guide the development of a new fiscal relationship between the Canadian government and First Nation governments and institutions of governance. It assesses the fiscal relationships between indigenous peoples and other states and tries to identify lessons pertinent in a Canadian context. It surveys the full spectrum of fiscal relationships including:

- how public services are delivered to indigenous peoples;
- what self-government powers are in place;
- how self-government is financed - (i.e. through transfers, own-source revenues);
- what financing authority indigenous peoples have;
- what accountability mechanisms are in place;
- what pressures are emerging on these systems; and,
- what criticisms are emerging.

1.3 Study Methodology

1.3.1 Scope

Three international examples are studied: the Maori in New Zealand, American Indians in the United States and Aboriginal people in Australia. Recent developments with the Council of Yukon First Nations (CYFN) are also included. These cases were chosen because they involve English speaking states with British common law roots and strong parallels to the Canadian situation. The former circumstance makes conducting the research practical. The latter ensures the results are relevant.

The study first characterizes fiscal relationships for indigenous peoples and then makes recommendations that are pertinent to the Canadian context. There are many interesting questions. To list just a few:

- Does the international experience suggest that equalization transfers for First Nations might blur government accountability or distort incentives for economic growth and self-sufficiency in small communities?
- What services could a reconstituted First Nation system of government deliver more efficiently than other levels of government? What services are required to promote their cultural identity?
- What tax powers should First Nations acquire, and how should these interact within a new transfer system? Are there potential issues with respect to taxpayer compliance?
- Is there a workable accountability model? What is the proper breakdown between conditional and unconditional transfers?
- Have new fiscal arrangements contributed to economic growth for indigenous peoples? If so, how?
- Have new fiscal relations created unanticipated economic distortions or political difficulties?

Not all these questions can be answered by studying the international experience. Fiscal relations for indigenous peoples are still evolving and are not easily defined by formulae and powers. The international experience is more pertinent for determining what issues will be created by their development, how they should be implemented and what international standards are emerging.

1.3.2 Unique Attributes of Fiscal Relationships for Indigenous Government

Some unique characteristics of indigenous government are listed below.

- Fiscal arrangements for indigenous peoples are evolving. The knowledge and policies to administer them are still being developed. Fiscal relations for indigenous peoples were never as cut and dry, or formula driven, as those between national and "state" governments. In most cases, it is more appropriate to describe their current "state of play."

- The logic of indigenous government often conflicts with that of our existing sub-national governments. Most public finance theory is based on the notion that governments are organized around geographically defined "communities of interest," such as provinces or municipalities. This concept is not entirely appropriate for indigenous government because its *community of interest can sometimes be territorially defined, but it is not necessarily territorially determined.* Instead, indigenous based government derives advantage from having a common culture, a large and unique degree of consensus and commonly understood forms of social organization. Traditional economic thinking has difficulty analyzing such benefits, and traditional public finance has difficulty providing analytical guidance about how to promote them. Finally, existing forms of sub-national government are not wholly appropriate for utilizing this advantage. Powers desired by an indigenous government will not always be coincident with those of municipalities or provinces, and in certain key ways conflict with those of existing governments.

- Fiscal relations for indigenous peoples were not uniform in most countries. They were often ad hoc and based on short term, conditional transfers.

- The development of new fiscal relations is encountering immense political difficulties. In virtually ever case, the current arrangements are not working, yet change is subject to resistance and suspicion from outside the indigenous community, and a lack of clear consensus within that community. Part of the reason is the inconsistent and ad hoc way they have developed. Another part is the conflict they create with other sub-national governments.

- Existing fiscal relationships are better characterized as being with indigenous people rather than indigenous government. This notion captures the many different ways other countries deliver services to indigenous peoples. Also, fiscal arrangements are often not with indigenous governments but with indigenous service agencies or "government-like" bodies.

1.3.3 Context - Parallels between First Nations and other Indigenous Peoples

Listed below are some parallels among experiences with indigenous peoples.

- The histories of indigenous peoples in Canada, New Zealand, Australia and the United States are similar. Each group experienced domination by the British colonial power in the 1700 and 1800s. This led to population declines, displacements from their lands and a substantial dissolution of political and social organization.

- Each group now lives in conditions much worse, by all measurable standards, than the general public in the rest of their country. They have lower life expectancies and incomes, higher rates of unemployment, incarceration, suicide and substance abuse. Each group tends to live in poorly serviced, dispersed, economically unviable locations.

- Each group's population is growing faster than the national average. Each population is considerably younger than the national average. These demographics imply that each group requires a different mix of services, and faces different cost pressures than the general public.

- Each group is seeking expressions of "self-determination". There is renewed interest in their traditions, languages, religion, ceremony and art. Each recognizes it has unique forms of social organization and wishes to develop institutions based on this uniqueness.

- Each group is seeking to share in its country's prosperity. They are attempting to redefine their political relationship with the rest of the country and build their land and economic base. In each country, these political and economic aspirations tend to be misunderstood, and often mistrusted.

- Each group, except Australian Aboriginals, is basing its political agenda on a careful interpretation of its original treaties or understandings with the colonial power. In Australia, the situation is akin to Canada's non-Treaty Indians - there are no treaties, but history is still important because Aboriginal title to the land still exists.

These parallels are striking. Each group has suffered similar traumas to similar effect. Each group has a similar goal - reconstituting its land base and political institutions within a national government, and from this basis, building a strong culture and economy. Finally, each group faces similar obstacles:

- The geographical dispersion of its population and the disintegration of its traditional territorial presence.

- A lack of political cohesion.

- A lack of economic power and relatively high service costs.

- A government regime with little experience in dealing with the concept of indigenous government.

- Mistrust and misunderstanding of these issues by the population as a whole (essentially no understanding of the historical development of the unsatisfactory state of affairs).
- A need to accommodate new, imaginative fiscal arrangements within the established fiscal framework.
- Conflict with existing service agencies and jealously guarded jurisdictional powers of other governments.

1.3.4 Context - Differences

While there are strong parallels between Canada's First Nations and other indigenous peoples, each situation is unique. Each involves unique political and social organizations. Each group exists within different political and economic contexts. Each works on the basis of different historical developments, Treaty and Aboriginal rights and legal precedents. These differences have created subtle, but powerful, differences in the political agendas and means of each group.

Some key differences are listed here.

- The mix of powers and service responsibilities among tiers of government with respect to indigenous peoples.
- The nature and extent of Treaty and Aboriginal rights.
- The current powers of indigenous governments.
- The scale and cooperation of indigenous peoples' political organization at the national, regional and local level.
- The policy contexts within which new fiscal relationships are evolving.

1.4 Summary

This study will:

- describe the current state of fiscal relationships for indigenous peoples in New Zealand, Australia, the United States and the Yukon;
- provide relevant legal, political, economic and historical contexts for analyzing these relationships;
- analyze recent developments in these fiscal relationships and assess their evolution; and
- draw lessons that are relevant to Canada.

2 The Maori of New Zealand

2.1 Introduction

The Maori are the people indigenous to New Zealand. They comprise between 10 and 15 per cent of New Zealand's population or roughly half a million people. This is by far the largest indigenous population share of any of the groups studied. The Maori are also the only group guaranteed political representation in their State parliament commensurate with their population share. As a result, they are a powerful political force. This political strength is reflected in Cabinet, where three of twenty Ministers are Maori. Maori was made an official language of New Zealand in 1974.

> **Maori**
>
> **People:** Polynesian origin. 10-15 per cent of the population. A growing share of population. Maori population is 80 per cent urbanized.
>
> **Political System:** Guaranteed representation in national parliament, based on population share. No provincial level of government exists. No recognized Maori governments or right to self-government. There is only one treaty between New Zealand and all Maori. Maori have no special fiscal relationship. Pay same taxes and receive services from the same agencies as the rest of the country.
>
> **Outstanding Issues:** Settlement of claims based on violations of the Treaty of Waitangi in 1800s. This is restoring land base. Hampered by negotiation over costs and mandating of bodies to represent Maori.
>
> **Claims are being heard by Waitangi Tribunal.** This Independent tribunal makes recommendations that form basis for negotiation.
>
> **Developments of interest:** Use of Maori service providers – privately contracted public services. Use of Maori policy agencies to oversee provision of public services to Maori. Establishment of Maori corporations to administer claims settlement, makes investments in public-like services for Maori.
>
> **Lessons for Canada:** use of independent tribunal to hear claims, treatment of 3rd party interests in claims, use of mainstreaming to ensure services to urban Maori. Protection of sacred Maori sites, allocation of resource rights. Integration of indigenous management with environmental protection.

Despite their political power, the same depressing social indicators which plague Canada's First Nations characterize the Maori. These include higher rates of unemployment, incarceration and suicide, and lower incomes and rates of educational attainment. Much like First Nation peoples, the Maori are younger and faster growing than the general population of New Zealand. There is a growing realization that, if unchecked, these social and demographic characteristics will lead to sharp increases in the future costs of government services and reductions in average living standards.

The Maori are more culturally homogenous than are First Nations peoples. All Maori speak the same language, apart from variations of dialect, and think of themselves as being the same people and belonging to the same culture. Historically, their most important form of social organization was, and probably still is, the *hapu*. The *hapu* loosely corresponds to a sub-tribe, though in some references it is likened to a kinship society. *Hapu* within specific regions of New Zealand are often grouped together into *iwi*. *Iwi* correspond roughly to tribes and were organized among affiliated *hapu* for specific purposes, such as wars and negotiations.

Despite this homogeneity, there are significant political fissures within Maoridom. Interviewees report differences in interests between the urban Maori and those residing in traditional lands. There is much contention over the issue of proper "mandating" or political representation. The New Zealand government invariably

faces controversy when dealing with Maori issues because it is not always clear who has the mandate to represent various Maori groupings.

The Maori are very urbanized with over 85 per cent now living in major urban centers. Despite urbanization, there are still strong ties between urban Maori and their *iwi* and *hapu*. Maori culture has survived through urbanization because of the continuation of Maori ceremonies and supportive government policies.

Much like in Canada, land claims, Treaty rights and redress for historical injustices dominate Maori relations with their government. There are also both "radical" elements within the Maori pressing for greater sovereignty and "mainstream" leaders working within the political and legal systems. However the Maori political structures from which they base their claims are relatively undeveloped compared to First Nations. Neither *iwi* nor *hapu* have formal recognition as government entities. There is no government acceptance of an inherent Maori right to self-government, or any notion that relations between the Maori and the State should be conducted on a "government-to-government" basis.

2.2 History

The Maori are of Polynesian descent. They first arrived in the then uninhabited New Zealand roughly a thousand years ago.

European settlers began arriving in the late 1700s and early 1800s. These settlers introduced firearms and diseases. Much like the first settlers in North America, these settlers got involved in rivalries among Maori *iwi*. These actions all contributed to a quick reduction in the Maori population following contact with the settlers.

A desire by the British to pre-empt the French prompted the signing of a Declaration of Independence of New Zealand by northern Maori chiefs in 1835. This Declaration asserted the authority of the hereditary Maori chiefs over New Zealand. Settlers, partly out of respect for Maori military prowess, concluded the Treaty of Waitangi with the Maori in 1840. A British sailor signed on behalf of the British Crown and representatives of all Maori *hapu* signed or left an imprint of their facial tattoos on behalf of the Maori. Therefore, unlike North America, a single treaty covers all New Zealand.

The Treaty of Waitangi was intended to form the permanent basis of the relationship between the Maori and the settlers. The rights and lands of the Maori were to be protected and settlement on them would require their consent.

The Treaty had both English and Maori language versions and there were important differences between the two. The Maori version essentially cedes to the British only the right to govern, whereas the English version cedes sovereignty itself. Thus, similar to the Treaty First Nations in Canada, the Maori and the British interpreted the treaty in incompatible ways. The Maori saw it as establishing a partnership, whereas the British did not. The Maori chiefs signed the Maori version only. Much subsequent policy was based on the English-language version.

The Treaty of Waitangi failed to secure peace. Trouble started almost immediately after its signing. There were several causes, the most important of which were: (1) The different

interpretations and understandings of the Treaty; and, (2) The volume of subsequent immigration created enormous pressure to use Maori land.

There were a series of official and unofficial wars between the British and varied tribes of Maori throughout the late 1800s.

These wars were used by the British as justification for what the Maori term the *raupatu* or dispossession of Maori lands by unlawful means. The official instruments of *raupatu* were land confiscation, land purchases and forced creation of reserves. Communally held lands were made individual freeholds and subsequently removed from the Maori land base. Maori reserves were created and held by Crown administrators for the dual purposes of promoting settlement and providing for the Maori. Most of these lands were leased to settlers in perpetuity at below market rates.[1] Even Maori who had not revolted were often subject to the *raupatu*.

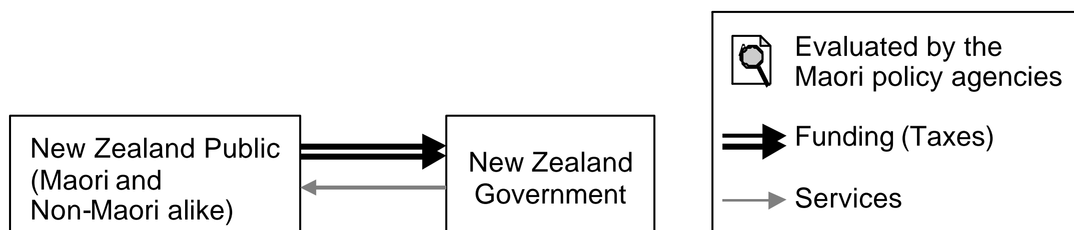
The *raupatu* caused widespread poverty and dislocation. Many Maori had to migrate from their traditional homelands. The *raupatu* caused a substantial dissolution of Maori social and political organization. This has had important implications for Maori self-government and any potential fiscal relationship. Many Maori view the destruction of their traditional social organizations as being more destructive than the loss of their land base.[2] It effectively removed Maori authority and left them far less able to represent their interests politically. This ensured their ill treatment for years to come.

Since the *raupatu*, the Maori have pressed for restitution. Only recently has the Government acknowledged the validity of these claims. The Treaty violations of the *raupatu* are the basis of Maori claims today. Similarly, the Maori interpretation of the Treaty of Waitangi forms the basis for modern day assertions of self-determination.

2.3 New Zealand Government

New Zealand inherited a parliamentary model of government from the British. Unlike Canada, New Zealand is a unitary state. There are only national and local governments. Because it is not a federal state, New Zealand has less experience with managing fiscal relationships and sharing program responsibilities with sub-national governments.

Figure 1.New Zealand's Fiscal Framework.



[1] The Taranaki Report of the Waitangi Tribunal cites one example. In 1912, there were 193,600 acres of reserve land set aside for Maori in this territory. Europeans had been leased 138,000 acres of this, while Maori farmers held only 24,800 under occupational leases.

Figure 1 depicts the fiscal relationship for Maori and non-Maori alike in New Zealand. Its relative simplicity is accounted for by the fact that the same service agencies are responsible for both groups (this approach is known as "mainstreaming") and that New Zealand is a unitary state.

Figure 2. Use of Private Sector Delivery and Evaluations to Promote Maori Values

Evaluated by the Maori policy agencies
Funding
Services

Public Sector
Maori policy agencies
New Zealand Government
Service providers (Non Maori)
Service providers (often Maori)
Commercial Revenues
Non-Maori
Urban Maori
Landed Maori
Private Sector

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2 The Taranaki Report states that the dissolution of social structures was more harmful to the Maori than their loss of the land base.

Figure 2 illustrates features of the fiscal relationship not captured by Figure 1. The government uses private sector delivery agencies and advisory and evaluation bodies to promote culturally appropriate public services. Advisory bodies measure program outputs and outcomes in order to assess the quality of services provided to the Maori. These evaluations are used as the basis for making recommendations about improvements. Figure 2 also shows that many services that are provided strictly via the public sector in Canada, are supplemented in New Zealand by services provided through Maori trusts. (This supplementary funding is labeled "commercial revenues.") These trusts were established with the funds from successfully concluded claims. Trust funds include lease revenues and revenues from Maori commercial enterprises.

2.4 Modern Fiscal Relations

A few important facts underlie modern Treaty relations.

- The Government of New Zealand has acknowledged that the *raupatu* was a violation of the Treaty of Waitangi.
- New Zealand is committed to settling all Maori claims by 2000.
- International covenants now provide that in questions of interpretation, the Maori language version of the Treaty of Waitangi should prevail.

Maori groups established the Waitangi Tribunal in 1978 to hear claims. This Tribunal was granted the powers of a Commission of Inquiry. It was further empowered in 1985 by the passage of the Waitangi Amendment Act. This act allowed the tribunal to make recommendations on all claims dating back to the signing of the Treaty.

The Waitangi Tribunal is an independent tribunal, similar to that often recommended for the hearing of Canada's specific claims. It is empowered to hear claims, report on them, and make non-binding recommendations to the Crown.[3] The Tribunal is comprised of members of New Zealand's judiciary, Maori elders and chiefs, and other lay people, both Maori and non-Maori. There are no set rules regarding its composition. Maori members do not participate in cases involving their own *iwi*.

The Tribunal's recommendations are not binding but still important. First, they provide the basis upon which the Crown will negotiate settlement. Second, the Tribunal is essentially making case law regarding the proper interpretation of the Treaty of Waitangi. Thus, Tribunal reports have important implications for the future of Maori institutions.

The Government is settling with Maori groups but does not recognize these groups as governments. Mainstream Maori political movements do not appear to be asking for this. Only the "radical" element is calling for self-government or *tino rangatiratanga*. The radical element uses tactics such as occupations of claimed sites and protests.

[3] The Tribunal can make binding recommendations in cases involving expropriation of land by privately administered public corporations.

2.4.1 Contextual Differences Between the Maori and First Nations

There are major contextual differences between the situations of the Maori and First Nations:

- **Land Base**. Unlike First Nations, most Maori were dispossessed and left without reserves.
- **Questions about Political Representation**. The Maori have less clearly mandated political bodies to receive settlements and/or negotiate any self-government arrangements. There is much controversy about whether receiving agencies are truly representative. Many mandated bodies have been criticized as creations of the non-Maori.
- **Self-government Powers**. *Hapu* and *iwi* have no formally recognized powers. There is no commitment by New Zealand to provide for Maori self-government.
- **Political System**. In New Zealand there is no provincial level of government. There are no federal-provincial issues to complicate the government's relationship with the Maori. In Canada, the United States and Australia, these issues blur the lines of accountability for service delivery and complicate the negotiation of the transfers of land, grants and/or jurisdiction. However, because there are no provincial governments, New Zealand also has little experience with a system of providing for sub-national governments, sharing tax room and administering transfers.
- **Aboriginal Title**. There is no issue of unextinguished aboriginal title in New Zealand. There are also no non-Treaty Maori. Maori claims to lands and cash arise solely from the violation of the Treaty of Waitangi and the injuries caused by this violation.
- **Third Parties**. In Canada and Australia, most of the land transferred to indigenous peoples has a relatively small non-indigenous population. In New Zealand, much newly acquired land is occupied by non-Maori. It was leased years ago to people who have made substantial improvements to it. Adjustments must be made to reflect these improvements. While the government is encouraging lessors to work out new arrangements with Maori authorities, it appears to anticipate considerable compensation may be owed to these third parties. Complicated schedules for the transfer of leases have been worked out to ensure minimal disruption to third parties. In many cases, cash is being offered instead of land, which will allow the Maori to purchase alternative lands to serve as a land base.
- **Compensation Process**. The former New Zealand government committed itself to capping the cost of settlements at $1 billion New Zealand dollars (slightly less than $1 billion Canadian dollars). This total was not to include compensation to third party interests. This position, known as the "fiscal envelope" was contentious. Maori groupings seeking settlement viewed it as artificial, too low and really designed to entice them to rush to the negotiation table in competition with one another. It created political unrest and undermined good will. The current government removed the cap on settlements. However, its shadow continues to hang over negotiations.

2.4.2 Maori Self-government

There is no true fiscal relationship between Maori governments and the Government of New Zealand because there is no recognition of a Maori right to self-government. The only Maori institutions with formally recognized "governmental" powers are boards established after settlements, to provide input on land use and resource conservation policy. These are similar in structure and purpose to the Canadian concept of "co-management" boards.

Other Maori institutions have no inherent or delegated powers. For example, the New Zealand Maori Council, although government funded, is strictly an advisory body.

2.4.3 Services to the Maori

While there is no government-to-government relationship between New Zealand and the Maori, there is a fiscal relationship specific to the Maori people.

There are no separate government departments responsible for delivering services to the Maori or different Maori groupings. The same agencies are responsible for delivering public services to the entire population. This approach, termed *mainstreaming,* is the reverse of earlier policies, where separate Maori delivery agencies were used. The closest counterpart to Canada's DIAND is the Department of Maori Development.

The role of the Department of Maori Development is to represent Maori issues to government service delivery departments. The Department works with *iwi*, *hapu* and other Maori organizations to identify unique Maori needs and recommend how to meet these.

The Department's principle work is evaluating other government departments and assessing how well they are meeting Maori needs. It also makes recommendations about what goals to set and which statistical indicators to use. These might include statistics about access to services, levels of education attainment, health indicators, employment numbers and utilization of Maori service providers. Two commissions supplement this role: the Maori Development Commission for Health and the Maori Development Commission for Education. These commissions are composed of independent advisors who report directly to the Minister of Maori Development. Their recommendations focus on reducing disparities between Maori and non-Maori on key indicators. The coalition agreement of the current New Zealand government also calls for creation of a Maori Economic Development Unit and a Maori Employment and Training unit. Both will also work with mainstream government departments to promote Maori interests.

New Zealand relies more than Canada on private sector provision of public services. Many public services, such as education, are publicly funded but contracted out. One benefit of this is that New Zealand can use Maori service providers for services where this is seen to matter. However, Maori commentators suggest that the full potential of private providers is not being achieved and that the Government has not adequately developed Maori service providers.

Maori Trust Boards and corporations have undertaken many quasi-government functions using the monies provided by cash settlements, grants, resource royalties, leasing revenues and the commercial operations of the Trust Board. These include the operation of an

endowed college, administration of scholarships, resource and land management functions, investment funds, economic development and social housing.

Considerable emphasis has been placed upon the development of economic development initiatives, which will complement the trust activities. These include the development of Maori business networks, some of local and others of national scope, and a Maori business development board.

2.4.4 Revenue Sources and Tax Status

Groups receiving settlement proceeds have not been subject to tax on these proceeds.

New Zealand seems determined that no "government- type" structure will emerge from the settlement process. Maori organizations are constructed on a largely commercial basis and are largely constituted as trusts. As a result, there is apparently no move towards constructing tax authorities beyond property tax.

There is nothing to correspond with the tax exemption that applies to Canadian Indians. Maori pay taxes like all other New Zealanders. Exemptions for Maori trusts are based on their status as charitable organizations.

2.5 Issues and Developments of Interest

2.5.1 Tanui Settlement

Maori claims settlements are allowing the Maori to re-establish a land base and create trusts, which manage the cash and lands received. The trusts are generally organized as charitable corporations with all Maori covered by a settlement becoming shareholders. The trusts are divided into corporations. These manage properties, administer scholarships and make investments in support of Maori economic development.

Under the recent Tanui settlement, the Maori received $170 million in property and cash, and allowance was made for the establishment of an endowed college.

Maori groupings receiving settlements are acquiring some interest from properties, capital gains from property management, rental payments for properties, resource royalties (principally forestry although others are under negotiation), and interest from trust funds and investments, and they have gained some ability to tax property. Their ability to sell and lease lands differs, as there are two types of Maori land: Maori freehold land and general land. Maori have also acquired valuable assets such as fishing quota, which has led to the establishment of viable commercial enterprises, principally in seafood, horticulture, agriculture and forestry.

Maori trust organizations have made investments in infrastructure on Maori lands. Investments include a Maori radio station, communications and housing programs.

2.5.2 Emergence of Self-government

Several factors suggest that a stronger movement towards self-government may emerge in New Zealand.

- Population growth will cause Maori political power to grow over the medium term.
- Settlement of Maori claims is leading to the establishment of a land base with representative institutions. These are pre-conditions for the development of self-government.
- There are elements within the Maori calling for self-government.
- The Maori interpretation of the Treaty of Waitangi appears to provide for Maori self-determination and autonomy.

However, there are also factors working against self-government.

- The urbanization and integration of much of the Maori population makes self-government less plausible.
- The guaranteed representation of the Maori within the national parliament and Maori political clout may make self-government less necessary for promoting Maori values and interests.
- Differences in the organization of the public sector could allow the Maori to achieve many of the purposes of self-government from outside the public sector.
- New Zealand has no experience in dealing with the issues of fiscal federalism. The decentralization of powers implied by self-government may be more difficult to achieve as a result.

2.6 Summary of Maori

The Maori have more political clout at the national level than do First Nations. They have guaranteed proportional representation in their Parliament and a large and growing share of the population. Their ability to achieve greater autonomy is limited by: the temporary lack of a land base; problems in determining appropriate representative institutions; and, the relatively large share of their population that has been urbanized.

The problems concerning their land base and representative institutions are now being addressed through the claims process. Maori groups are acquiring land and in so doing they are creating mandated institutions to represent themselves. These are the most basic requirements for any political movement towards greater Maori autonomy and a new fiscal relationship. Any Maori move to acquire tax powers will likely start with incorporation of Maori communities as municipalities and the development of user fees and property tax.

However, Maori relations with their national government are on a different track. While there is an element of the Maori population calling for sovereignty, it does not appear to be the

mainstream. A new fiscal relationship along the lines envisioned for First Nations in Canada would be very unlikely at this time.

- Services for the Maori are "mainstreamed" into the same departments, which serve the rest of the nation.
- The issue of providing Maori-sensitive services is being addressed by advisory agencies and the use of contracted service agencies.
- The tax system is entirely mainstreamed. There are no statutory exemptions for Maori or vacant tax room for them to occupy.
- New Zealand has no experience with a system of fiscal federalism, as does Canada.
- Much of the Maori population is urbanized so that new fiscal relations for them are impractical within a territorial approach to self-government.
- The Maori are much better positioned than the other groups to represent their interests through mainstream politics.
- Maori traditional political institutions were far more devastated by colonization than those of Canada's First Nations. As a consequence they have less experience with administering government.
- The focus of Maori aspirations appears to be on social and commercial developments, as opposed to political sovereignty. However, Maori commercial developments are creating the financial means to provide government-like services.

3 The Indians of the United States

3.1 Introduction

There are several indigenous peoples within the United States. These are classified according to law, history or geography. The principle groups are Alaska natives, American Indians and Polynesian groupings including Hawaiians and Samoans. This paper concentrates on American Indians and Alaska natives.

The American Bureau of Indian Affairs (BIA) estimates there are 1.2 million American Indians and Alaska natives, with roughly 900,000 living on or near reservations. They are organized into over 500 nations. The American Census reports 1.9 million Indians, of which 63 per cent are urbanized. The difference between the two is accounted for by the BIA's criteria which counts only those with formal tribal affiliations. Both estimates are less than one per cent of the American population. As a result, American Indians have little political clout. They are not the country's principal minority, nor are they guaranteed representation in Congress. They tend to be under-represented in federal and State legislatures.

Social indicators are similar to other indigenous peoples. They include much lower incomes than the population as a whole, higher rates of incarceration, lower life expectancies, higher rates of suicide and substance abuse, lower levels of educational attainment and a 37 per cent unemployment rate, to name just a few. Like the other indigenous peoples, they have a younger and faster growing population than the United States as a whole.

American Indians

People: 1.9 million. 1.2 million live in trust relationship with U.S. government. 500 separate nations.

Political System: Tribal governments are recognized as sovereign governments, protected by U.S. Constitution. Rights for Indians stem from membership in tribes. Federal government has a trust relationship with tribal governments. Services are provided by federal, state, local and tribal governments. The service mix varies from tribe to tribe.

Outstanding Issues: Large real per capita declines in federal spending on Indians are threatening tribal governments. Several billion dollars in trust funds are not properly accounted for. Devolution of responsibilities from federal to state level. Proposals before Congress to tax tribal governments. Resolution of State versus tribal jurisdiction, particularly tax jurisdiction

Developments of interest: Proposals to develop exclusive on-reservation tax authorities. Many existing authorities are concurrent with States. Federal proposals to make tribal governments more eligible for the same programs as States. Ongoing negotiation of tribal compacts and evolution of transfers.

Lessons for Canada: Use of cost-sharing programs to support tribal governments. Use of compacts. Use of many own-source revenues including earnings taxes.

3.2 History

American Indians are the original inhabitants of the continental United States. They have lived on the land for longer than can be determined. Controversy attends speculation on how they arrived. For practical purposes, as with Canadian Indians, they have lived in North America forever.

American Indians had first contact with the Spanish in the south of the continental United States and later with the English, French and Dutch along the eastern seaboard and the French through the Mississippi basin. Much of the foundation for American policy towards Indians was laid during this period.

European settlers established the United States in 1776. The United States government created its Secretary of War in 1784 and charged it with negotiating treaties with Indian tribes. The Trade and Intercourse Acts, passed between 1790 and 1834, established the framework of American Indian policy. These acts made interaction between Indians and non-Indians subject to federal control.

The original federal policy was to negotiate treaties with the Indian tribes. This changed drastically as the American population increased and settlement proceeded westward over the Appalachians into lands, that the British had formerly reserved for Indians. The new policy is best exemplified by the passage of the Indian Removal Act of 1830, under which many Indian tribes were forcibly resettled west of the Mississippi. During this period, many Indians of the eastern United States lost much of the autonomy they had enjoyed in earlier periods.

By the late 1840s, the new policy was that Indians were to be "civilized" and resettled. The real aim was to free up Indian lands in the West for settlement. Indians refusing to be resettled were to be *"harassed and scourged without intermission*."[4] During this period many acts, such as the Indian Allotment Act, were passed that provided individual allotments of land to Indians. The total acreage of these individual land holdings was then progressively reduced through sales until the 1930s.

Another era began with the passage of the Indian Reorganization Act in 1934. This Act is credited with initiating modern tribal self-government within the system of American government. This Act promoted the creation of tribal constitutions. Despite this, the BIA largely dictated "self-government" during this period. Any attempt to assert sovereignty was reversed by the 1950s, when the policy once again reverted to assimilation. During this period, several Indian tribes were subjected to termination acts, which essentially denied them any of the services due to Indians by and terminated their government-to-government relationship with the federal government.

The end of the assimilation era is generally regarded to be 1970, when the Nixon administration called for "*self-determination for Indian people without the threat of termination of the trust relationship over Indian lands.*" Self-determination remains the official policy objective of the American government with respect to American Indian tribes.

3.3 American Fiscal Framework

The United States is a federal state with three tiers of government, other than tribal governments: federal, state, and municipal. The federal government is the chief recipient of

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[4] Johnson, Tadd and Hamilton, James, "Self-Governance for Indian Tribes: From Paternalism to Empowerment", Connecticut Law Review, May 1995, p 1253.

income taxes, the state governments are the chief recipients of consumption taxes, and local governments are the chief recipients of property taxes. The federal government administers transfers to both state and local governments. State governments also transfer funds to local governments.

Transfer arrangements have been less stable than in most other federal states. The United States also relies more heavily on cost sharing arrangements and many specific purpose conditional grants.

Figure 3.The Fiscal Framework for Tribal Indians

Ongoing compacting process
Funding
Flow through Funding
Services
Jurisdictional Dispute

Federal Office of Self Governance
BIA (and Interior)
IHS
Tribal Indians
Tribal Government
State and Local Governments
Other federal agencies
Own Source Revenue

Figure 3 illustrates the fiscal relationship for "tribal Indians" (Indians residing within Indian country) in the United States. The figure shows that the principal federal service agencies are the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA). These agencies provide services directly to Indians residing in Indian country and also contract service responsibilities and their associated financing to tribal governments through the

"compacting" process. The expansion of the compacting process is being facilitated through the Office of Self-Governance – a federal agency at arm's length from the BIA. A variety of other federal agencies also provide services to Indians as part of their responsibilities towards all Americans. These agencies are generally outside the compacting process. Many federal agencies provide "flow-through" funds to state governments so that they can deliver services to Indians or support tribal governments in doing so. Flow-through funding is illustrated by the dotted lines within the box marked "State-Local" The American fiscal relationship is subject to frequent disputes over tax jurisdiction between tribal governments and state and local governments. These disputes are indicated by the skull and crossbones set on the lines marked "Own-Source revenue". Disputes are based on a variety of issues including the checkerboard nature of land designations within Indian country, the variety of classifications of citizens within Indian Country and the final division of service responsibilities between state and local governments and tribal governments. Their ultimate cause is the incomplete specification of the fiscal relationship. The implications of this situation are depicted in Figure 7.

3.4 Modern Fiscal Relations

3.4.1 Modern Treaties and Land

Until 1871 treaties were the generally preferred means of defining the relationship between tribes and the United States. However, in 1871 Congress brought the treaty making process to an end as the result of a dispute between the House and the Senate. Agreements, executive orders and legislation then took the place of treaties. In some areas, state laws have also been important. As a result of this history, there are today both Treaty and non-Treaty Indians in the United States.

American history has produced other complexities in its classification of reservations and types of Indian status. For example, there are *executive order* reservations, *treaty-based* reservations and *Congressionally created* reservations. Each of these has slightly different legal status and rights. Governments on each will have different powers. There are different forms of recognition of tribal governments. This includes state recognition versus federal and varying degrees of federal recognition. There are also unrecognized groups of Indians who nonetheless maintain a distinct relationship with the federal government; terminated Indians who lost recognition and are seeking a renewed relationship; and non-reservation Indians. Some reservations also have unique rules by virtue of the conditions under which the state in which they reside gained statehood, for example in Oklahoma. In short, there is a complex range of relationships between American Indians and other governments, and these are still evolving.

The American federal government recognizes that it has a government-to-government relationship with sovereign tribal governments. The recognition of the inherent sovereignty of Indian governments is protected by the American Constitution and has been defined by subsequent Acts of Congress, executive orders and policy statements. Each tribal government is respected as having a unique and specific relationship with the federal government. A series of Supreme Court rulings have led to this relationship being termed a trust relationship.

The formal policy of the federal government is to advance the capacity of tribal governments to take on self-governance to the degree that they wish and are capable. Since 1970, a series of legislation and executive orders to further this aim have been passed.

3.4.2 Public Services

Public services to American Indians are provided by a combination of all levels of government including tribal governments. The U.S. federal government, unlike state and local governments has a trust relationship with over 500 tribal governments in the lower 48 states and Alaska. Because of this responsibility, it provides many services to Indians residing in Indian country,[5] that other Americans receive from their state and local governments. It provides these through a variety of federal agencies. Two of these agencies; the BIA, which is part of the Department of the Interior and the Indian Health Service (IHS), which is part of the Department of Health and Human Services, are exclusively oriented to serving Indian tribes.

The BIA is the federal government's primary financier of Indian programs and services, and it also administers 43 million acres of tribally owned land. It provides services directly, or through self-determination contract, grant and compact agreements with tribes, to over 1.2 million American Indians and Alaska Natives in 31 states.

Both the BIA and IHS budgets have been falling in real per capita terms since 1979. This has caused substantial reductions in real levels of program support. Tribal representatives confirm that the cuts have really hurt them. In real terms, federal spending for Indian programs peaked in 1979 at a total of $4.4 billion. By 1989, this had fallen to $2.5 billion. Measured in current dollars, the BIA has a budget of roughly $1.7 billion (1997 dollars) and the IHS $2.4 billion.

BIA funding supports roads and irrigation projects, tribal police, tribal courts and meeting the requirements of the Child Welfare Act. The BIA also funds schools (states generally fund schools both on and near reservations as well), and community colleges. The BIA provides the Community Development Block Grant in support of the administration requirements of tribal governments. Additional federal monies are routed through the states as Community Services Block Grants. The BIA provides welfare assistance to those Indians living on or near reservations who do not qualify for state benefits. Recent welfare reforms in the United States have made it likely that these expenditures will need to be significantly increased in the near term.

BIA expenditures cover the following state and local government services:

Elementary, secondary and post-secondary education.

Law Enforcement

[5] The precise definition of "Indian country" is very important for determining tax jurisdiction, eligibility for programs and exemptions. Despite its importance, the definition remains unclear. One difference between Canada and the United States is that in the U.S., areas adjacent to reserves and occupied by large numbers of tribal Indians are considered "Indian country" and hence federal responsibilities.

Social Services	Business Loans
Judicial Courts	Tribal Government Support
Land and Heirship Records	Forestry
Agriculture and Range Lands Development	Water Resources
Fish, Wildlife and Parks	Roads
Housing	Adult and Juvenile Detention Facilities
Irrigation and Power Systems	

The BIA budget process allows tribes to help shape the BIA's funding requests within the federal budgeting process, by stating their priorities for the Tribal Priority Allocations (TPA) account. This account comprises approximately 45 per cent of the BIA's total budget.

The TPA works by having tribes start from baseline budget amounts to develop detailed budget requests, which express their funding needs and preferences. This tribal budget process provides the flexibility to consider funding options should the appropriation be higher or lower than the base level. Tribes and their respective Agency Offices (83 nation-wide) work closely together to establish budget priorities for funding and staffing. The budget is then submitted to Area Offices (12 nation-wide) for their input and forwarded to the central office. Neither the Area nor Central Office will change budget priorities set by tribes without consultation. Tribes on the other hand may reprogram funds to other programs following the actual appropriation

The IHS operates hospitals and clinics on reservations and provides related health services for Indian communities.

States and local governments also provide services within Indian country. The extent of this varies considerably from state to state and tribe to tribe. In many instances, tribes may be reluctant to allow such services because this opens them up to state attacks on their tax authorities.[6]

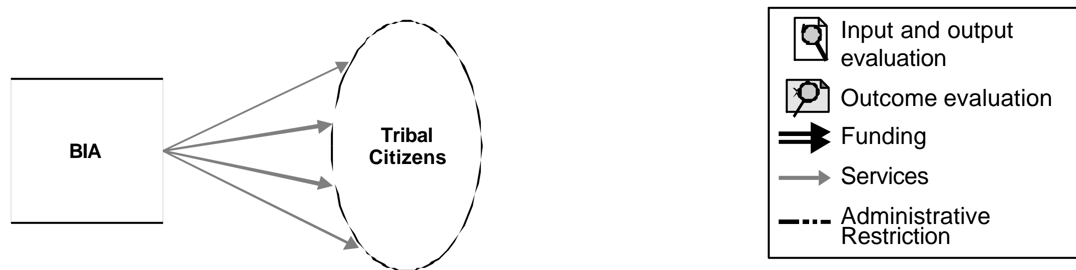
3.4.3 The Evolution of Self-Determination for Tribal Government

Figures 4, 5 and 6 depict how service responsibilities have been gradually transferred from the American federal government to tribal governments. The key lessons is that in order to fully realize the advantages of tribal government, the focus of accountability had to be shifted. The focus was shifted from direct control over spending priorities by the federal

[6] For example, in *Oklahoma Tax Commission versus the Sac and Fox Nation* argued before the Supreme Court, the OTC argued that it gained rights to taxation by virtue of providing essential services. While the OTC lost this argument, it was not because of their logic, but rather because they failed to prove they provided such services.

government towards ensuring tribal governments were administratively capable prior to assuming responsibilities and then focusing evaluations on program outcomes.

Figure 4.No Autonomy – Services Delivered Directly by the Federal Government



Note: The legend with Figure 4 also applies to Figures 5 and 6. Evaluations and restrictions are conducted and imposed by a number of U.S. federal agencies.

Figure 4 shows the model for delivering services to tribal Indians that existed prior to 1975. The federal government, primarily through the BIA and the IHS, would supply services directly to Indians living on reserve. Many of these services were delivered to other Americans from different state, federal and local agencies.

This model was unresponsive to the needs of tribal citizens. Federal Indian agencies were held accountable to the federal government through audits and not evaluations, but were not accountable to tribal citizens. The model was also criticized for being paternalistic and fostering dependency.

Figure 5.Limited Autonomy – Tribal Governments Deliver Services Under Federal Direction

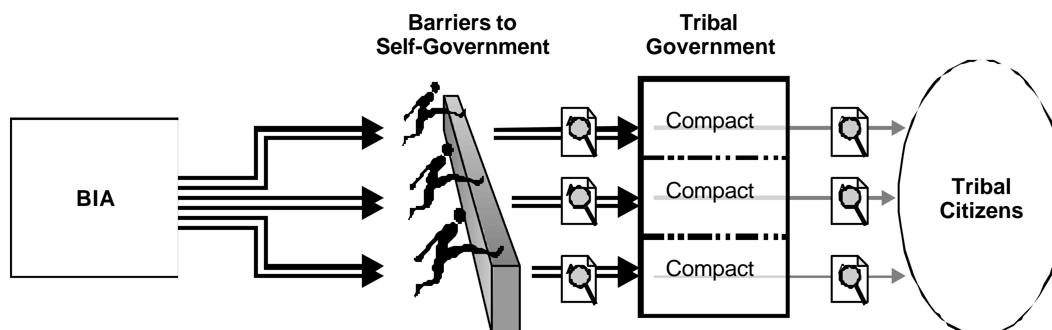


Figure 5 illustrates the first "compacting" model. This allowed tribal governments to take over service responsibilities from the BIA. This model was created by the <u>Indian Self-Determination and Education Assistance Act</u> in 1975. "Compacting" refers to the negotiation of contracts by which the federal government transferred service responsibilities and associated funding to tribal governments.

Strict controls were placed on compacting. Controls reflected federal concerns that tribal governments were either not "ready" for such responsibilities or would embarrass the federal government by mismanaging funds.

- *A separate compact had to be negotiated for each assumed service. The three separate lines emerging from the box marked "BIA" illustrates this.*

- *Funds could only be spent on the service for which they were designated. This is illustrated by the dotted lines separating compacts within the box marked "tribal government".*

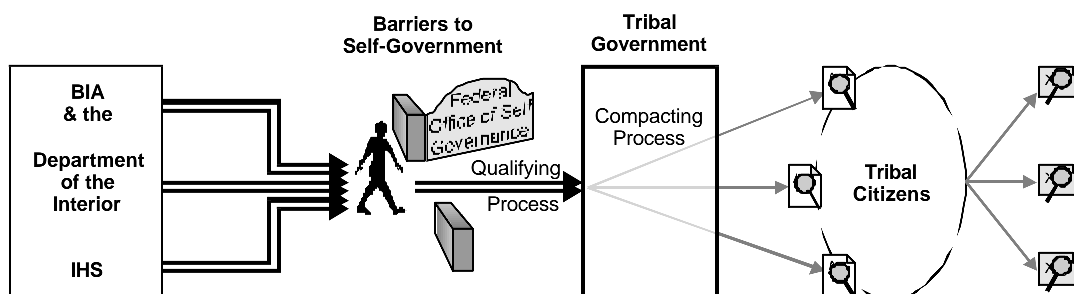
- *The disbursement of funds was closely monitored. This is indicated by the magnifying glass icons in the four arrows that point to the box marked "tribal government".*

- *Services provided by tribal governments were evaluated by federal agencies. These evaluations are indicated by the magnifying glasses in the service arrows coming out of the box marked "tribal government". Federal agencies exercised strict controls over how services were to be delivered.*

- *There were high costs to negotiating each compact because of their many specifications regarding funding and performance requirements. Costs are indicated by the wall labeled "Barriers to Self-Government". These costs had to be borne by the parties negotiating the compact. Negotiation costs proved to be a significant deterrent to both the federal agencies and the tribal governments.*

This model was an important step forward. It provided a training ground for self-government. However, over time its flaws became clear. Stipulations, intended to ensure accountability, made the process far too restrictive. Tribal governments were not allowed to pursue service innovations. There was little incentive to pursue efficiencies because any savings could be not be expended for other purposes. In effect, tribal governments were forced to accept the priorities and methods set by the BIA. Finally, the costs of negotiating compacts often proved prohibitive.

Figure 6.Near Autonomy – Tribal Governments Use Federal Funds According To Their Own Priorities



More programs are eligible for compacting. In addition to BIA programs, IHS and Department of Interior programs are also eligible.

- *The administrative firewalls have been removed. Funds can be easily re-allocated according to tribal priorities or as a result of service efficiencies.*

- *The Office of Self-Governance facilitates negotiations between tribal governments and federal agencies. This arm's length federal agency mediates and pays the negotiation costs of both parties. This is depicted by the change from a hurdler needing to clear the wall marked "Barriers to Self-Government" to a person now walking through a gate.*

- *The strict controls placed on program delivery have been removed. The focus of accountability has shifted. Tribal governments must now go through a qualifying process where they demonstrate mastery of sound practices before assuming service responsibilities.*

- *The need for extensive audits and strict control over service delivery has been replaced by an emphasis on evaluating outcomes. In short, if programs produce good outcomes then how services are delivered, how priorities are set and how funding is disbursed is not an issue.*

3.4.4 Self Government

The move towards true self-government began in the 1970s with the passage of the Indian Self-Determination and Education Assistance Act of 1975. This Act created a contractual mechanism for transferring responsibilities from the BIA to tribal authorities. It allowed for funds to be transferred directly to tribes as they assumed responsibilities for specific services.

The legislation was seen as groundbreaking in its day. However, it was found to be of limited utility owing to bureaucratic restrictions. Over time, it also came to be criticized for being excessively costly to administer. The chief criticisms were as follows.

- Contracts were very restrictive and closely scrutinized by the BIA.

- There was virtually no scope for redirecting program funds.

- There was little incentive to economize on program costs because there were strict limits on how such savings could be utilized.

- If the contract involved the tribe managing any resources for which the BIA has trust responsibility then tribes required BIA concurrence for all decision-making.

- BIA approval was required for all programs redesigned by the tribe.

- Tribal staffs were required to report to the BIA, according to regulations and timetables, which it set out.

- Tribes found contracting to be financially hazardous because they were reimbursed for costs rather than granted funds up front.

Nonetheless, many observers feel the legislation was very important for building within tribes the capacity to govern and for laying the groundwork for the Tribal Self-Governance Act of 1994.

The Tribal Self-Governance Act was the culmination of six years of experimenting with ways to improve the earlier act. In 1988, the Secretary of the Interior had begun a demonstration project, the Tribal Self-Governance Demonstration Project. This was renewed in 1991 with thirty tribes participating. The lessons learned from the demonstration project were incorporated into the Tribal Self-Governance Act. The Tribal Self-Governance Act was distinct from the earlier legislation for several reasons. It established a federal agency that

was separate from the BIA, the Office of Self-Governance, which would help *any* federal organization within the Department of the Interior or the IHS, that provides services to Indian tribes, to negotiate self-administration contracts, commonly known as, “compacts”. It relieved the United States federal government of its trust responsibility when transferring program funds. It provided considerably more flexibility over the disbursement of funds. Tribes were free to “plan, conduct, consolidate, and administer programs, services and functions.” In other words, they were given a block grant. This legislation also allows tribes to take over management of any activity or site that has special geographical, cultural or historical significance. The chief accountability mechanisms are now based on performance measures with performance reports using both outputs and outcomes. The BIA maintains the right to reassert its control almost immediately in cases where land or assets it holds in trust are threatened by the new arrangement.

Twenty tribes or groups of tribes per year are permitted to enter this program. In order to be accepted, each must present a resolution requesting entrance, demonstrate fiscal stability, and complete a “planning” phase which includes tribal planning of priorities and service delivery as well as budgetary and legal research.

The percentage of BIA expenditures accounted for under “compact” arrangements has risen from 37 to 50 per cent since the establishment of the Office of Self-Governance.

3.4.5 Taxation and Own-Source Revenues

American case law regarding the tax status of Indians, Indian reservations and Indian corporations is relatively complex. There is a widespread perception among Americans that Indians are exempt from taxation. In fact, there is no Constitutional clause exempting Indians from taxation. However, there are some non-Constitutional exemptions, recently affirmed by the Supreme Court, which do apply to reservations.

- Federal income taxes are not levied on income from trust lands held for Indians by the United States. Tribes are also exempt from federal taxation.
- State income taxes are not paid on income earned on an Indian reservation, however state income taxes can be levied on those Indians residing outside Indian country.
- State sales taxes are not paid by Indians or Indian enterprises on transactions made on an Indian reservation; and if states impose taxes on Indian country these must be explicitly designed so that the incidence of taxation is not on Indians.
- Local property taxes are not paid on reservation or trust land.

Indian governments have broad taxation powers. They are free to levy income taxes (generally known as “earnings” taxes) and most other tax powers available to state governments. However, these are often not exclusive jurisdictions. Tribal governments have had ongoing challenges to their jurisdiction, primarily from state tax authorities.

For example, tribal tax authorities can tax non-tribal interests on reservation lands. However, these powers are often concurrent with state powers. The lines of demarcation are very blurred and this is a serious detriment to both investment and the utilization of this tax

authority. An oil well that must pay royalties to both state and tribal authorities will likely not operate. The U.S. federal government has recognized the potential problem of double taxation and the disincentives this creates for investment. They are therefore considering the development of a tax credit, which would compensate enterprises being subject to double taxation on reservation lands.

States can also earn the right to levy taxes off the tribal tax base, if they argue that they provide State services on tribal land. For example, expansion of state funded roads and state-financed schools can be used as justification for "rebalancing", which would give states the right to tax on the reservation.

State tax authorities have made periodic challenges to Indian tax jurisdiction on a number of other bases as well. These include the differences in the status of the land and the nature of tribal rights within the land. While many of these challenges were ultimately struck down by the Supreme Court, they nonetheless undermine the financial stability and investment climate on reservations.

Some American tribes have been very successful in earning funds from commercial enterprises, including casinos. They have been aided in this respect by tax exemptions applying to Indian-owned commercial enterprises operating on reservation lands.

3.5 Emerging Issues and Developments of Interest

The future of self-government and its underlying fiscal relationship is threatened by the trend of declining real per capita support for tribal governments by the U.S. federal government. Declining budget appropriations are causing a search for new means of financing. Some tribal governments are attracting third party support, for example, through foundations that assist in the establishment of community colleges and schools. There are also proposals being put forth by the Executive Branch to create new revenue options for tribal governments. These call for the further development of exclusive on-reservation taxation authorities by Indian governments and the recognition of tribal governments as being equal to the states for the purposes of implementing federal statutes involving the distribution of funds or the administration of programs. Some of these are already being implemented. For example, tribal governments are now included in legislation that provides funds for infrastructure development, or other federal benefits, such as the Higher Education Amendments of 1992, and the Intermodal Surface Transportation Efficiency Act of 1991. Tribes are free to use funds provided under self-governance compacts to lever these additional federal funds.

The proposals above are positive developments. However, it is unclear whether new Executive proposals will come to fruition. There are also other proposals that could be very detrimental to tribal governments. For example, federal reforms have devolved federal responsibility for many services to the state level. However, states do not have a trust relationship with tribal governments. There is widespread apprehension that federal funds directed to state governments and intended for services to Indians will not be so disbursed. Tribal governments report they are now being requested to direct many of their compact requests, particularly welfare services, to their state governments. This could open the tribal governments up to "rebalancing" challenges by the state against their tax jurisdiction. Finally, welfare reform at the state level is causing an increasing number of Indians to be denied state services. Responsibility for them is then shifted to the BIA, which strains its

shrinking budget. Finally, there are also proposals currently before Congress to tax tribal governments. This would cause substantial reductions in the funds currently derived from commercial enterprises, including casinos.

The American Experience Shows the Importance of Specifying All Three Major Elements of a Fiscal Relationship

Issue: Tribal government is not working as well as it could. Tribal services are suffering. Tribal economies are being left behind. Social problems are growing.

Reason: Fiscal relationship is not properly specified, specifically the division of tax powers and service responsibilities between states and tribal governments. States have concurrent jurisdiction with tribal governments. States can lay claim to tribal tax room whenever, their share of the services provided on reservations rises. Frequent state challenges to tribal tax jurisdictions are undermining tribal government's revenue base, investment climate, quality of services, financial certainty and ultimately sovereignty. Businesses fear double taxation and uncertainty and stay off of reservations.

Many things can trigger state attacks on tribal jurisdiction. Often these events are unintended consequences of issues unrelated to Indians.

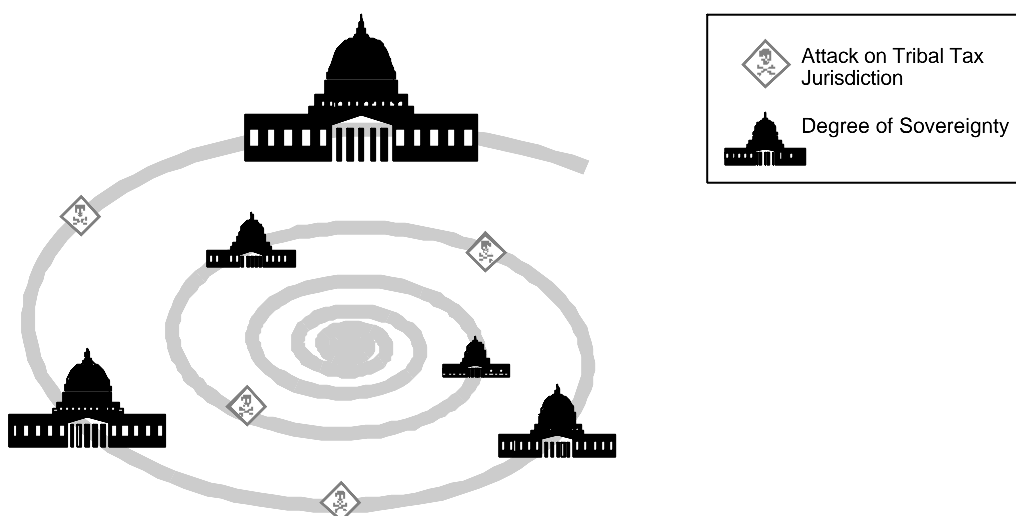
Examples:

- Federal government transfers powers and associated funding to the states
- Budget reductions to the IHS or the BIA
- Budget reductions to any federal agency which serves Indians or Indian lands
- Tax jurisdiction over any square on the reservation checkerboard is challenged
- Congress institutes taxation of tribal government enterprises
- Concurrent tax jurisdictions continue to undermine investment
- Tribal commercial enterprises are threatened by legislation. For example, tribal casinos are disallowed.

Solutions:

- Clarify tax powers and service responsibilities
- Ensure exclusive tax jurisdictions for tribal governments
- Provide financial certainty over transfers
- Provide legal certainty over tribal jurisdiction and land title

Figure 7. Undefined Fiscal Relationship Elements Can Shrink Tribal Sovereignty



3.6 Summary

Key trends in the development of fiscal relationships for American tribal governments include:

- The negotiation of compacts, which are similar to Manitoba's dismantling agreements.
- Steady reductions in real per capita direct federal support for tribal governments.
- Mainstreaming tribal governments into the federal-state transfer system by making them eligible for many of the cost sharing programs for which states are eligible.
- Devolution of some former federal responsibilities (particularly welfare programs) to the state level, where there is no trust relationship with Indians.
- Ongoing challenges by state taxation authorities upon Indian tax jurisdiction.

Initiatives are being discussed at both the Executive and Legislative branches of the U.S. federal government which may have significant implications for American Indian tribes. These include the following.

- Proposals to develop exclusive tax jurisdictions for tribal governments and recognize tribal governments as being on a par with states in determining eligibility for federal transfers and cost sharing programs.
- Proposals to develop federal tax credits to address the issue of double taxation. Supreme Court rulings have established many tribal tax jurisdictions, such as resource extraction taxes, as being concurrent with state powers.
- Proposals from Congress to tax tribal governments.

The American situation is fluid. Some tribal governments stand to win and some are likely to lose as these events unfold. For example, the decline in direct transfers from exclusively Indian delivery agencies is clearly going to hurt tribal governments. However, this will be offset for many as they become eligible for many of the federal programs aimed at states. When the federal government puts them on a par with state governments, they will become part of a larger political constituency. This bodes well for the security of their transfers. The key determinants for many will be the extent to which the U.S. federal government continues to rely on cost sharing programs and the relevance of the cost sharing programs opened up to tribal governments.

The U.S. federal government has room to maneuver, even if congressional real appropriations for the BIA and IHS continue to decline in per capita terms. The U.S. federal fiscal position is greatly improved. This could make it easier to follow through on their proposals to create exclusive tax jurisdictions for tribal governments. They could also support tribal governments by making them eligible for the same cost sharing programs as states or local governments. This would be a more politically defensible form of support than direct transfers. From the federal perspective one advantage of cost sharing is that it creates strong incentives for tribal governments to exercise any tax jurisdiction they are granted and to promote economic development.

The downside of the above scenario is that it could lead to a growing disparity between rich and poor tribal governments. Tax jurisdictions are only useful to tribal governments with a tax base. Eligibility for cost sharing programs is only useful for tribal governments with own-source revenues.

Proposals to tax tribal governments will hurt those tribes with strong commercial revenues. Many tribes, such as the Oneida, in upstate New York have turned these into their chief revenue sources.

4 The Aboriginals of Australia

4.1 Introduction

There are two indigenous peoples in Australia: Aboriginals and Torres Strait Islanders. The Aboriginals are the original inhabitants of the bulk of modern day Australia. The Torres Strait Islanders reside in the region immediately north of the tip of Queensland and are of Polynesian origin. A single council, the Aboriginal and Torres Strait Islander Commission (ATSIC), represents them both at the federal level. Aboriginal and Torres Strait Islanders today number roughly 352,000 or 2 per cent of the population. This study will focus primarily on the Aboriginals.

The socio-economic characteristics of Australia's Aboriginal population are similar to other indigenous peoples. They are characterized by higher rates of infant mortality, a younger, faster growing population, higher rates of unemployment (roughly 39 per cent), much lower incomes, lower levels of educational attainment, higher rates of incarceration, higher suicide rates and a host of other social ills.

The Aboriginal population is still largely rural. In fact, a recent article reports that 90 per cent of Australians have never met an Aboriginal. This population is also dispersed across the country. The Aboriginals do not have a common language or culture. Many very different languages are spoken. Art, kinship systems and ceremonies also vary significantly.

4.2 History

Archaeological evidence dates the Aboriginal occupation of Australia back 60,000 years. The first British settlers began arriving in the late 1700s and early 1800s and were apparently convinced that the land was virtually uninhabited. Captain Cook noted the presence of the Aboriginals but seems to have greatly underestimated their population.

Unlike the other countries under review, no formal treaties were concluded between the colonizing power and the Aboriginal

Aboriginals

People: Roughly 2 per cent of Australia's population. Younger and faster growing population than Australia as a whole. Large rural element. Much poorer, less educated, more imprisoned and shorter lived than population as a whole.

Political System: Federal state. The federal government is known as the Commonwealth. Aboriginals are a concurrent responsibility. Most services are state provided. Aboriginals are under-represented at both the federal and state level in Australia's parliaments. No treaties were ever signed. No treaty rights for Aboriginals. Emphasis on international covenants regarding rights of indigenous people. Many government-like Aboriginal bodies and strong national political organization.

Outstanding Issues: Clarification of aboriginal title and government position on this as a result of the <u>Mabo</u> and <u>Wik</u> decisions. Meeting the goals and objectives of the <u>National Commitment</u> to improve social outcomes and services for Aboriginals. Still no Treaty or recognition in Australia's Constitution. No apology ever issued for "Black wars", seizing of children or deaths in custody.

Recent Developments: Produce a National Reconciliation with Aboriginals in time for millenium. Negotiation of "regional agreements" between Aboriginals and commercial interests on lands under claim. Research by Aboriginal organizations into changes in Australia's fiscal framework to support improved services for Aboriginals.

Lessons for Canada: Use of regional agreements on land under Aboriginal title. Structure of truly national Aboriginal organization representing both urban and rural Aboriginals.

inhabitants. Lands were simply taken by the first settlers. Title was never transferred because the legal status of the land was assumed to be *terra nullis,* or land inhabited by no one. Aboriginals were considered too primitive to have land rights.

The earliest policy of the Australian government towards Aboriginals might be summarized as "*extermination.*" The "*black wars*" with Aboriginals began almost as soon as colonists arrived. These wars characterized the establishment of virtually every settlement in Australia. Essentially, the colonists used military force to push the Aboriginals off the land. Australia's history until well into the 20th Century was characterized by occasional massacres of settlers and much larger and more frequent massacres of Aboriginals.

As early as the 1830s, some Australian officials argued that the government should conclude treaties with the Aboriginals. Only one treaty was ever concluded, with Tasmania's aboriginal population in 1832, and it was an oral treaty, which was quickly forgotten.

Extermination policy was followed by "*assimilation*" policies. The presumption was that the Aboriginal population would either die out, or be bred and civilized out of existence. Aboriginals were given legal rights, although not necessarily citizenship, as subjects of the Crown. However, the black wars continued. Settlers on the frontier organized small armies to "*shoot the land clear.*"[7] During this period, laws made it mandatory for Aboriginals to either work for the pastoral industry or be confined to reserves. Thousands of Aboriginal children, particularly those of mixed parentage, were taken from their parents in order to be better assimilated at missionary camps. In 1951, assimilation was made the policy of the Commonwealth government. Aboriginal people were declared wards of the state. The state governments gained legal rights over their movements, employment, residence, wages and marriage. Rural Aboriginals worked in a system of forced labour, in camps and settlements established throughout the outback. The Commonwealth was constitutionally prohibited from intervening.

The modern era began with two events around 1967. The first was the Wave Hill strike. It was precipitated when an Aboriginal leader demanded pay closer to what European workers were receiving.[8] He started the strike after his demands were refused. The strikers set up a camp at an old dreaming site[9] and refused to either work or leave the site. Early in 1967, they formally petitioned the Governor-General for the return of some of their tribal lands. The strike generated publicity and attention, and as a result the strikers gained sympathy and support from non-Aboriginal sources. The striking Aboriginals established a company to represent themselves. In 1972, the Prime Minister recognized the legitimacy of Aboriginal grievances and announced that funds would be made available to Aboriginals for the purchase of properties not on reserve. He officially ended the assimilation policy and

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[7] From "Frontier", a program sponsored by the Australian Broadcasting Corporation.

[8] Aboriginal workers were being paid significantly less than their European counterparts. The government supported this policy because it was argued that low pay would induce Aboriginals to relocated to missions where they would be more effectively assimilated (see "Some Signposts from Daguragu", a speech delivered by Sir William Deane, Governor-General of the Commonwealth of Australia, August 22, 1996).

[9] A dreaming site has spiritual and political significance to Aboriginals.

announced one of “self-determination”. In 1976 the Aboriginal Land Rights (Northern Territory) Act was passed. It established a land acquisition fund and a process under which Aboriginals could regain territory.

The second event signaling the modern era was a Constitutional amendment passed in 1967. This made Aboriginals a concurrent responsibility of the state and Commonwealth governments. Prior to this, Aboriginals had not been counted in the census as Australians and had been exclusively the responsibility of state governments. Moreover, under the Australian Constitution, the Commonwealth is the paramount power and so it had acquired real authority regarding Aboriginals for the first time. Aboriginals have looked to the Commonwealth government to defend and advance their interests ever since this event.

Many Australians report that this history was not taught in public schools until very recently. Most Australians were taught that they occupied the land because the Aboriginals had simply “*moved on*.” This story should highlight the political difficulties facing any Australian government seeking to address the political aspirations of Aboriginals.

4.3 Australia’s Fiscal Framework

Australia is a federal state very similar to Canada. The Commonwealth government and the states and territories have powers roughly commensurate with Canadian provinces. For example, like Canada, the states deliver health care and education but depend on financial assistance from the federal government to do so. The resultant “vertical fiscal imbalance” is relatively larger than it is in Canada. That is to say, Australia’s federal government controls a larger share of public revenues than are necessary to meet its formal program responsibilities.[10]

The Commonwealth makes both conditional and unconditional grants. In 1997/98, 16 billion dollars was transferred to the states through general-purpose grants (generally, unconditional block transfers), $11 billion in specific purpose transfers and $7 billion in “through” transfers (pass through state governments to local governments). Another $1.5 billion was transferred directly to local governments.

Australia’s equalization program is much like that of Canada. It provides states with the financial capacity to ensure that uniform service standards are maintained across the country. However, unlike Canada, measures of differential service costs as well as revenue capacity and tax effort are used in the calculation of entitlements. In this respect, the Australian equalization system is similar to Canada’s territorial financing system. Other things being equal, states with relatively high Aboriginal populations receive relatively larger equalization grants owing to the tendency of Aboriginals to live in remote locations. However, while equalization formulae account for differences in service costs, they do not dictate that funds actually address these differences. Hence, there is no guarantee that funds intended for Aboriginals are spent on Aboriginals.

[10] In 1997/98 the Commonwealth, with a population two thirds that of Canada, will transfer almost $36 billion Australian dollars to other levels of government. An equivalent Canadian transfer system would require the federal government to transfer $54 billion to the provinces and local governments instead of its actual $19.9 billion.

Independent commissions at both the state and local levels oversee the transfer system - the Commonwealth Grants Commissions and Local Government Grants Commissions. These commissions determine actual disbursements among governments, based on terms of reference set by the governments themselves. Each commission is intended to be an independent and impartial arbiter regarding the distribution of grants. While these bodies only make recommendations, their recommendations are generally accepted and implemented.

Figure 8.Fiscal Framework for Aboriginals

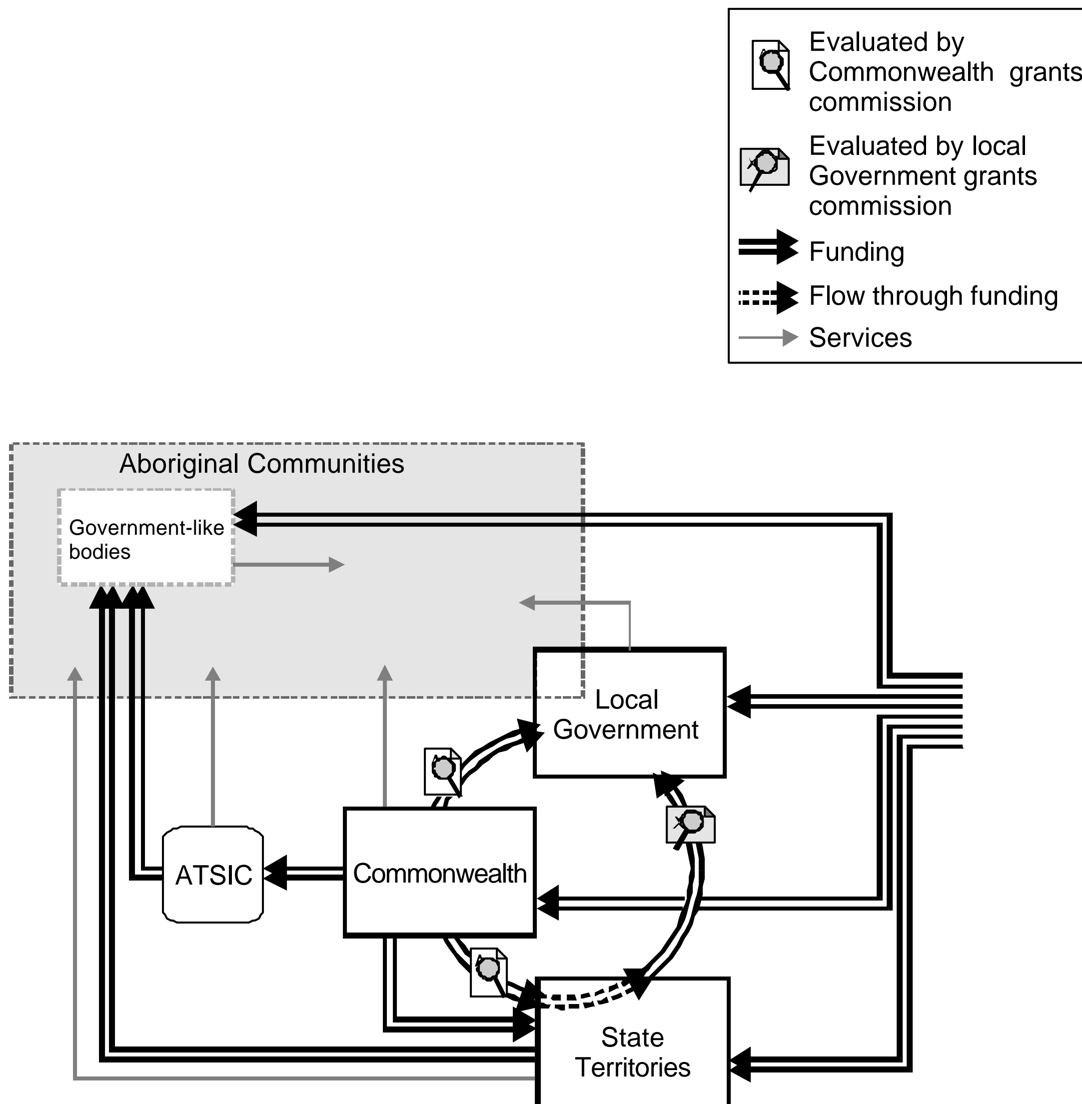

Figure 8 illustrates the fiscal framework for Aboriginals. The chart shows some developments of interest. For example, "government-like" bodies are emerging within Aboriginal communities. These bodies provide services to Aboriginals either as contractors to government or to supplement government services. These bodies receive funding from a variety of sources including grants-in-lieu of resource royalties, property taxes, and fees for access to land. They also receive federal funding, which is administered by ATSIC. Finally, state agencies may contribute.

All three tiers of government provide some services directly to Aboriginals. This is indicated by service lines which flow directly to Aboriginal communities. The Commonwealth government is unique however, in that most of its funding is administered by ATSIC.

Some Aboriginal communities are local governments. These are eligible for the same support as non-Aboriginal local governments.

4.4 Modern Fiscal Relations

4.4.1 Treaty and Land

Because there were no formal treaties signed with Aboriginals, they have no special rights or status. They also have little political power at either the state or Commonwealth level. Only 3 of Australia's 841 current parliamentarians are indigenous and this is an all-time high. There has been only one federal Aboriginal parliamentarian in Australia's history.[11]

Despite these weaknesses, Aboriginals are seeking to enhance their culture, improve social and economic outcomes and re-establish control over some of their traditional lands. Like non-Treaty First Nations, they have based many of their political and economic aspirations on assertions of aboriginal title.

Aboriginal title was not recognized in Australia until the Mabo decision of 1993. This ruling by Australia's highest court held that Aboriginal title had not been extinguished when Australia was founded. Instead, Aboriginal title had only been extinguished when it had been the "clear intent" of the government to do so. The court partly defined actions which constituted "clear intent" to extinguish, such as granting fee simple title. This ruling implied that Aboriginal title still existed over vast tracts of the country.

After Mabo, the Commonwealth government passed the Commonwealth Native Title Act which transformed the way in which Aboriginal ownership of the land could be formally recognized and incorporated within Australian legal and property regimes. The act provided Aboriginal groups with a process for reasserting sovereignty over lands still under Aboriginal title.

Mabo was followed by the Wik decision in 1996. Wik further clarified Aboriginal title. In particular, it ruled that some aspects of Aboriginal title remained after the granting of a pastoral lease. In the case of conflict, the interests of the pastoral lease shall prevail. However, holders of pastoral lease are required to accommodate Aboriginal interests.

Mabo and Wik provide the context for contemporary Aboriginal policy. Mabo is similar to Canada's Delgamuukw ruling but with some key differences: (1) Aboriginal title over all privately held land was deemed to be extinguished; and, (2) Aboriginal title can be unilaterally extinguished more easily than in Canada, where a Constitutional amendment would be required.

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[11] Address to Reconciliation Convention by Mr. John Ah Kit, Aboriginal member of the Northern Territory Legislative Assembly.

The Wik decision created backlash. It was argued that this created too much uncertainty over title and was hurting investment. Third party interests lobbied the government for changes and a formal extinguishment policy. The Prime Minister went so far as to state that the "pendulum had swung too far" in favour of Aboriginal rights. In January 1997, he refused to rule out the possibility that the government would amend Australia's Racial Discrimination Act so as to allow the legislative extinguishment of aboriginal title. The Commonwealth has since proposed amendments to the Native Title Act, which have been strongly rejected by Aboriginal leaders. They argue that the amendments provide for easier legislative extinguishment of aboriginal title, and make it more difficult for Aboriginal groups to make claims based on aboriginal title

Despite these recent controversies, Aboriginals have been very successful in establishing a land base. Since the 1970s, they have turned much former "reserve" land (in fact, Crown land) into Aboriginal land under inalienable freehold title. For example, 50 per cent of the Northern Territory and 12 per cent of Australia is now deemed Aboriginal land. Of course, the majority of this is marginal land.

The fight for an Aboriginal land base has created most of the pre-conditions of self-government: a defined land base; representative institutions; and, substantial revenues accruing to these institutions from the land.

In 1991 the Council for Aboriginal Reconciliation was established to bring about a national reconciliation with Aboriginals. It is not clear through what instrument this will be accomplished. Some advocate that the Commonwealth sign a formal treaty with Aboriginals. Others argue for a simpler *makarrata* or instrument of reconciliation. There are also advocates for a Constitutional amendment that would explicitly bring Aboriginals into the Constitution. Constitutional reform is not proving as difficult in Australia as it has in Canada.

4.4.2 Services

The division of service responsibilities between federal, state and local governments is the same for Aboriginal and non-Aboriginal people. However, Aboriginals generally do not enjoy the same level of public services or infrastructure as other Australians. Australian governments recognize these disparities. In 1993 they produced a consensus document the National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal People and Torres Strait Islanders (National Commitment), which identified specific areas of disparity, and committed all three levels of government to removing these. Unfortunately, the majority of Australians do not believe such disparities exist.[12]

The Commonwealth has also recognized that its mix of services and delivery mechanisms are not always appropriate for Aboriginals. In 1991, it transferred the bulk of its program responsibilities for Aboriginals from the former Department of Aboriginal Affairs to a newly created Aboriginal-run organization, the Aboriginal and Torres Strait Islander Commission (ATSIC).

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[12] Most polls show that a majority of Australians believe Aboriginals receive better services than non-Aboriginals.

ATSIC is the principal Commonwealth policymaking body for Aboriginals and it administers most Commonwealth programs for Aboriginals. Other Commonwealth agencies with extensive responsibilities for Aboriginals are the Department of Employment, Education, Training and Youth Affairs (DEETYA) and the Department of Health and Family Services.

ATSIC reports to the Minister responsible for Aboriginal Affairs. The Minister appoints the Chief Executive Officer of ATSIC and many of its chairpersons. These officials ostensibly run ATSIC, however they do not have total control. A significant portion of ATSIC's budget must be spent in accordance with priorities established by the Minister, these generally being community housing and infrastructure.

ATSIC's total budget for the 1997 fiscal year was $950 million. This was a small increase over 1996, when the budget was reduced by 11 per cent. The budget is entirely discretionary and recent arbitrary cuts have created a good deal of uncertainty.

ATSIC provides a semblance of Aboriginal political organization at every level of Australian government. It has local, regional and national offices. Local offices are run by elected councils. The roles of each are listed below.

1. The national office liaises directly with the Commonwealth government.
2. State offices coordinate ATSIC programs with state and local programs and also represent Aboriginal interests at this level.
3. Regional offices control most of ATSIC's budget and deliver programs to their respective communities. Elected regional councils administer sixty per cent of ATSIC's programs.

Because it is a Commonwealth agency, ATSIC's principle programs lie outside areas of state responsibility.[13] ATSIC programs include: welfare experiments, work experience experiments, community housing, infrastructure, experiments in local government and the facilitation of agreements among Aboriginal organizations and other levels of government. However, the largest share of its expenditures support assertions of Native title, land purchases and business development. These accounted for $540 million in 1996. ATSIC is not permitted to contract bodies to provide the services for which it is responsible.

The Aboriginal and Torres Strait Islander Commission Act (1989) is subject to ongoing review and amendment. A major review of the Act was instigated by the Board in April 1997, and will report, after community consultation, during the next financial year.

The public is suspicious of ATSIC. As a result, it is the most closely scrutinized agency in the Commonwealth. A government bureaucracy oversees ATSIC and it is also subject to review by the Office of Evaluation and Audit and by the Australian National Audit Office. ATSIC maintains an internal Fraud Awareness Unit. In 1997, the Commonwealth

[13] Nonetheless, ATSIC reports that the much of its resources are used to fill gaps left by inadequate state programs.

government appointed a Special Auditor to examine the financial documentation of ATSIC-funded indigenous organizations.

ATSIC only provides services that are Commonwealth responsibilities. Most services are state responsibilities and hence not affected by it. Many Aboriginal bodies argue that despite the National Commitment, state services will not be improved without changes to the transfer system[14] that force change. There are currently no conditions attached to transfers that require recipients to provide adequate services and infrastructure to Aboriginal communities. However, additional conditions are not an easy political sale. Unlike most other countries, the share of conditional grants has risen over the last twenty years. The States are arguing these limit their flexibility and ability to innovate. The Commonwealth seems unwilling to antagonize them by imposing further conditions.

Another approach to improving Aboriginal services was advocated in the National Commitment. This document suggested the negotiation of formal agreements among governments to spell out each government's role and responsibilities in meeting the needs of Aboriginals and Aboriginal communities. ATSIC suggested that they conclude agreements in health, housing, infrastructure, employment, and business funding and land management. To date no such agreements have been concluded.

The Aboriginal response to this failure takes three tacks. The first two are "mainstream" approaches.

(1) The Commonwealth government should make greater use of specific purpose grants with conditions and accountability requirements. The following is ATSIC's specific recommendation:

- "[The Commonwealth Government should impose] *specific requirements on the States and Territories that funds provided by the Commonwealth are used in a way that adequately addresses the needs of indigenous peoples*"[15]

- "*The Commonwealth should use its leverage and make greater efforts to effect agreements with the states and territories that clearly define service responsibilities and performance measures for Aboriginals at both the state and Commonwealth level.*"

(2) Finally, a self-government approach is emerging.

- "*The Commonwealth should make greater use of direct funding to Aboriginal communities so that they can provide their own services or contract their provision*".[16]

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[14] In 1992, the Central and Northern Land Councils (regional Aboriginal organizations) as well as ASTIC made proposals for transfer reform. Proposals have also been made to the Commonwealth Grants Commission, which is generally sympathetic but answers that the issue is outside its mandate.

[15] Aboriginal and Torres Strait Islander Commission, "Reform of Commonwealth and State Financial Relations", 1997.

The radical approach appears to be gaining momentum as a result of the impasse on reforming state-Commonwealth fiscal relations and the failure to conclude even a single service agreement with state governments.

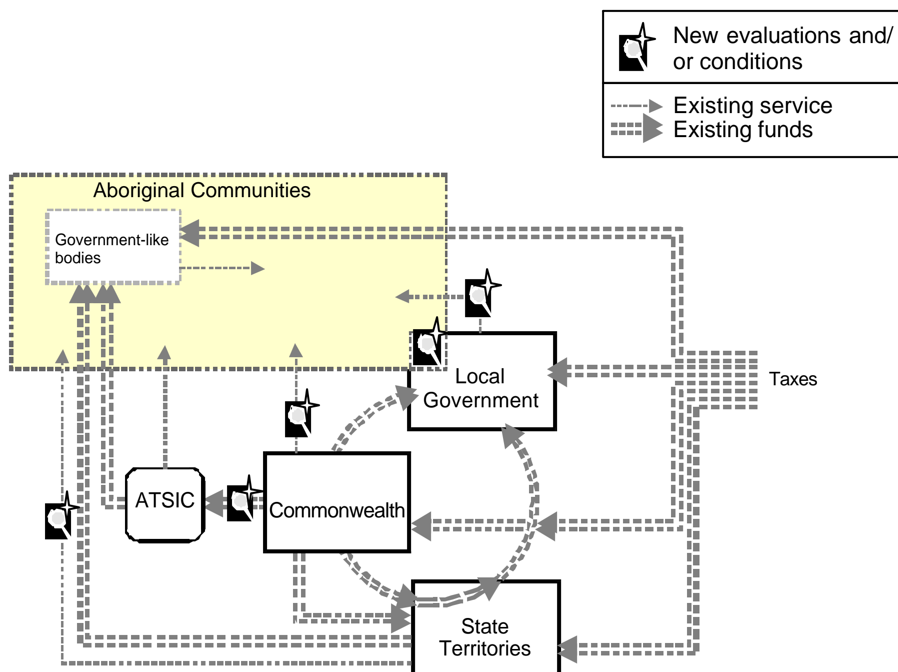
4.4.3 Aboriginals' Two Options for Improving Services

In 1993, Australia's local, state and Commonwealth governments jointly produced the study, The National Commitment to Improving Outcomes for Aboriginals and Torres Strait Islanders. This study found that indigenous peoples were receiving substandard infrastructure and services from all three levels of government. The conclusion was particularly troubling because jurisdictions with large Aboriginal populations receive relatively large transfers. The problem is that nothing in the transfer formulae compel transfer recipients to expend such funds on Aboriginal services. As a result, Aboriginal poverty can actually become a source of wealth for other Australians.

The National Commitment committed every government in Australia to improving this situation. It called for agreements between governments and Aboriginal organizations to promote better services. However, after five years, there have been no discernible signs of improvement. Not a single agreement has been produced. Aboriginal organizations have widely recognized that the National Commitment has been a failure.

Aboriginal organizations are debating their response to failure. The following two figures illustrate their two basic choices and the effect of each on the national fiscal framework:

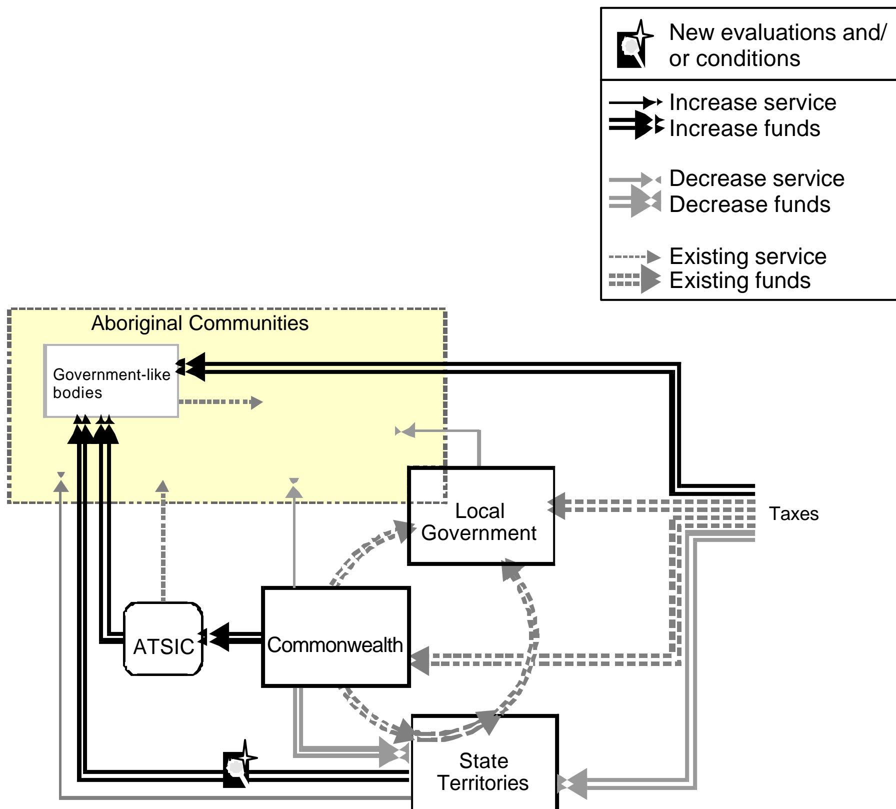
Figure 9.Option 1 - Impose New Conditions on Federal Transfers.



[16] Ibid.

Option 1 calls on the Commonwealth to impose new and strict conditions on transfers to other governments. These conditions would force all governments receiving transfers from the Commonwealth to spend more of these funds on Aboriginal services. The required changes are depicted in the diagram as follows. An icon shown in the legend denotes each transfer requiring new conditions. For example, services from the Commonwealth government to Aboriginal communities have such an icon. This indicates that the Commonwealth would be required to monitor and evaluate the services it provides directly to Aboriginals. Another icon shows that evaluations would be necessary on all expenditures made through ATSIC. In fact, close evaluation would be needed over the services provided by all governments to Aboriginal communities. New conditions would be posed on all transfers from the Commonwealth government to (1) states and territories, (2) local governments, and (3) local governments through states and territories.

Figure 10.Option 2 - Create a New Fiscal Relationship for Aboriginal Government.



Option 2 calls for the Commonwealth to devise a new fiscal relationship that accommodates self-government. If this option is chosen, existing transfers would be redirected to Aboriginal governments and commensurate changes would be made in service responsibilities. This would imply the formal recognition of Aboriginal governments whereas under the former option these remain “Government-like bodies”. The figure illustrates the effect of diverting transfer funds and re-assigning service responsibilities on the national fiscal framework. It shows which of these flows are increased, which are decreased and which are unchanged under the new fiscal relationship. Essentially, transfers to Aboriginal government are all increased while transfers to other governments are reduced along with their service

responsibilities. Aboriginal governments would also claim a share of tax receipts at the expense of other tiers of government.

The advantage of Option 1 is that it does not call for wholesale changes in the fiscal framework. Option 2 would likely require the re-assignment of tax room to Aboriginal governments and this would likely be quite controversial. The reduction of transfer funds would likely also be resisted.

However, while Option 1 is easier to implement it would likely cause greater problems over the medium term than would Option 2. Sub-national governments in Australia complain that a much larger percentage of their transfers have attached conditions than is the international norm. They argue that the quality of their services is suffering as a result. Option 1 calls for further increases in this percentage. It also repeats the errors of the first "compacting" model used in the United States (see Figure 5) - it limits self-determination by imposing conditions. As a result, incentives to be innovative in delivering services will be reduced and Aboriginal organizations will be less able to make their expenditures reflect their own priorities.

These problems are being replicated at the local level as well, where many urban Aboriginal groups are pressing for changes to the local government transfer system. State funding for local government is currently governed by statewide local government Grants Commissions, similar to the Commonwealth Grants Commission. They have the same flaw as well: the commissions determine the distribution of grants, but cannot determine how they are actually spent. Evidence suggests that Aboriginal services are substandard in many locations. The Local Government Grants Commission of Western Australia passed legislation in the late 1980s to address this inequity. The legislation allowed them to withhold funds to local governments if these funds were not being spent equitably on Aboriginal communities. The use of this procedure was struck down in 1992 because it was determined to be outside the scope of their authority.

4.4.4 Self-government Initiatives in Aboriginal Communities

The official national policy towards Aboriginals is "self-determination" with maximum participation in management. However, self-determination in the Australian context does not necessarily imply a commitment to self-government or a new fiscal relationship. There is no national commitment for the further transfer of service responsibilities or tax powers to Aboriginal organizations or governments. There is no commitment to a new transfer system for Aboriginals and there is no commitment to the creation of new exclusive tax authorities. However, there are ad hoc initiatives underway.

In 1994, roughly 100 Aboriginal local governments and "local government-type" bodies received funding from the Commonwealth under its local government financing arrangements. Roughly, two thirds of these bodies were in the Northern Territory. The rest were also in remote areas. Before the Commonwealth can provide funding to a local government-type body, it must receive approval from the state government. This form of self- government is easily accomplished within Australia's federal system because it is entirely territorially based and many remote communities have populations which are exclusively Aboriginal.

The Commonwealth started financing Aboriginal local government after a 1984 inquiry found that large numbers of Aboriginal communities were not receiving funding despite being incorporated as local governments or serving as government-like bodies. Recommendations were made for changes to local government financing, which were passed into law in 1986's Local Government (Financial Assistance) Act.

There are also state level initiatives. However, fiscal relations with the states vary considerably. Many observers seem cynical and argue that most state experiments in Aboriginal self-management are really attempts to offload the costs of Aboriginal services. Aboriginal organizations report that states are often hostile towards Aboriginal interests and show little interest in promoting viable Aboriginal self- management.

In Western Australia, 29 Aboriginal councils have been granted by-law powers. As in Canada, the Minister responsible must approve every by-law.

In Queensland, the Community Services (Aborigines) and the Community Services (Torres Strait) Acts were passed in 1984. Their stated intention was to devolve decision-making power to Aboriginal communities. The stated aim of these Acts is to create a framework within which Aboriginal populations can develop self-government powers, complete with Constitutions that specify the nature of the government and its associated powers. Powers under consideration for transfer include local services, police, courts and resource management. State funds are provided to assist in developing community plans under the Alternative Governing Structures Program. ATSIC has also assisted Aboriginal communities in developing community plans under this framework. Queensland has indicated some willingness to transfer revenue-raising powers, including some tax powers. It also appears willing to discuss developing such arrangements within larger urban locations.

The Northern Territory Land Councils prepared a discussion paper on Aboriginal self-government. However this paper did not consider any impacts on the fiscal framework.

There are about 2000 incorporated Aboriginal and Torres Strait Islander organizations that perform government-like functions. These include health services, legal services, housing cooperatives, land councils, and social, cultural and sporting bodies. Most receive government funding. While most of these organizations are small and serve only their local community, several operate at the state/territory or national level. Most are funded through annual appropriations. Agencies must prepare submissions and negotiate new arrangements every year. These agencies are frustrated by the amount of time they spend negotiating financing every year.

4.5 Emerging Issues and Developments of Interest

4.5.1 Regional Agreements

The development of largely self-financing Aboriginal governments or government-like organizations has been partly driven by their efforts to reacquire a land base and land rights. For example, the passage of the Aboriginal Land Rights Act in the mid-1970s and the Native Title Act in 1993 created Aboriginal Land Councils in the Northern Territory. These councils gained statutory authority regarding issues of land use on Aboriginal held lands. They currently serve as advocates of Aboriginal interests and providers of many services. The

councils are assisting Aboriginal organizations in their efforts to recover a land base and negotiate terms and conditions regarding use of their land. These councils receive guaranteed funding from the Commonwealth through a formula that provides them with grants equal to a fixed percentage of the royalties earned off their land.

The Mabo decision recognized Aboriginal title over a large portion of Australia. This recognition put pressure on commercial interests, particularly mining interests, to deal with the Aboriginals. Aboriginal organizations have taken advantage of this pressure to negotiate what are termed "regional agreements." Essentially, these are contractual arrangements that fill the vacuum left by vagueness in the law. Aboriginal organizations and commercial interests negotiate terms under which commercial organizations can access and use land under Aboriginal title. Regional agreements have created some impetus for self-government, as Aboriginals are becoming more familiar with land management, are gaining access to new employment and revenue opportunities and have gained some negotiating leverage over the state and Commonwealth governments.

4.5.2 Northern Territory Statehood

Another factor driving the evolution of Aboriginal governments is the Northern Territory's political drive for full statehood. The Northern Territory is currently a self- governing territory. It is also the largest net recipient of equalization payments within the Commonwealth of Australia, by virtue of its relatively large Aboriginal population. However, Aboriginal services and infrastructures do not appear to be receiving these funds.

Northern Territory legislators want full statehood. However, 26 per cent of the Northern Territory population is Aboriginal. Their support for statehood depends upon the following:

- greater recognition of their rights to land,
- protection of their cultural and sacred sites;
- guarantees that grants received under the equalization formula on the basis of Aboriginal disadvantage will be spent on Aboriginal communities; and
- recognition of their right to self-government.

4.5.3 Pressure for A New National Fiscal Framework

Aboriginal organizations have begun to formulate a policy response to the failure of the present fiscal framework to provide them with adequate services. In conjunction with some non-Aboriginal groups, they are arguing that serious reforms are necessary in the financing of Aboriginal services.[17] Governments in Australia have recognized the need for reform. However, the National Commitment has not produced any results. There has been no move

[17] The Royal Commission into Aboriginal Deaths in Custody was critical of the government's policy of mainstreaming Aboriginal services and referred to, *"the confusing and complex funding arrangements which already bedevil Aboriginal communities."* It went on to conclude that there was a *"very great need for governments to get together to examine the whole complex picture of funding in the Aboriginal affairs area."*

by the Commonwealth to add conditions respecting Aboriginal services to its granting formulae. There have been no agreements struck with the Commonwealth, state or local governments to delineate service responsibilities for Aboriginals or to set performance indicators.

As a result, there is a search for alternatives, including greater self-government. Direct grants and possibly own-source revenues including taxes would finance self-government. However, the self-government movement *appears* to have only begun to wrestle with the issue of its place within the national fiscal framework. Different solutions are being advocated. Some Aboriginal organizations simply want additional Commonwealth funding to be dedicated to Aboriginal programs. Others advocate placing additional conditions on Commonwealth grants to other levels of government. Some argue that existing funding intended for Aboriginal services be taken from Commonwealth agencies and state and local transfers and be consolidated into direct grants to Aboriginal organizations. Over and above transfer reform, Aboriginal organizations also want the government to review the "enormous and inequitable capital infrastructure needs of indigenous communities".

Progress is being delayed by the political reluctance of government to address the issue and the absence of a clear and consistent national Aboriginal position. A recent article, (partly funded by ATSIC), Australian fiscal federalism and Aboriginal self- government: some issues of tactics and targets, notes:

> *The paper asks whether Aboriginal organizations which have pursued ideas of self-government through these encounters have had a clear view of what they are attempting to achieve through which federal fiscal mechanisms and how they plan to achieve it.* (Sanders, 1995, p.1)
>
> *The paper concludes that there has been some lack of clarity among Aboriginal organizations pursuing ideas of self-government through Australian fiscal federalism and that some significant rethinking of their tactics and targets is probably needed.* (Sanders, 1995, p.1)

In short, the paper says that Aboriginals need to decide in which situations they would like to see conditions added to state and local grants, and where they would prefer to deliver services directly. The ATSIC position does not yet appear to directly challenge the notion that Aboriginal needs should be supported by having service responsibility remain with the states, while the Commonwealth uses more specific purpose transfers. However, many argue that the current state of Commonwealth-state fiscal relations will not permit this. The agency is therefore also funding studies into self-government arrangements and is working with communities and local governments to establish Aboriginal local governments with revenue raising functions. It is also working towards developing Commonwealth/state/local agreements on service provision arrangements pertinent to Aboriginals.

The Commonwealth Grants Commission reviewed the issue of Aboriginal services within the fiscal framework in 1993. It also concluded that the current system is not meeting the needs of Aboriginals. It was argued within some policy circles that the CGC study how a fiscal equalization for directly funding Aboriginal communities, their governing bodies and service organizations might be developed. This work has not been done.

Australia's Reconciliation Commissioner believes that fiscal reform can only be successful if the Commonwealth government leads it. The Commonwealth controls most of the tax base and has a better history than do state government in terms of promoting Aboriginal rights.

4.6 Summary

There are strong parallels between Australia's Aboriginals and First Nations. Both have large populations residing in relatively under-populated parts of the country. Both are acquiring large tracts of land in these regions. Both have strong cultural and spiritual ties to the land. Both have recently had their Aboriginal title to the land recognized by the nation's highest court. Both peoples are plagued by poverty, and poor services and infrastructure. Both are seeking to use their newly acquired land and land rights to promote economic development and greater autonomy. Both face political resistance from the public, which believes that Aboriginal peoples receive special services and that their claims threaten investment and the economy.

Aboriginals in Australia face some disadvantages relative to First Nations. For example, unlike Canada, the Commonwealth government has implicitly threatened to extinguish aboriginal title. It has made no formal commitment to self-government. It has no treaty obligations towards Aboriginals. Aboriginal rights are not recognized in the Constitution. There is no trust relationship or tax exemption between Aboriginals and their national government. There is no vacant tax room for Aboriginal governments to occupy.

Aboriginals in Australia also have some advantages. There is less Constitutional gridlock. The Commonwealth Government is committed to developing an act of reconciliation with Aboriginals. The Commonwealth is in a better position to act unilaterally than is the Canadian federal government. It controls a larger share of the revenue pie. It is not caught in a dispute with the states regarding responsibility for Aboriginal services. The same service agencies currently provide services to the urban and the outback Aboriginals. Aboriginal political organizations are weaker than those of First Nations, but also operate on a larger geographical scale and are less bedeviled by internal divisions and closely guarded powers at the community level.

5 Conclusions

5.1 The Common Challenge – A Fiscal Relationship Which Supports Political Reconstitution and Improved Outcomes

Indigenous peoples in Australia, New Zealand, Canada and the United States have much in common. They are outnumbered in their respective countries, but all have a younger and faster growing population. They have suffered through similar traumas with similar results – they are disadvantaged according to virtually every socio-economic indicator, they are under-represented in the business world, and they have public services and infrastructure that are well below nationally prevailing standards.

Each of these indigenous peoples is now trying, with varying degrees of success, to recover some of its land base, receive better services and reconstitute its political institutions. In order to do this, they must change their existing fiscal relationships. In fact, it appears that until they produce the right fiscal relationship, their economic and social problems will persist – high unemployment, low incomes, poor services and infrastructure, and, high rates of incarceration and social dependency.

The unique demographic profile of all of these peoples and their poor state of development have gained the attention of policy makers in each country. Their shares of the working population will soon double and so the real cost of their economic under-utilization will also double if their current state of disadvantage does not improve. This will exacerbate the problems of sustaining social programming and standards of living in an aging society. However, this fact is not greatly understood by non-indigenous populations in any of the cases studied. In fact, they generally have little appreciation of any of the following points:

- the extent of indigenous disadvantage;
- the ongoing historical legacy that produced this disadvantage;
- what makes the indigenous people different from a country's ethnic minorities;
- the different demographics of the indigenous people; and
- the effect that indigenous disadvantage and demographics will have on their economic prospects.

National policy must do two things: (1) educate the public regarding the five points listed above and (2) address the sources of indigenous disadvantage. A new fiscal relationship is key to the second point.

Efforts to change fiscal relationships are piecemeal in most cases. Different groups are focusing on different specific elements of their fiscal relationships without reference to the other elements. Furthermore, each group is taking a different approach, operating in a different context and encountering different obstacles. However, these different experiences actually provide valuable lessons. These lessons can be divided into three types:

- Those which are directly and specifically pertinent to the four initiatives regarding fiscal relationships outlined in Gathering Strength – accountability, data systems, transfer formulae and tax systems.
- Lessons learned about interactions among the elements of the fiscal relationship.
- Lessons about how to develop and implement a new fiscal relationship.

5.2 Understanding Self-Government

A new fiscal relationship must be able to financially support all the powers devolved under self-government. Ideally, the determination of devolved powers should be based on the logic of self-government for indigenous people (i.e. what can be more efficiently and effectively provided by a First Nation government, what is necessary to promote the culture). The "correct" fiscal relationship would then be the one that which provides the financial means for exercising these powers.

It is not easy to define the "right" powers. Self-government is a relatively new phenomenon whose political rationale is better understood than its economic rationale. The granting of self-government is often mistakenly viewed as a tradeoff in which economic costs are accepted in order to achieve political ends. This view implies that self-government always means higher costs and efficiency losses to the nation as a whole.

This "economic cost/political benefit" view is not entirely accurate. Some elements of self-government *do* imply higher costs - for example, new political institutions and measures to advance indigenous culture. However, self-government as a whole could lower the costs of government and promote economic growth. If done properly, it would create more efficient public services, increase economic growth on land under claim, and improve service quality for First Nation residents.

The key to realizing these advantages is to understand why indigenous people are better off when they deliver some services themselves. Common themes amongst the indigenous peoples were that they had unique ways of doing business, highly specific forms of communication, better knowledge than outsiders of their capabilities and resources and distinct community consensus. Greater self-government would allow them to take fuller advantage of these attributes. Also, current fiscal relationships often provide indigenous people with little incentive to seek economic growth and service efficiencies.

The proper powers under self-government would allow First Nations to better use the advantages listed in the paragraph above. The proper fiscal relationship will provide the financial means to exercise these powers. However, the exercise of these powers must be constrained by the nation's financial means, the need to maintain efficiency, and the nation's social and economic union. A new fiscal relationship should therefore be flexible enough to allow for some experimentation.

The best "mix" of powers for indigenous government will likely differ from those powers presently available to either municipal or provincial governments. The fiscal relationship will accordingly need to be uniquely different from that afforded local or state level governments.

The CYFN umbrella agreement has partly recognized this point by allowing for negotiations among the parties to seek out the best mix of powers for Yukon First Nations.

5.3 The Transformation Challenge.

Figures 11 and 12 depict the challenge of transforming the current fiscal relationship. Figure 11 illustrates the current fiscal relationship for First Nations together with some problems that have been identified with it. Figure 12 is strictly conjecture about an improved fiscal relationship that would correct these flaws.

The key differences between Figures 11 and 12 are as follows.

- First Nation governments will realize increased own-source revenues and larger direct transfers from the federal government (this is illustrated by the thicker lines).
- On-reserve citizens will receive fewer services directly from other governments (this is indicated by the thinner lines).
- First Nations will receive a share of the transfers currently flowing from the federal to the provincial governments. This share will be commensurate with the assumption of service responsibilities formerly provided by provincial governments. First Nations would in particular require a share of the equalization grants currently received by provinces. However, there may be increases in funds flowing from First Nations to provincial governments if First Nations choose to contract some services to provincial service agencies.
- There will likely be some consolidation of band governments into larger nation governments.
- Ambiguities between on-reserve and off-reserve Indians will be reduced (this is indicated by the dotted lines in the first figure becoming solid lines in the second figure).

Adjustments to the fiscal relationship and new functions required to administer it are marked. Adjustments and new functions imply roles for First Nation institutions in either negotiating the arrangements or governing them. The key changes illustrated are as follows:

1. A comprehensive framework for tax collection agreements is included. This reflects the likelihood that with a new fiscal relationship many more First Nations will create tax systems and they will have new tax powers to administer. This expansion of tax powers will greatly stress the current system of individual agreements for each tax collected by each First Nation. Complexity and administration costs will be greatly reduced if tax collection is conducted within a comprehensive collection agreement.
2. Formulae for determining First Nation transfer entitlements will be needed. These formulae will need to be negotiated and administered and will have to integrate the tax and transfer systems. The administration of these formulae will require improved financial reporting and data collection systems by First Nation governments. Disbursement formulae for determining the allocation of transfers among individual First Nations will also be necessary.

3. Service responsibilities and transfer entitlements between First Nation and provincial governments will need to be reconciled. Thus entitlement formulae for provincial as well as First Nation governments are marked for evaluation. Service agreements between First Nation and provincial governments will also need to be concluded. These may involve First Nation governments contracting provincial service agencies and provincial governments contracting service agencies from First Nations in certain situations, such as urban Indians. These reconciliation's and service agreements will require improved data systems.

4. The hypothetical future fiscal relationship shows improved access to capital. A new fiscal relationship will improve the investment climate in First Nation jurisdictions. It will improve financial reporting and information systems on reserve. It will signal stability to investors and improve administration. It will create funds for improvements in infrastructure and services. This last effect will be greatly amplified if a financing authority for First Nation governments is supported.

Figure 11.Canada's First Nations Fiscal Framework

Financial Flows
Funding
Flow-through funding
Services

Key Problems
Little expenditure discretion
Too much dependency on transfers
Uncertainty over service standards
Too little tax jurisdiction
Limited access to public debt capital
Federal/Provincial dispute

Financial Markets
Public Debt Capital
On-reserve Indians
Off-reserve Indians
First Nation Governments
Transfer
Federally Funded
Not Federally Funded
DIAND
Federal Government
Transfer
Provincial Governments
Many Tax Collection Agreements
Own Source Revenues

Figure 12.Canada's Transformation Challenge

Funding
Flow through funding
Services
Service Agreements
Data
Evaluation
Dismantling Process

Financial Markets
Public Debt Capital
On reserve Indians
Off reserve Indians
First Nation Governments
Off reserve service providers
Transfer
DIAND
Federal Government
Transfer
Provincial Government
Umbrella Tax Collection Agreement
Own Source Revenues

5.4 Define Financial Requirements

The first step in developing a new fiscal relationship is to determine the financial requirements of the new service responsibilities for First Nations. Revenue requirements should be based upon the costs of performing these services at national standards. This determination could include some estimate of the differences in service costs owing to location. The CYFN agreement in the Yukon partly allows for this. It however does not indicate whether it will fully compensate for the difference in service costs accounted for by the lack of economies of scale available to many First Nations. Full compensation for this factor would actually reduce incentives to seek administrative efficiencies.

5.4.1 Clarify tax powers and service responsibilities

A fiscal relationship includes the assignment amongst governments of revenue raising powers, service responsibilities and transfers. Each of these major elements should be defined in a new relationship. Not recognizing the relationship among all three creates inconsistencies and trouble. The jurisdictional disputes between American states and tribal governments outlined in Chapter 3.5 are an example. Here the problem is poorly defined tax jurisdictions and service responsibilities between state and tribal governments. The sub-standard services provided to Aboriginals in Australia are another example. The problem here is the lack of clearly defined service responsibilities among the local, state and Commonwealth governments. In both these cases, the lack of clarity has created suspicion, ongoing disputes and a programming vacuum. In the American example, it has undermined the financial certainty of tribal governments and the integrity of their tax systems. In both these cases, economic prospects for the indigenous people have suffered as a result.

The CYFN agreement in the Yukon fails somewhat on this measure. There is considerable ambiguity as to the eventual assignment of service responsibilities and tax powers. It appears that many concurrent tax powers will persist on settlement lands with different peoples paying taxes to different jurisdictions.

5.5 Develop an Implementation Process

The key to a successful new fiscal relationship is its implementation process. If the implementation process is right, then any element of the relationship can be more readily adjusted as necessary. If the process is not right, then even the best fiscal relationship will not succeed. A good process will:

- build administrative capacity within First Nation institutions;
- build consensus from First Nations across the country and keep them involved;
- allow experimentation with formulae;
- build consensus outside First Nation communities by identifying interested parties; and
- develop First Nation institutions that will govern the fiscal relationship and manage its evolution.

5.5.1 Federal Government Must Lead

Federal governments have had to champion indigenous rights in every case studied. There are a few reasons. Federal governments have usually had a longer history dealing with the indigenous people. The fair treatment of indigenous people is a national, not a local issue. The relationship at the national level tends to be less adversarial because indigenous governments are viewed by other sub-national governments as competing for transfer dollars and sovereignty. Finally, ensuring a new relationship does not undermine the national fiscal framework or economic union requires a federally led process.

5.5.2 Anticipate Resistance

Whenever indigenous governments have asserted new powers, they have usually created tension with municipal and state level governments. There are some sound reasons for this.

- Indigenous governments compete for transfer dollars and tax room.[18]
- The existence of indigenous governments makes decision-making over land and resource use more difficult.
- Indigenous governments will take over many of the powers on their land base that are currently assigned to other governments.

However, tension is also caused by misinformation. Misinformation has led to similar criticisms in each case. These are summarized below.

- New arrangements will raise the cost and complexity of government.
- New arrangements will create more red tape.
- The ability of other governments to manage land and the economy will be undermined.
- New arrangements will create investment uncertainty.
- The unity of the country is being undermined.
- The benefits of indigenous government are unproven.
- Indigenous governments receive powers and funding above what other governments receive.
- Indigenous persons receive special rights, and a new fiscal relationship will enshrine these rights.

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[18] In fact, despite the fact these governments are often freed from many expensive service responsibilities they can lose as a result. For example, Saskatchewan and Australia's Northern Territory both receive large cash transfers because of their indigenous populations. They stand to lose much of this transfer under a new fiscal relationship.

- The development of new relationships is against the wishes of the indigenous group and only serves the indigenous "industry."

The first participants in a new fiscal relationship will be more closely scrutinized, and held to a higher standard, than will other governments in Canada. Many criticisms won't be fair or accurate. The key to addressing them is a consultation process, a communications process and soliciting support from interested third parties (in Australia this has sometimes turned out to be individual business interests). The principles of the fiscal relationship should be understandable, its formulae familiar and its financial reporting sound. Particular attention should be paid to: encouraging accountability through transparency and regulatory harmony with surrounding jurisdictions (see 5.4); developing a national framework for implementation; developing an extensive communications and consultation process; and, developing a qualifying process.

5.5.3 Accountability

There are two important elements of accountability. First, indigenous governments must be accountable to their own citizens. In the United States and Canada, with their long histories of closely guarded treaty rights, any new relationship must address how a fiscal relationship affects Treaty rights. National and provincial governments must be accountable to their electorate. They must account for the use of public funds, the treatment of 3rd parties and whether the new arrangements constitute special rights.

Both types of accountability will be best served by a focus on evaluating outcomes and ensuring the administrative readiness of tribal governments. The close monitoring of program outputs and financial inputs is more costly to implement and reduces the effectiveness of self-government. This is borne out by the American experience with tribal governments where they switched to outcome evaluations in order to create stronger incentives to deliver services efficiently and effectively. This approach also created stronger incentives for self-reliance and lowers administration costs.

Experience has shown that it is easier to ensure accountability when the following conditions are met: (1) people understand which level of government is responsible for what services (2) they agree with these service priorities (3) they know how these services are paid for and (4) the fiscal relationship aligns a government's interests with its responsibilities.

These conditions lead to the following recommendations.

- The fiscal relationship should clearly specify the responsibilities of each order of government towards each First Nation.

- Transfer formulae should be as clear and easily understandable as possible. They should be modeled on existing formulae for provinces and territories.

- The fiscal relationship for all First Nations should be placed within a common framework. This framework should be the responsibility of a national table on First Nations fiscal relationships. Such a framework will make fiscal relationships easier to understand and allow for easier comparisons amongst jurisdictions. The same powers, service responsibilities, tax powers, transfer entitlements and associated conditions,

should be made available to all qualifying First Nation governments. However, this should not mean "one size fits all". It should simply allow all First Nation governments to choose from the same options.

- A national framework should include: (1) national standards for financial reporting; (2) national standards for statistical collection methods; (3) national formulae for transfer entitlements, (4) national transfer conditions; and, (5) national enabling legislation for the assumption of tax powers.

- First Nation governments should be encouraged to establish Constitutions. This is an American policy that promotes the accountability of First Nation governments to their members and signals stability to investors.

- Qualifying requirements should be set for First Nations wishing to participate in the new arrangements. This is an American policy that was introduced to promote accountability without restricting the exercise of tribal sovereignty. These requirements would include requiring tribal governments to demonstrate a mastery of the requisite administrative capacity, planning capacity and financial reporting capacity. Qualifying standards should be national in scope. They should be developed and administered in conjunction with First Nation institutions and, if politically feasible, influential third parties. Logical participants in setting standards would be ITAB, a First Nations financing authority, and a new and independent First Nations auditing body. Some advantages of this approach are that it:

  - assures investors that this is a capable and qualified government;

  - ensures that standards will be set with a sensitivity towards First Nation requirements;

  - means that First Nations will police themselves;

  - provides First Nations with a basis upon which to build cooperation on a national scale;

  - serves as a training ground for developing investment and administrative expertise within First Nations; and

  - promotes uniform reporting practices.

5.5.4 Build Supporting Institutions

A new fiscal relationship requires supporting institutions. These institutions would oversee its development, build administrative capacity within First Nation communities and help govern the new arrangements. They would make it easier to change fiscal relationships as circumstances and priorities change.

These institutions should be First Nation-administered. Preferably, First Nations from across the country would be represented on them, so as to enhance political cohesion. These institutions would provide First Nations with a sense of ownership over the fiscal relationship

process. They would also improve communications amongst First Nation communities, First Nation governments, other governments and private investors. Finally, they would help develop larger groupings of First Nation governments and this would create administrative efficiencies.

Supporting institutions should include the following.

- A training function. Training is required for administrators and some aspects of service delivery. This function should build from existing training bodies and institutions.

- A statistics agency. This agency would be in charge of improving data collection methods and the quality of statistics coming from First Nations.

- A financing authority. This authority would reduce the cost of capital and expand its availability. This would promote economic growth. It would also create incentives to develop taxation regimes, improve financial reporting and promote accountability.

- An expanded role for ITAB. It will have to represent First Nation interests over a larger range of tax powers.

- An audit body. This is required to set standards, promote accountability, and, if necessary, conduct investigations. Its existence will promote political acceptance and improve the investment climates of First Nation communities.

- An institution to represent First Nations in negotiations about transfer formulae and disbursement formulae. This institution should preserve equity between First Nations and other jurisdictions and also among First Nations. It would be similar to Australia's Commonwealth Grants Commission.

- A body charged with determining the administrative readiness of First Nation governments for a new fiscal relationship. This would be similar to the function currently performed by ITAB with respect to taxation.

5.6 Broad Strategic Considerations

5.6.1 Focus on Economic Growth

A new fiscal relationship will ultimately be judged upon its ability to deliver better public services and real economic opportunity. Accordingly, it should be designed with the explicit aim of improving First Nations' investment climates. An important step in this regard would be the establishment of a financing authority for First Nations. This would deliver the following advantages.

- It would improve the link between developing tax revenues and accessing financing. A financing authority would improve the rates, flexibility and availability of terms under which First Nation governments borrow. First Nation governments would be better able to use projected tax receipts to finance infrastructure. Improvements in infrastructure, in turn, will help attract more private investment.

- A financing authority will improve incentives for First Nation governments to monitor financial practices and promote accountability. Poor financial practices by one First Nation government would affect the credibility of the financing agency, and thereby affect access to investment capital by all First Nation governments.

- A financing authority would expand the availability of investment capital giving many smaller and more rural First Nation communities the ability to debt finance infrastructure projects. Many of these communities would otherwise be denied access because of their small size and lack of history. Making capital more generally available would expand the political constituency for a new fiscal relationship and Indian tax jurisdictions.

5.6.2 Transfers

International experiences suggest that *any* new transfer formula will meet political resistance from both within and outside of First Nations. External resistance will be reduced if the transfer's principles are easily understood and consistent with the national fiscal framework. Internal resistance will be reduced if it is made clear that a new transfer system enhances Treaty rights.

Both types of resistance can be reduced if the system is made national in scope. National dimensions to a transfer formula include the following.

- Ensuring that all First Nation governments are provided with the same options.

- Ensuring that a new transfer formula can reflect the different circumstances faced by First Nations.

- Ensuring that the transfers provide participating First Nation governments with the fiscal capacity to provide services equal to other jurisdictions.

- Ensuring that all new fiscal relationships are set within a common framework of powers, service responsibilities, attached conditions, qualifying requirements and reporting requirements.

A new transfer formula should allow First Nations to take on new responsibilities in stages. Currently, many lack the administrative capacity to take on all the powers they would ultimately wish to assume. The American compacting model would allow the gradual assumption of powers. It would also allow all governments the opportunity to test new arrangements.

Transfer formulae should be based upon existing models and procedures. This would support accountability by allowing easier comparisons with other jurisdictions. This would also create a broader political constituency for defending entitlements under the new transfer. For example, a transfer program based on the equalization program would have natural political allies in all the equalization-receiving provinces. It would also be more easily integrated within the national system. This would make it easier to reconcile transfer entitlements within the national fiscal framework and to use existing expertise in designing and administering the entitlements.

Cost-sharing programs should be considered for First Nations. The American federal government is considering making many cost-sharing programs available to state and tribal governments alike. While, cost-sharing programs tend to distort expenditure decision, this model should still be considered. If cost-sharing programs were equally available to First Nation governments and/or provinces and municipalities this would address criticisms of special rights. Cost-sharing programs would create incentives for participating First Nation governments to develop own-source revenues and free up funds by seeking service efficiencies.

5.6.3 Link to Land Issues

A well-defined land base is crucial to a workable fiscal relationship. It allows a people to develop representative institutions and own-source revenues. In Australia, the assertion of aboriginal title led to the development of representative institutions and a revenue base. These institutions are now paving the way for improvements in the fiscal relationship for all Aboriginals – they are providing revenues with which to improve services and leverage from which to negotiate. The Mabo Decision, which recognized Aboriginal title in Australia, has helped Aboriginal institutions to apply leverage on state governments and assert their authority through the development of regional agreements with business interests. In Canada, the Delgamuukw decision, which also recognized aboriginal title, creates similar leverage. Provincial governments and business interests will be more compelled to negotiate with First Nation governments. Provincial governments must consider royalty sharing and exclusive tax jurisdictions for First Nation governments.

5.7 Final Summary

The international experience provides no magic "one size fits all" model of an ideal fiscal relationship for First Nations in Canada. It only provides snapshots of "works in progress". No other country has managed to deliver self-determination and a high standard of living for its indigenous people. Other indigenous peoples are also seeking a better relationship – one that provides improved services, improved socio-economic outcomes and self-determination. Much like Canada, there is no consensus about how to best achieve these goals. There are conflicting interests between indigenous populations now residing in cities and those in indigenous communities. There are political rivalries within and among indigenous communities and organizations. There is often controversy within indigenous populations about whether indigenous institutions are representative enough to consider changes to the fiscal relationship. A generic truism from the international experience is that there is considerable dissatisfaction with the status quo among both indigenous and non-indigenous people, and yet resistance to any movement away from it.

In many respects, Canada is the world leader in fiscal relationships for indigenous people. This is particularly true after the recent settlements in the North. Nonetheless, Canada has a long way to go with fiscal relationships before self-government can deliver its promise. In addition to purely political difficulties, there is the lack of a shared vision and a failure by many to recognize the need for a new fiscal relationship to resolve other issues.

International experiences suggest that many issues need to be resolved in Canada. (1) Coordination with provincial governments to develop exclusive tax jurisdictions for First Nation governments. (2) Guarantees of continued service for First Nations unable or

unwilling to adopt a new fiscal relationship. (3) The specification of a relationship between own-source revenues and transfer entitlements. (4) The development of arrangements for resource access and resource revenue sharing. (5) The definition of jurisdictions to be transferred under self-government arrangements. (6) Policies regarding the rights of third parties under new arrangements. (7) The development of financial reporting and other accountability provisions. (8) Development of national First Nations institutions in order to efficiently administer a new fiscal relationship.

The ultimate issue is going to be convincing the Canadian public and First Nations citizens that developing self-government with an expanded land base, representative institutions, a secure transfer formula and exclusive tax jurisdictions is going to be to the benefit of all. The rapid growth of the First Nation population will ensure that the status quo becomes steadily more costly both in fiscal and social terms. However, given the immense political difficulties these issues present and the importance of developing national positions on them, a national table on fiscal relationships is a vital next step for Canada.

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Appendix A

Recommendations For "Gathering Strength"	
Accountability	• Establish qualifying process in conjunction with First Nations – to be administered by First Nations
	• Standardize financial reporting
	• Consider Constitutions for tribal governments
	• Tie to familiar formulae and procedures
	• Specify all service responsibilities for each level of government
	• Work with large aggregations
	• Pre-establish uniform framework of policies, responsibilities and powers
	• Train administrators
Data	• Standardize financial reporting requirements.
	• Standardize data collection arrangements
	• Establish training program for data collection and information management
Tax	• Enabling legislation for assumption of new powers
	• Avoid concurrent jurisdiction/must have exclusive tax jurisdictions
	• Establish qualifying process in conjunction with First Nations – First nations training and accreditation body
	• Consider incentive program
Transfer	• Tie a new transfer to existing formulae and procedures
	• Establish process for qualifying for new transfer arrangements
	• Have a First Nations governing body help draft terms of reference for a disbursement formula. Consider a Transfer Authority to liaison with other bodies and determine disbursements based on Terms of Reference
	• Consider gradual implementation of new arrangements, i.e. similar to American compacting process.
	• Establish a national framework policy for the assumption of new powers/transfers. This should specify limits.

Appendix B

Statistical Background to Research Countries

Geographic Characteristics

Country	Size (km ^{2})	Coastline (km)	Arable Land (%)	Forest/Woodland (%)
Australia	7,686,850	25,760	6	14
Canada	9,976,140	243,791	5	35
New Zealand	268,680	15,134	2	38
U.S.A.	9,372,610	19,924	20	29

Source: 1994 CIA Fact Book

Demographic Characteristics

Country	Population	Population growth (%)	Life Expectancy	Literacy Rate
Australia	18,077,419	1.38	77.57	100
Canada	28,113,997	1.18	78.13	97
New Zealand	3,388,737	.57	76.38	99
U.S.A.	260,713,585	.99	75.9	97

Source: 1994 CIA Fact Book

Economic Characteristics

Country	GDP ($ B)*	Economic growth (%)	Unemployment Rate (%)	Inflation	Overnight Interest Rate
Australia	339.7	1.8	8.2	1	4.99
Canada	617.7	3	8.9	1.1	4.62
New Zealand*	53	3	9.1	2	
U.S.A.	6,379	3.9	4.7	1.5	5.5

Sources: The Economist, March 7th – 13th, 1998
* 1994 CIA Fact Book

Trade Characteristics

Country	Exports ($ B)	Top two exporting countries	Imports ($ B)	Top two importing countries
Australia	44.1	Japan, U.S.	43.6	U.S., Japan
Canada	133.9	U.S., Japan	125.3	U.S, Japan
New Zealand	10.3	Australia, Japan	9.4	Australia, U.S.
U.S.A.	449	W. Europe, Canada	582	Canada, W. Europe

Source: 1994 CIA Fact Book

Final Draft
July 19, 1999

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Presented to:

The Indian Taxation Advisory Board
and
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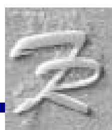

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This paper reflects the views of the authors only and not necessarily those of the Indian Taxation Advisory Board or the Department of Indian Affairs and Northern Development.