



Clarifying Accountability Relationships Affecting Indian and Northern Affairs

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Executive Summary

Following the sponsorship scandal, the Gomery Inquiry, recent federal elections and the introduction of the Federal Accountability Act, it is hard to imagine accountability having a higher priority in this country than it now enjoys. Implementing sound accountability relationships is challenging between levels of government. And this is especially the case between INAC and First Nations.

In light of these and other complexities, the Audit and Evaluation Sector has contracted the IOG to write a ‘think piece’ on the principal accountability relationships with First Nations of relevance to INAC – specifically the accountability relationship between the Minister of INAC and First Nations and that between First Nations Councils and their citizens.

Back to Basics: Accountability 101

Accountability is critical to good governance. In granting sweeping powers to their political leaders, citizens expect them to be held accountable for their actions. Nonetheless, it is far easier to define than put into practice. There are no universal answers for a variety of reasons:

- accountability is not an absolute; it can conflict with other principles of good governance
- it is difficult to prove that government programs and services are indeed having their intended impact; results-based management is complex and expensive to implement
- there are multiple accountability relationships, a situation which ‘muddies the waters’ considerably, and
- history, culture, the type of government system – all these factors matter in how accountability plays out in practice.

Government to Government Accountability

As one of the world’s oldest federations, Canada has adopted some innovative features in developing its accountability relationship between the federal and provincial/territorial governments. Still, strongly competitive, executive federalism, among other factors, has hindered Canada from adapting its 19th century federal model to 21st century realities. First Nations have participated in some of these innovations but equally have not been immune to some of the challenges.

INAC-First Nation Accountability Relationship

Because of history and other factors, INAC and First Nations face even greater obstacles to developing a good accountability story, a story which is critical to garnering increased funding levels. One important obstacle is the widely different understandings of what their accountability relationship should look like.

The First Nation perspective, as espoused by the Assembly of First Nations, would see an accountability relationship with the federal government mimicking closely that between the federal and provincial governments, a position based on its understanding of Aboriginal and

treaty rights and the Crown's fiduciary obligations to First Nations. Key attributes would be a constitutionally recognized order of government; the federal government being as much accountable to First Nations as the reverse; significant own source revenue for First Nations (but not from taxing its own citizens); and unconditional fiscal transfers determined by legislation and resembling equalization and other federal transfers in the health and social fields. The Penner Committee, RCAP and more recently the Blue Ribbon Panel have provided varying degrees of support for this position, albeit with some nuances.

Leaving aside the validity of the AFN's assertions on rights and fiduciary issues, there are attributes of First Nation governments that cast doubt on the desirability of the AFN position. One of the most important is the vast difference among First Nations in their capacity to govern. This suggests a highly differentiated approach to accountability to reflect these differences. Other important features of these governments are their large size (as measured by per capita spending) coupled with few checks and balances; their volatility caused in part by the rapid churn of political leaders and staff; the large number of regulatory voids in which they operate; and the high dependence on federal transfers coupled with the near absence of a tax relationship with their members. All of these factors have an important bearing on their accountability relationship with the federal government.

In fashioning an improved accountability relationship with First Nations, INAC officials will need to take into account the important directions as set out in the recent Treasury Board Policy on Transfer Payments, which, among other things, calls for a risk-based and recipient focused approach to fashioning and managing funding programs.

The less than stellar state of its current funding arrangements coupled with the vastly different First Nation perspectives on accountability will provide INAC senior managers with significant challenges in implementing the new Treasury Board Policy and Directive. Current problems include:

- Despite their central importance, there is a lack of clarity about the overall objectives of the funding arrangements and a lack of leadership
- There has been little or no progression to more flexible arrangements
- Risk management leaves much to be desired
- Reporting requirements do not vary much between arrangements
- For many First Nation recipients, there is a significant reporting burden and there is little understanding of the value of the reports
- The increased reporting burden associated with new funding programs (housing, education, water) on self-governing First Nations and those with multi-year block funding agreements is reducing the benefits of their funding arrangements with the federal government
- Very little of the reporting relates to outcomes or program results
- There is little in the way of co-ordination of arrangements across the federal government
- Overall, the accountability relationship is not sound

Future Directions

As a first order of business INAC officials should see the department as more than just a funding agency. Its own program logic models, the Office of the Auditor General, Parliament, the media, the general public and of course First Nation themselves all attribute significant influence to INAC in determining levels of well-being in First Nation communities.

In terms of recasting the accountability relationship with First Nations, primarily through its funding arrangements, this essay argues for:

- Renewed leadership within INAC, both at headquarters and in the regions, in managing the accountability relationship with First Nations
- Assigning more staff both at headquarters and in the regions to managing the accountability relationships with First Nations
- Developing permanent forums with First Nation representative, first in the regions and then nationally, to develop better approaches to funding arrangements and related reporting requirements
- Reworking the INAC funding arrangement architecture to provide a higher degree of differentiation to reflect the vast capacity differences among First Nation
- Working with central agencies to reduce or eliminate the reporting burden associated with new funding programs vis-a-vis self-governing and other high performing First Nations
- Developing more sophisticated approaches to assessing risk
- Developing a strategy to dealing more effectively with communities under extreme distress
- Determining if and when OSR should be a factor in determining transfer amounts
- Experimenting with sampling approaches to obtain credible, result-based information

The First Nation-Member Accountability Relationship

The other important accountability relationship on which this essay focuses is that between First Nation governments and their citizens. The issue is far more complex than just reducing federal accountability requirements on First Nations so that they can fashion sound accountability mechanisms and practices with their members. Factors canvassed earlier in this essay – in particular, the large size of First Nation governments coupled with a lack of checks and balances and the lack of a tax relationship with their members – cast doubt on achieving a quick fix in this accountability relationship.

INAC has some influence on this accountability relationship and how it evolves. Particular policy approaches should either encourage more dispersion of power within communities or help create more checks and balances in the exercise of this power. Specific initiatives might include:

- Encouraging more arms-length bodies within and among First Nation communities to take on responsibilities that might otherwise fall to Chief and Council
- Encouraging more integration of First Nation controlled institutions within provincial systems especially at higher levels of aggregation than single communities
- Encouraging more home ownership and privately owned businesses, recognizing that these approaches require governance frameworks to succeed

- Assisting in the development of First Nation-controlled redress mechanisms
- Developing a more effective promotion strategy for increased taxation of First Nation members by their governments
- Introducing legislation to provide First Nations with a voluntary personal income tax power of residents of their communities.

Conclusion

Like most aspects of governance, achieving significant improvements in accountability that are sustainable is a long term proposition. It's a journey not a destination.

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Clarifying Accountability Relationships Affecting Indian and Northern Affairs

Introduction

Following the sponsorship scandal, the Gomery Inquiry, recent federal elections and the introduction of the Federal Accountability Act, it is hard to imagine accountability having a higher priority in this country than it now enjoys. Central to democratic government, accountability has a beguiling simplicity to it: defining the concept is easy enough, but putting it into practice is another matter.

Implementing sound accountability relationships is especially challenging between levels of government. Canada is one of the oldest democratic federations. Longevity as a federation is both a benefit and a drawback. Experience is not to be sneezed at and we have had a long history of knowing what works and what doesn't. On the other hand, Canada, to a certain degree, is locked into a federal model built for the 19th and not the 21st century. For example, Canada has very little formalized machinery for managing its federal-provincial/territorial relationships when compared to other countries.

As challenging as accountability relationships are between the federal and provincial/territorial governments, these may pale in comparison to what INAC faces vis-à-vis First Nations. History matters and the relationship is still mired in the after affects of colonialism. Further, because First Nation own source revenues are relatively small, the relationship is heavily one-sided. And at least one other factor is critically important: more than any other governments or quasi-governments in Canada, First Nations exhibit a vast range in their capacities to govern and manage well.

In light of these and other complexities, the Audit and Evaluation Sector has contracted the IOG to write a 'think piece' on the principal accountability relationships with First Nations of relevance to INAC – specifically the accountability relationship between the Minister of INAC and First Nations and that between First Nations Councils and their citizens. The principal objectives of this essay are fourfold:

- To discuss accountability in the Canadian context in general, to review some basic concepts and to understand why accountability, despite its fundamental importance to democratic government, is so difficult to realize in practice (Section I)
- To discuss accountability in a federal state, specifically the issue of accountability between levels of government, and to outline how First Nations would like to see the relationship evolve (Section II)
- To draw out implications for structuring the accountability relationship between First Nations and the Minister of INAC and ultimately to Parliament (Section III)
- To outline some of the special challenges facing First Nation governments and their accountability relationship with their own citizens and to discuss some policy options for INAC (Section IV)

There are other accountability relationships affecting INAC that this essay will not discuss. For example, the Minister of INAC has certain responsibilities spelled out in the Indian Act with regards to First Nation individuals – Sections 42-50 of the Act dealing with wills and estates is one such example. Another accountability relationship not discussed is that between INAC and First Nation service or advocacy organizations.

One further introductory comment is worth making before proceeding to Section I and it is this: accountability can not be neatly divorced from the issue of the level of funding for First Nations, specifically INAC's being limited to a 2% increase in its First Nation programming since 1997/98. Getting the deficit under control was obviously a contributing factor here but, without a good accountability story to tell, INAC has faced challenges in subsequent years, even those with large federal surpluses, garnering public and therefore political support for increases above that cap. Exceptions – for example, new funding for potable water and for education – have been achieved but only with tight conditions attached to these new funds. In short accountability and funding levels appear to be inextricably tied together, another reason for the importance of this issue.

It is useful in discussing accountability to review some of the basics – the focus of the first section of this essay.

I. Back to Basics: Accountability 101

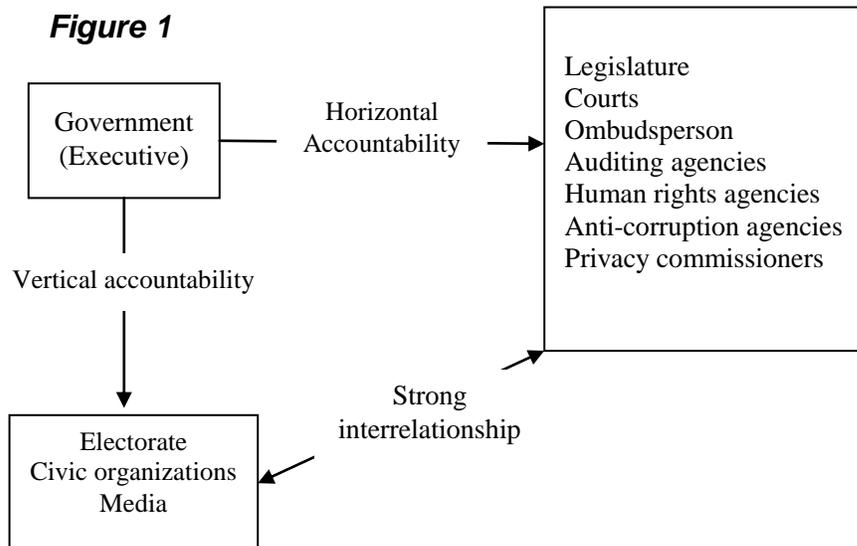
A. The Basic Bargain

Accountability is central to democracy¹. Citizens grant sweeping powers to their political leaders. They entrust them with responsibility for critical decisions about design and implementation of public policy and use of public funds. In turn, citizens want to guard against abuse of these powers. Further, they also want to ensure that their political leaders use their power wisely, effectively and efficiently, and that they will be responsive to demands by citizens to change the ways in which the government carries out its functions. They expect, therefore, that their political leaders will be held accountable for their actions.

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

¹ Accountability is also central to 'for profit' and 'not for profit' organizations and has taken on a similar high profile because of the Enron and Worldcom debacles, among others. In the United States the adoption of the Sarbanes-Oxley Act has had significant ramifications for the private sector, many of which have been very controversial.

These two kinds of accountability are referred to by some as “vertical accountability” (to citizens directly or indirectly via civic organizations or the news media) versus “horizontal accountability” (to public institutions of accountability imposed by the government upon itself, including the legislature, the judiciary, auditing agencies, ombudsperson, human rights commissions). Figure 1 illustrates these two kinds of accountability relationships.



The fundamental bargain at the heart of accountability is therefore easy to grasp: citizens grant powers to political leaders and in return expect them to account for the exercise of that power. Why, then, does it appear so difficult to put sound accountability into practice? To answer this question, let’s begin with a brief overview of the Canadian approach to accountability. We start with the basics – responsible government and ministerial accountability.

B. Responsible government and Ministerial Accountability

In an essay done for the Canada School of Public service, two Canadian academics, Peter Aucoin and Mark Jarvis, describe the modern understanding of responsible government this way:

“The Canadian constitutional system of responsible government is designed on the foundation of accountability because the government must always be present in the House of Commons to account for its actions, when required, and be accountable to the House. The Canadian constitutional regime demands accountability, even when the government has a majority in the House. The rule of responsible government is that the government must always have the confidence of the majority in the House”.²

² Peter Aucoin and Mark Jarvis, *Modernizing Government Accountability: A Framework for Reform*, Canada School of Public Service, 2005, www.MYSCHOOL.MONECOLE.gc.ca, p.12-13

With just one exception³, when the government has lost the confidence of the House, the Governor General has dissolved the House and called for new elections.

Closely tied to this collective notion of accountability of the government to Parliament is the doctrine of Ministerial accountability. As Aucoin and Jarvis note, “Ministers must account for how they and their officials use ministerial authority in carrying out their statutorily assigned responsibilities. And the House passes judgment on them.”⁴

Ministers can delegate their authority and responsibility to officials but not their accountability. Hence when problems arise, even if the Minister was not involved, he or she must account to the House in providing a description of what happened and indicating what if any corrective action he or she will undertake.

In some instances, where arms-length bodies report to Parliament through a Minister, the Minister may be “answerable” but not “accountable” to the House, since the authority of the Minister over these bodies is limited by statute.

The Aucoin/Jarvis overview of responsible government and ministerial accountability appears clear and straightforward. Nonetheless, Canada’s experience in putting them into practice has not been without significant controversy. Take for example the relationship between Ministers and officials. We have had a number of inquiries in this country – the RCMP’s dirty tricks in the 1970s, the Al-Mashat episode, Somalia, and Gomery to name a few – where a principal issue was the accountability relationship between Ministers and public servants.

‘Arms-length’ agencies like the police, regulatory bodies or some Crown Corporations present another kind of accountability problem. On the one hand, political leaders are not to give day-to-day direction to these bodies but at the same time must have some ‘control’ over them – a delicate balancing act indeed. The Apex Inquiry was one recent example of this uneasy relationship between politicians and the police. Managing the accountability relationship between the judiciary and the executive branches of government is a similar if not more difficult problem. And then there is the large number of not for profit agencies which deliver government programs, another variation on this same theme of arms length bodies and the accountability challenges they present.

Finally, sub national governments – provinces, First Nations, municipalities, for example – must be accountable to their citizens and at times to the national government for transfer payments. To say that these governments resent the imposition of conditions or reporting requirements to another government is to state the obvious. We turn to the set of problems these relationships produce later in the essay.

³ The exception occurred in 1926 when the Liberal government of Prime Minister King was defeated in the House. The Governor General refused King’s request to call an election and instead asked the leader of the opposition to form a government. The events leading up to the proroguing of Parliament in December 2008 may warrant their own footnote in future academic discussions of the Canadian constitution.

⁴ Aucoin and Jarvis, p. 13

C. The Principal Elements of the Canadian Approach to Accountability

Within Canada's system of responsible government, Aucoin and Jarvis summarize the significant array of mechanisms that make up the federal government's approach to accountability (see the box next page).

The Canadian Approach to Accountability Principal Mechanisms

The basic building blocks of the Canadian system of ministerial and government accountability encompass:

- votes of confidence in the government by the House of Commons
- Question Period in the House, where Ministers respond to questions from MPs on both sides of the House, but especially the Opposition
- scrutiny by parliamentary standing committees, including the House of Commons Public Accounts committee and the Government Operations and Estimates Committee
- the annual publication for Parliament of the departmental plans and performance reports prepared by departments and agencies
- the Prime Minister's assessment of the performance and actions of individual ministers and order-in-council appointees
- Treasury Board oversight of the performance of deputy ministers, departments and arms length agencies
- Public Service Commission audit and oversight of departmental public service staffing delegated by the Commission
- internal performance appraisals of public servants by their administrative superiors
- the audits of the Office of the Auditor General on the administration of public affairs generally and the management of the public purse in particular
- the reviews of the administration of particular statutes by parliamentary agents including the Information Commissioner, the Official Languages Commissioner and the Privacy Commissioner
- judicial review of administration decisions by courts and quasi-judicial administrative tribunals
- public commissions of inquiry into alleged instances of maladministration, and
- the public's right of access to government information

The democratic dimensions of this system assume both healthy competition in elections and a vigorous and vigilant press⁵.

Source: Peter Aucoin and Mark Jarvis, *Modernizing Government Accountability*, op. cit. P.21

Several of these mechanisms warrant elaboration. These include:

- The federal institutions of accountability

⁵ Aucoin and Jarvis might have added civil society and business as other important elements in this mix.

- The federal government’s approach to results-based management
- The interplay of culture and accountability.

We look at each in turn.

Federal Institutions of Accountability

Weak political parties, first past the post voting systems that lead to majority governments (at least until recently at the federal level) and regional under representation in government, strong party discipline, the lack of an elected Senate (unicameral systems in the provinces), the extensive powers of appointment resting with the Prime Minister and provincial First Ministers – these are the principal factors that have created strong executives in Canada, both at the federal and provincial levels. It’s not surprising then that pressures have mounted over the past thirty to forty years to create new or expand the powers of existing institutions of accountability to provide a counter balance to these strong executives.

At the federal level, prior to the adoption of the Federal Accountability Act there were five such institutions reporting to Parliament: the Office of the Auditor General, the Privacy Commissioner, the Information Commissioner, the Official Languages Commissioner, and the Public Service Commission. The *Act* strengthens some of these bodies – in particular the Office of the Auditor General – and adds a number of new institutions including:

- Commissioner of Lobbying
- Public Appointments Commission
- Procurement Auditor
- Director of Public Prosecutions
- Parliamentary Budget Officer
- Public Sector Integrity Commissioner
- Conflict of Interest and Ethics Commissioner (formerly the Ethics Commissioner)

The Act aims to create more transparency in the awarding of government contracts, reform the financing of political parties, reduce the influence of lobbyists, and provide protection for and reward whistleblowers. As one columnist noted “Clean doesn’t get any squeakier”⁶.

When the Bill was introduced, several commentators noted some potential downsides to the Bill. John Ibbitson predicted these changes “...will make a big and unwieldy bureaucracy even bigger and more unwieldy.”⁷ Jeffrey Simpson echoed Ibbitson criticism about a more unresponsive, risk adverse bureaucracy and added that the Bill will also weaken political parties⁸.

But there may be other tensions at play besides the issue of accountability versus performance. Ironically accountability and legitimacy – another attribute of good governance – may also have an uneasy relationship. From one perspective, sound accountability should lead to higher levels of trust and ‘ownership’ among citizens. As the 2006 Speech from the Throne notes, improved accountability should restore trust in government. On the other hand, a steady stream of negative

⁶ John Ibbitson, *Globe and Mail*, April 12, 2006

⁷ John Ibbitson, *op. cit.*

⁸ Jeffrey Simpson, *Globe and Mail*, April 12, 2006

findings from the various institutions of accountability, such as audit organizations, findings which are in turn amplified by media and political opponents to the government, may have the long term affect of souring relations between citizens and government. Polls taken during various inquiries, including Gomery, seemed to confirm this phenomenon. Long term trends about loss of confidence in all institutions, especially governments and politicians, are also worrisome.

Finally, fairness and accountability can be adversaries. Consider, for example, that a long standing Canadian consensus (at least until recently) has existed around equalization payments from the federal government to ‘have-not’ provinces. Indeed, this equalization principle is enshrined in our Constitution (Section 36.2 of the *Constitution Act 1982*). While such payments improve services in these provinces, they do break the nexus, in some cases dramatically, between taxation and expenditures. In short, equalization in the name of fairness can muddy accountability.

The lesson here is that accountability is not an absolute. It requires judicious balancing with other attributes of good governance, no easy task, especially in the heat of intense political battles.

Federal Government’s Approach to Results-based Management

Our notion of how to demonstrate accountability has evolved. For a long time, it was simply a matter of compliance: that is, proving that funding allocated by parliament was spent for its intended purposes and in a manner that followed the rules. To give a simple example, if the Health Department was allocated a \$1 million to run an anti-smoking ad campaign, the department would have needed to demonstrate that it had indeed spend the money on such a campaign and in a manner that had respected the government’s contracting rules. End of story.

Compliance is still an important aspect of accountability but the recent emphasis on results-based management has added new complications. The Health Department must now attempt to demonstrate that, not only did it comply with spending rules, it also achieved its intended results – to reduce smoking-related diseases. This is a difficult challenge.

First introduced in 1996 in the federal government, results-based management has evolved into a substantive initiative to improve reporting to parliamentarians on the performance of government programs. As part of this initiative some 90 departments and agencies have developed results-based systems for describing and monitoring their programs. This information is used both as part of the annual Estimates process to inform Parliament about departmental plans and priorities in results-based language and then to account for departmental efforts in tabling Departmental Performance Reports in the fall.

Few would argue against the intent of results-based management – to provide better information on the achievement of objectives to parliamentarians. Nonetheless, problems abound in its application, both practical and theoretical. Here is a sampling⁹:

⁹ For an elaboration of these themes, see Mark Schacter, Not a “Tool Kit”: Practitioner’s Guide to Measuring the Performance of Public Programs, Institute On Governance, 2002, www.iog.ca/publications

- A key problem is attribution. Even if smoking-related diseases decline, it may be far from clear what caused the decline. There may be a myriad of other factors besides the ad campaign that could explain this result.
- Time delays are another significant challenge. It may take years for programs to have their intended affect. Many smokers, for example, stop and start smoking numerous times before quitting for good.
- Reporting on the results of program relies to a great degree on data, which in many cases are only proxies for what is the government’s ultimate objective. To find data, for example, to measure improvements in ephemeral concepts like individual or community well-being is a challenge. Moreover, by focusing managers on achieving proxy measures, managers may face incentives that are sometimes perverse – that is, ‘managing what can be measured’ may run counter to what the government is trying to achieve¹⁰. Thus maximizing the number of people who watched the anti-smoking ad may mean that the target audience – perhaps teenagers – is largely missed.
- Horizontal initiatives are especially challenging. In her 2005 review of three such initiatives – the Canadian Biotechnology Strategy, the National Homelessness Initiative and the Vancouver Agreement – the Auditor General found “There was little planning in any of the these initiatives for measuring and reporting on how federal organizations would contribute to the initiative as a whole. Most reporting focussed on individual federal programs. As a result, Parliament does not have an overall picture of what the initiatives are achieving”.¹¹
- Finally, capturing results-based information is expensive. And as a general rule the more desirable the data – that is, data that demonstrates program impacts on citizens - the more expensive they are to collect.

The Interplay of Culture and Accountability

The courts in any liberal democracy play a significant role in an accountability system primarily through limiting or circumscribing the powers of government. This has certainly been the case in Canada but nevermore so since the adoption of the Charter of Rights and Freedoms in 1982. The current Chief Justice of the Supreme Court, the Right Honourable Beverley McLaughlin, has described the impact as “monumental” on Canadian law, noting that it has “...elevated the basic human rights, Aboriginal rights and equality to the status of supreme law, against which all government actions and legislation must be assessed”¹².

Some have suggested that the speed and enthusiasm in which Canadians have embraced the Charter is symptomatic of an “...abiding insecurity about our identity”¹³. Ms. McLaughlin begs to differ and in doing so makes an important point about accountability and, more generally, governance:

¹⁰ For a stunning example of the perverse affects of introducing standardised student testing across the Chicago Public School system, see Steven D. Levitt and Stephen J. Dubner, *Freakonomics: A rogue Economist explores the Hidden Side of Everything*, Harper Collins, New York, 2005 pp. 26-37

¹¹ Auditor General of Canada, “2005 Report of the Auditor General of Canada to the House of Commons: Chapter 4 – Managing Horizontal Initiatives,” Office of the Auditor General of Canada, p. 2

¹² Beverley McLaughlin, “Fourth Annual Lafontaine-Baldwin Lecture”, in *Dialogue on Democracy*, op. cit. p. 131

¹³ *Ibid.* p. 131

“Canada, as a nation grounded in difference and respect, has erected an impressive legal structure to protect difference. But the structure is not merely law. This is no alien, imposed legal order. It is a structure that expresses our history of respecting minorities and our ever-strengthening commitment to the politics of inclusion and accommodation and to the belief in the fundamental dignity and worth of each human being. Inclusion and equality cannot be achieved by mere rights. But when the rights reflect a nation’s values and are accepted as a means of brokering differences and finding accommodation, they take on profound importance.”¹⁴

In summary, to be effective, any system of accountability must be grounded in a country’s history and culture. Moreover, this suggests that it is no easy matter to simply import good governance practices from one country to another. Cultural norms matter.

D. Summary: the Challenges of Accountability

Accountability has an alluring simplicity about it. That accountability is central to democratic governments is beyond doubt. In addition, the basic bargain between citizens and their government is easy to understand as are the basic concepts of responsible government and ministerial accountability. Furthermore the need for countervailing checks and balances on the actions of a strong Executive Branch are compelling. What is in dispute, however, is how best to realize it. As this section points out there are no universal answers for a variety of reasons:

- accountability is not an absolute – it can conflict with other principles of good governance
- it is difficult to prove that government programs and services are indeed having their intended impact
- there are multiple accountability relationships, a situation which ‘muddies the waters’ considerably, and
- history, culture, the type of government system – all these factors matter in how accountability plays out in practice.

From the perspective of First Nations, several other points are worth emphasizing. First, there is very little literature on First Nation concepts of accountability and how they might differ from ‘mainstream’ approaches. One exception – although it is not First Nation but Métis – is the Métis Settlements of Alberta Appeals Tribunal. Second, First Nation governments, despite their wide range of responsibilities, which are more akin to provincial governments than municipalities, have weak vertical accountability mechanisms (there is little in the way of civil society and few independent media) and almost no horizontal accountability mechanisms run by Aboriginal people (a legislature, courts, ombudspersons etc.). And finally, their small size and limited governance capacity makes results-based reporting even more of a challenge to implement in any meaningful way. These are themes the essay will return to in Section III.

In the next section of the essay, we turn to a further complicating factor – how accountability plays out in a federal state.

¹⁴ Ibid, p. 132-133

II. Accountability in a Federal State: Challenges and Issues Facing Canada

This section consists of five parts. In the first we provide a brief overview of Canada's development as a federal state – what was intended at the time of Confederation and where Canada now finds itself. The second part focuses on fiscal federalism. It outlines some basic principles relating to accountability and again situates Canada within these principles. The third and fourth parts describe three broad approaches for improving accountability in a federal state. And the fifth presents the First Nation perspective on accountability within the Canadian federation at least as espoused by the Assembly of First Nations.

A. Canada as a Federal State

Canada is one of the oldest continuous democracies and consequently one of the oldest democratic federations. As noted in the Introduction of this essay, Canada, to a certain degree, is locked into a federal model built for the 19th and not the 21st century. This requires some elaboration.

With the American civil war only a few years behind them, the framers of the Canadian federation opted for a federal state with several key characteristics¹⁵:

- First, it would be a dual federation, that is, the federal and provincial governments would each have a full range of executive, legislative and judicial branches following the Westminster parliamentary model and substantial revenue generating powers.
- Second, the legislative powers of each of level of government, with some exceptions, would be independent of one another, that is, the governments would occupy largely water tight compartments. Shared jurisdictions would be few – agriculture, immigration and, much later, contributory public pensions such as the Canada Pension Plan, for example. Collaboration would also be required to run a tax system given the overlapping tax powers and to manage the criminal justice system.
- Third, the federal government would be the dominant partner. Thus, in the *Constitution Act 1867*, the federal government has the broader, more comprehensive set of powers and any power not specifically allocated fell to the federal Parliament. In contrast, provincial powers were meant to be “specific and limited”¹⁶. Further, unlike some contemporary federations like Germany, there would be weak representation of provincial government interests at the centre. Finally, the federal government would have a broad disallowance power of provincial legislation.

The dual character of the Canadian federation has remained but the other key characteristics are no where to be found. First, Canada has become highly de-centralized¹⁷ compared to other federations. For example, federal share of public sector spending in Canada is 37% versus 41% in Germany, 53% in Australia and 61% in the United States. This de-centralized federation has

¹⁵ David Cameron, “Intergovernmental Relations in Canada”, Forum of Federations, www.forumfed.org

¹⁶ Ibid, p. 11

¹⁷ Forum of Federations, “A Comparison of Federalism in Canada and Australia”, April 2006.

resulted from a variety of forces – judicial interpretation of the division of powers, which has broadly favoured the provinces; the dramatic growth of provincial areas of responsibility including health, welfare and education; popular support for provincial governments as a reflection of Canada’s regional diversity; and the growth of Quebec nationalism post World War II, a nationalism that has strongly reacted to federal intrusions into areas of provincial jurisdiction assigned by the constitution.

Second, the assumption of water tight compartments has largely evaporated. In part this is due to the exercise of the federal spending power¹⁸ in areas of provincial jurisdiction, principally health, social welfare and post secondary education. But wider forces are at play. It is hard to imagine any jurisdiction, provincial or federal, that does not have ramifications on the other level of government. That some 20 Ministerial Councils with supporting structures for officials exist in Canada is a testament to the adage that “everything is related to everything else”. Intergovernmental relations are particularly intense in fiscal arrangements, social programs, the environment, regional development and international trade. And as we will discuss later, the interdependence between levels of government can only increase.

Despite the significant degree of collaboration among provincial, territorial and federal governments, Canada has “...among the least formalized intergovernmental relations of all the federations”¹⁹. As Douglas Brown explains:

“Newer federal systems such as Germany have incorporated into their constitutions specific institutions to deal with intergovernmental relations because they could predict the heavy weight they would bear. But Canada’s older constitution did not foresee such a need, and has of course proven very difficult to reform. Instead Canada has had a more gradual evolution of institutions and processes to deal with intergovernmental management. These have been rather ad-hoc and informal, placing clear limits on what they achieve in terms of joint decision-making and the execution of shared responsibilities.”²⁰

Some would argue that this lack of formalized intergovernmental relations in Canada partially explains another significant characteristic of the Canadian federation - it tends toward the competitive as opposed to the collaborative end of the spectrum²¹. Another reason for this tendency is executive dominance of both federal and provincial levels of government. And this leads to a central dilemma: how to achieve higher levels of collaboration in an executive-dominated federation while at the same time respecting the principles of responsible government.

¹⁸ According to constitutional interpretation by the Courts, the federal government can spend funds in provincial areas of jurisdiction so long as its actions do not impinge on provincial legislative powers. The provinces also have a spending power and some have chosen to use it in areas of federal jurisdiction, most notably in the conduct of international relations.

¹⁹ Douglas Brown, “Getting Things Done in the Federation: Do we Need New Rules for an Old Game?”, Institute of Intergovernmental Relations and the Institute for Research on Public Policy, Queen’s University and IRPP, Montreal, 2003, p. 3. David Cameron agrees with this assessment: “Canada is seriously deficient in its institutions of intra-state federalism”, *op. cit.* p. 11.

²⁰ *Ibid.*, p. 3

²¹ *Ibid.*, p. 4

No discussion of federalism and accountability would be complete without some reference to fiscal federalism and it is to this somewhat arcane topic that we now turn.

B. Fiscal Federalism

The 2006 report of the Advisory Panel on Fiscal Imbalance for the Council of the Federation had this pessimistic assessment of the state of Canada's fiscal federalism:

“Canada's system of fiscal federalism has fallen into disrepair. Left unreformed, it will be a growing irritant among federal, provincial and territorial governments. The friction produced will in time begin to shape the attitudes of Canadians and heighten the tensions among Canada's regions and communities. Perhaps it has done so already. Left unattended, the deficiencies we identify below will compromise the contributions that Canadians and their governments might otherwise make to our collective well-being; they will stunt our national economic capacity and our international competitiveness.”²²

The intention of this essay is not to plough the same ground of that of the Panel. Rather, it is to better understand the connections between fiscal federalism and accountability in a federal state.

The starting point is with two principles of fiscal federalism that can be at odds with one another. The first is that revenue capacity of each level of government should match to the extent possible its expenditure responsibilities so that the basic bargain with citizens is maintained: governments should be accountable for the taxes they raise. Compared to Australia, Canada fares well in that the size of the fiscal transfer from federal to provincial governments is under 20% of aggregate provincial revenues versus close to 40% for Australia. This is not to argue that the current level of federal transfers is at “right” level. Indeed, the Advisory Panel on Fiscal Imbalance argued, as have many of the provincial governments, notably Quebec and Ontario, that there is a fiscal imbalance which the federal government should correct, either through a transfer of tax points (the more preferable option keeping in mind this principle) or through increases in fiscal transfers.

The second principle is that provinces and states should be able to provide relatively the same quality of services at comparable rates of taxation. This principle is now enshrined in the *Constitution Act 1982* in section 36(2): the government of Canada is committed to making equalization payments to the provinces to ensure that they have “...sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.” This is a strong argument therefore on the grounds of equity to have the national government of any federation have revenue generating powers exceeding its expenditure needs.

Compared to other federations, Canada has relatively large revenue disparities. Given these large disparities and the relatively small percentage of federal fiscal transfers to total provincial revenue, it is not surprising that federal transfers do not achieve complete equalization whereas Australia is able to achieve full equalization.

²² Advisory Panel on Fiscal Imbalance, “Reconciling the Irreconcilable: Addressing Canada's Fiscal Imbalance”, The Council of the Federation, www.councilofthefederation.ca, p. 9. Panel members were Robert Gagne and Janice Gross Stein, co-chairs, Peter Meekison, Lowell Murray and John Todd.

There are also contending principles on the issue of conditionality of federal transfers. On the one hand, experts urge that fiscal transfers contain as few conditions as possible so as to allow the sub-national governments to determine their own priorities to best meet the needs of their citizens. Such an approach also helps clarify accountability relationships. On the other hand, there are solid reasons for placing conditions on transfers especially in two cases: first, when important national goals are at stake and second, to reduce ‘spillover affects’ from one jurisdiction to another²³. From the federal government’s perspective, therefore, transfers to the provinces and territories premised on the conditions of meeting the goals of the *National Health Act* and of ensuring that provinces do not place residency requirements on social assistance payments would meet these criteria. Others would differ.

Canada’s record on conditional transfers is better than some federations. For example, in the US, 85% of all federal aid is delivered to state and local governments through some 635 narrow categorical grants, each of which must be spent in specific ways for specific purposes.²⁴ Germany’s federal system follows a somewhat similar pattern to that of the US and in Australia a high percentage of its federal transfers are conditional in nature. Australia has 40% of its total transfers in the form of tied grants for designated purposes to support national priorities; these typically come with strings attached.²⁵ Appendix A has a brief description of Canada’s unconditional transfers to provinces and territories.

There is a final set of contending principles in any federal fiscal transfer system and it is this – on the one hand, for reasons of accountability, it is useful to have a transfer system that most citizens can understand without an advanced degree in economics. Therefore clarity and simplicity are virtues. That said, arguments for ‘equitable treatment’ move the system in just the opposite direction, toward increasing complexity to the point where only a very few experts truly understand the underlying mathematics that has developed. So a predicable pattern emerges.

- A simple system is introduced
- Calls for equity result in ever increasing number of changes which render the system increasingly incomprehensible
- Demands for reform produce panels and commissions charged with clarifying and simplifying the transfer system
- Reforms to simplify the system are carried out and the pattern begins again with cries of unfairness.

Is it any wonder then that the Advisory Panel on Fiscal Imbalance entitled its report “Reconciling the Irreconcilable”, given the contending principles that fiscal federalism must deal with? It is not surprising therefore that many federations have established elaborate machinery to manage this area. The Advisory Panel described three broad approaches:

- Expert commissions, either ongoing or occasional (South Africa, India, Australia)

²³ An example of a spillover affect might be a coal fired generator in one jurisdiction causing air pollution in another. In addition to the environment, there could be spillovers in social programs (residency requirements in one jurisdiction but not others) or regional development programs (tax treatment that encourages movement of businesses from one jurisdiction to another) to cite other examples.

²⁴ John Kincaid, “Intergovernmental Relations in the United States of America”, Forum of Federations, www.forumfed.org

²⁵ Alan Morris, “Australia: Equity, Imbalance, and Egalitarianism”, Forum of Federations, op. cit.

- Intergovernmental councils (Malaysia, Pakistan)
- Central legislatures with effective representation in its upper house from sub-national governments or units (Austria, Belgium, Germany, Switzerland, United States)

The Advisory Council was critical of Canada for using none of these approaches:

“Instead it uses a fourth approach – unilateral action by the central government. The federal government, using its authority under the spending power, determines the level of and nature of the financial transfers to provinces unilaterally, sometimes after discussions with the provincial governments. There is no effective provincial government representation in the national legislature, no expert commission, no institutionalized first ministers’ council. Canada employs this lopsided system to determine the vast majority of its major financial arrangements, including the equalization formula and tax point and cash transfers to the provinces for a wide variety of purposes.”²⁶

Based on this analysis the Panel recommended the establishment of a First Ministers’ Fiscal Council, supported by a small secretariat and by a new body, the Canadian Institute for Fiscal Information, which would, among other things, “...undertake analyses and gather quantitative information relating to the full range of intergovernmental fiscal arrangements, and produce common data and a common information base on which discussions of policy would proceed.”²⁷ In addition it would have a public education function and its report leading up to a five year review of fiscal arrangements by First Ministers would be tabled and considered by Parliament and provincial and territorial legislatures.

In short, more collaboration through executive federalism tempered with greater transparency and legislative involvement.

C. Approaches for Improving Accountability in a Federal State

Federations including Canada have considered three broad approaches to improving accountability arrangements. These are

- Disentangling responsibilities to reduce overlap and achieve greater clarity about what government is responsible for what
- Improving collaboration through better governance, and
- Developing better performance information in areas of shared responsibilities.

In terms of disentanglement, the governments of Quebec and Alberta, among others, have consistently argued for limiting the federal spending power; concentrating more on federal responsibilities; and reducing excess federal revenues primarily through reduction in federal taxes or increasing transfers to the provinces. On the other hand the federal government has proposed a stronger federal role to address “...structural impediments to competitiveness and

²⁶ Op. Cit. p. 92

²⁷ Op. Cit. p. 97

efficiency within the Canada's economic union.”²⁸ The latest manifestation of this federal approach is the call for a national body to regulate securities, following the recent world-wide financial crisis²⁹.

A disentanglement strategy might help clarify accountability arrangements in a federation but it will not be sufficient to deal with the full range of accountability challenges. Indeed, many commentators point to trends that will increase the need for future collaboration in federal states. Of these, three are noteworthy in the Canadian context: i) growing interdependencies among nations to deal with global problems; ii) developing a third (Aboriginal) order of government; and iii) dealing with the challenge of cities.

In light of these and other forces that call for greater degrees of collaboration in federations, it is useful to examine how Canada and other federations manage the governance of this collaboration, a second approach for improving accountability and the functioning of the federation. In Canada we have had a number of initiatives on this theme:

- Improving the overall management of the federal-provincial relationship through, for example, the establishment of a Council of the Federation as a permanent forum “...for collaboration among the federal partners, presumably including the federal government. Its task would be to coordinate intergovernmental relations in such areas as internal trade, social union, broad economic management and international relations”.³⁰ The Council would be supported by a permanent secretariat with three sub-secretariats.
- Enhancing or emulating sectoral governance mechanisms such as Council of Ministers of the Environment, an incorporated body with a permanent secretariat and a mandate to achieve harmonization by applying two key principles: i) a single window approach and ii) assigning roles to the government best able to carry them out.
- Developing intergovernmental agreements such as the Agreement on Internal Trade (1994), Canada-wide Accord on Environmental Harmonization (1998), the Social Union Framework Agreement (SUFA) (1999), Canada Health Accord (2004), and the Kelowna Accord (2005)
- Experimenting with dispute resolution mechanisms such as those incorporated in the Agreement on Internal Trade and SUFA

Attempts to improve the quality of collaboration within the Canadian federation have involved Aboriginal peoples in general and First Nations in particular. They have participated in federal/provincial meetings, have negotiated significant tripartite agreements – the recent health accord in British Columbia is one such example – and have experimented with dispute resolution agreements, most notably in the Nisga'a self-government agreement.

A third strategy for improving accountability in multi-governance situations focuses on performance information and reporting. As the Auditor General noted in his 1999 report on collaborative arrangements, including intergovernmental arrangements, “As more taxpayer dollars are being spent through collaborative arrangements, the associated risks require greater attention. These include the risk of poorly defined arrangements, commitments not met,

²⁸ Department of Finance, “Budget 2006: Restoring Fiscal Balance in Canada – Focusing on Priorities”, www.fin.gc.ca

²⁹ See Department of Finance, “Budget 2009: Canada's Economic action Plan”, www.fin.gc.ca

³⁰ Douglas Brown, *op. cit.* p. 6

insufficient attention to protecting the public interest, insufficient transparency and inadequate accountability.”³¹

The IOG has identified three approaches for improving reporting on collaborative arrangements involving governments in a federation:

- adopting common reporting formats and data collection – an example was the Child Benefit Program where the federal and provincial governments agreed to produce an annual joint accountability report and to eventual joint evaluations of the program
- creating joint efforts to improve data – an example is the Canadian Institute for Health Information (CIHI), an independent, not-for-profit organization that serves as a focal point for collaboration among the major players in the Canadian health system – the federal government, provincial governments, regional health authorities, hospitals, researchers, and associations representing health care professionals – for statistical information and analysis about a variety of health topics affecting Canadians.
- instituting joint reviews – jointly coordinated audits is one example but a more interesting one is the establishment of the Health Council of Canada as part of the 2003 Health Accord, a body that “speaks directly to Canadians, offering a national, system-wide perspective and impartial assessment on the status of health care renewal in Canada.”³²

Again we have seen echoes of this approach with First Nations: the development of the First Nations Statistical Agency is one good example.

D. Conclusions – How Canada Stacks Up

It is difficult to make any sweeping generalizations about how well Canada stacks up against other federations in managing accountability. Because Canada is one of the oldest federations it is not surprising that we have learned from our experience and do some things very well. From adopting the Charter and constitutionalizing the equalization principle to some good practices on the ground like the Canadian Council of Ministers of the Environment and the progress in dispute resolution in Aboriginal self-government agreements – there are lots of exemplary examples to point to.

Nonetheless the executive dominance of our governments combined with regional diversity has led to a competitive form of federalism which in many ways leaves much to be critical about. Indeed Canada’s inability to develop more formalized machinery to manage key relationships in the federation is also reflected in the federal-First Nation relationship. To be fair, there have been many informal attempts at collaboration around accountability issues – the Accountability for Results Initiative was one such example. And there are solid examples in some regions of ongoing fora where First Nations and INAC officials discuss funding arrangements and related accountability issues.

³¹ Auditor General of Canada, “Collaborative Arrangements: Issues for the Federal Government”, 1999 Report of the Auditor General, April 1999, www.oag-bvg.gc.ca/domino/reports.nsf

³² Health Council of Canada, “Health Care Renewal in Canada – Clearing the Road to Quality: Annual Report to Canadians,” <http://www.healthcouncilcanada.ca/docs/rpts/2006/ExecSumEnglish2006.pdf>

These comments lead naturally into the final part of this section, which focuses on how First Nations would like to see their government to government relationship evolve.

E. First Nation Perspectives

The Assembly of First Nations articulated its position on the accountability relationship between First Nations and the federal government as part of its preparations for a series of roundtable discussions initiated in 2004, one of which focused on accountability:

“As noted, First Nations are not simply ‘stakeholders’ in the area of accountability, reporting and data collection, they have treaty and inherent rights of self-government, and; as such, they comprise an independent jurisdiction with unique rights and interests. The development of an accountability framework must respect the principle of the nation-to-nation and government-to-government relationship...”³³

This accountability relationship, according to the AFN, must be a two way street:

“But the Federal Government, which has held the greater responsibility and authority, has not been accountable to First Nations for the decisions they have made nor for the disastrous results of those decisions. And neither First Nations governments nor their communities have been empowered to hold the Federal Government to account or demand the changes that those disastrous results so clearly require. There has been no real accountability”³⁴.

The implications for financial arrangements are also clear from the AFN perspective:

“Financial arrangements with First Nations should resemble those between the federal and provincial government. A new fiscal framework should be ongoing, adequate for need and delivered through a single window (e.g. CHST, SUFA arrangements). To have accountability, the full honour of the Crown must be restored through the acknowledgement and fulfillment of all of its fiduciary and other obligations to First Nations”.

First Nations have had significant support for many of the AFN’s positions for over 25 years. As early as 1983, the Special Committee on Indian Self-government, chaired by Keith Penner, argued for constitutional recognition of Indian governments, a theme also taken up by the Royal Commission on Aboriginal Peoples. Both bodies drew up radically different plans to finance First Nation governments under their proposals for self-government.

Penner’s Committee recommended funding in the form of unconditional grants within a legislative framework which set out overall funding levels for a five year period³⁵. Increasing

³³ AFN, “AFN Background Essay on Accountability”, Canada-Aboriginal Peoples Roundtable Follow-up Session: Accountability, January 2005, P.6

³⁴ *ibid* P.2

³⁵ Special Committee on Indian Self-government, “Indian Self-government”, Queen’s Printer, October 1983, P. 145-6

own source revenue was also important to the Committee but none in the form of direct taxation of First Nation citizens. First Nations seeking these new self-government arrangements would have to demonstrate among other things some viable accountability system to its own citizens.

The Royal Commission in 1996 recommended a somewhat similar unconditional transfer arrangement but more akin to the funding arrangement that now exists between territories and the federal government as laid out in the *Federal-Provincial Fiscal Arrangements Act*. In contrast to Penner the RCAP recommended taxing powers be granted to First Nation governments and perhaps more importantly, First Nation governments should be established at the “nation” rather than community level, thus entailing a significant level of aggregation.

Just prior to the RCAP report being made public, the federal government announced its Inherent Right Policy, which among other things committed the government to act on the assumption that Aboriginal rights referenced in Section 35 of the Constitution Act of 1982 included the inherent right to self-government for certain defined areas of jurisdiction. The Policy does not explicitly establish First Nation governments under self-government agreements as being a new order of government. Only a very few self-government agreements have been negotiated under the policy since it was announced in 1996. Nonetheless the funding agreements have had few conditions and a legislative funding base.

The Penner and RCAP recommendations, although both aimed at a new relationship, continue to have resonance for funding for all First Nations. For example, the AFN in its submission to the Independent Blue Ribbon Panel on Grants and Contribution Programs recommended that

- Within five years all funding arrangements to First Nations be in the form of Transfers to Other Levels of Government
- Current arrangements immediately move to longer term “horizontal” agreements, and
- The federal government re-engage in a joint forum to discuss accountability arrangements.

The Blue Ribbon Panel **appeared to accept one of the** AFN’s principal messages in making this comment in its final report:

“Fiscal arrangements with First Nations governments are complex, reflecting not only the varied circumstances of the 630 First Nations of Canada but also the fact that payments to First Nations to First Nation governments are (or ought to be) more like intergovernmental transfers than typical grants and contributions. The panel is of the view that mechanisms other than grants and contributions for the funding of essential services such as health, education and social assistance in reserve communities are needed, but we have concluded that trying to address this issue would take us well beyond our mandate.”³⁶

The perspectives of the AFN and those of Penner, RCAP and the Blue Ribbon Panel call for further analysis, part of the focus of the next Section of the essay.

³⁶ Independent Blue Ribbon Panel on Grant and Contribution Programs, “From Red tape to Clear Results”, December 2006, www.brp-gde.ca, P.8

III. The INAC-First Nation Accountability Relationship

This section and the next, which deals with the accountability relationship between First Nation governments and their citizens, are the heart of this essay. In this section we look at the government to government relationship between the Minister of INAC and First Nation governments (for simplicity purposes, we refer to this as the INAC-First Nation relationship) and do so in four parts. In the first we tease out what are the distinguishing features of First Nation governments, features which are critical in shaping an accountability relationship. The second centres on the government's new Policy on Transfer Payments and the challenges facing INAC in implementing it. The third builds on part two in describing the current state of affairs with regards to INAC's funding relationship with First Nations. Finally the last part draws out the policy implications for INAC senior managers.

A. Defining Features of First Nation Governments

For the purpose of this essay, it is useful to describe five features of First Nation governments that are critical in shaping accountability relationship with INAC.

1. Extreme Capacity Diversity

Anyone who has had the opportunity to visit a number of First Nation communities is struck by their extreme diversity. Besides obvious cultural and linguistic differences, some are indistinguishable from any prosperous small town in Canada. Others would not be out of place in very poor third world countries.

Statistical measures of well-being back up these impressions. For example the department's Community Well-being Index (CWB) has a distribution which, for First Nations when compared to Canadian communities, is 'flatter' – that is, there is greater variation in First Nation communities³⁷. Moreover, a recent INAC study confirms that First Nation communities are worse off than neighbouring non-Aboriginal communities. As the study concludes "Evidently there is something about reserves, apart from their isolation and small size, that inhibited their ability to achieve levels of well-being akin to those observed in other Canadian communities."³⁸.

Other evidence suggests that this wide dispersion of community well-being is reflective of community capacity, in particular the capacity of First Nation governments.

- The fact that First Nation governments are so critical to their communities because of the many functions they perform
- The relatively high percentage of First Nation governments experiencing some form of financial difficulty compared to other governments in Canada

³⁷ Erin O'Sullivan and Mindy McHardy, "The Community Well-Being Index (CWB): Well-being In First Nation Communities, Present, Past and Future" *Aboriginal Well-being: Canada's Continuing Challenge*, edited by Jerry White, Dan Beavon and Nicholas Spence, Thompson Educational Publishing Press, Toronto 2007, 121

³⁸ Jerry White and Paul Maxim, "Community Well-being: a Comparable Communities Analysis", in *Aboriginal Well-Being* op. cit. 182

Similarly two Canadian academics have constructed a Community Capacity Index for First Nations consisting of four factors – size of the community; education levels; age-dependency (which measures the potential labour force in relation to those dependent on that base of potential workers and occupational diversity). Their results demonstrate “...a wide range of capacity among First Nation communities”³⁹.

The implication here is obvious: any accountability relationship between these governments and INAC has to reflect this extreme diversity. Or put another way, the level of risk inherent in any funding relationship varies enormously among the set of First Nations. Therefore, it is not useful or realistic to propose a single type of funding relationship, as does the AFN and to a lesser extent Penner and RCAP. Further, the Blue Ribbon Panel’s suggestion that payments to First Nations should be “more like intergovernmental transfers” is appropriate for some but clearly not all First Nations. In the case of the AFN, treating all of its member First Nations as “equals” is understandable given its advocacy mandate. But it is less so for Penner and RCAP.

2. Large Governments with few Checks and Balances

The small size of First Nation communities may mask an important characteristic of their governments: as measured by per capita spending, First Nation governments are the largest local governments in the world. The following table⁴⁰ tells part of the tale. First Nation governments by this measure of per capita spending are roughly 10 times as large as the average Canadian municipality.

Government	Per capita annual spending
All municipalities in Canada (2004)	\$1,750
All municipalities in NWT (2004)	\$2,666
First Nations under the Indian Act (2004–06)	\$17,142 ⁴¹ (on-reserve)

³⁹ White, Jerry and Maxim, Paul, “Toward an Index of Community Capacity: Predicting Community Potential for Successful Program Transfer”, *Aboriginal Condition*, edited by Jerry White, Paul Maxim and Dan Beavon, UBC Press 2003. P. 255. On the index’s scale of 1 to 12, 18 communities had a score of 3 or less while 19 had a score of 8 or more..

⁴⁰ Sources for this data include: Federation of Canadian Municipalities, “Building Prosperity From the Ground Up: Restoring Municipal Fiscal Balance,” June 2006; Conference Board of Canada, “Mission Possible, Successful Canadian Cities,” January 2007. The First Nation estimate is derived from a sample of twenty First Nations from across Canada varying in size from 76 to 4698 on-reserve members. The data in this sample derives primarily from the 2004/05 fiscal year; in some cases, from 2005/06. Comparable figures for the federal and provincial governments are in the \$7,000 to \$8,000 per capita range.

⁴¹ Readers should not conclude from this figure that First Nations are ‘over-funded’ for the functions they perform. Any conclusions on the adequacy of funding would require more detailed analysis of each function for which these governments are responsible.

Further, these large First Nation governments do not have the usual array of checks and balances that are found with other governments: not only are the voluntary, media and private⁴² sectors underdeveloped (vertical accountability as described in Section I), but there are few independent review mechanisms (horizontal accountability) like ombudspersons, First Nation-run courts, auditing agencies, or ethics commissions.

An additional problem is the large number of regulatory voids facing First Nation communities. Because provincial law relating either to land or 'Indianess' likely does not apply to First Nation communities and because there is little in the way of federal legislation, First Nation communities do not enjoy the array of legislative protection of neighbouring, non-Aboriginal communities in areas as diverse as potable water, waste water treatment, solid waste management, fire protection, environmental protection, natural resource management (forests, mines, quarries etc.), public health, matrimonial real property and so on. Thus, First Nation governments are not constrained by the same web of legal restrictions as are other levels of government. In short these large governments are relatively unregulated.

Once again the implications for structuring an accountability relationship with the federal government are significant. First, the central importance of First Nation governments to their communities means that this relationship is all the more critical. Second, the legal voids have implications for the conditionality of federal funding. For example, respecting the department's water protocol, which mimics provincial standards for potable water production and distribution, is a condition of all funding agreements with First Nations. And finally, ready assumptions that reducing federal accountability requirements will somehow ensure a shift to improved accountability between First Nation governments and their citizens needs to be questioned, a theme we will return to in the next Section of the essay.

3. A large Number of Politicians

Another distinguishing feature of First Nation is the large number of politicians per capita. The *Indian Act* defines the structure of the First Nation's Council to consist of one chief and one councillor for every one hundred members with the number of councillors being no less than 2 or more than 12⁴³. Given that many members do not reside on reserve, this ratio of politicians to citizens for practical purposes is even larger. Further, in sharp contrast to local governments in small, non-Aboriginal communities, the position of Councillor is a full-time job with a significant salary in many First Nation communities. This occurs for various reasons: scarcity of jobs outside the public sector; lack of capacity within the community; citizen expectations that their representatives should be available at all times; and long-term exposure to federal government ministers to name only a few.

With the large number of politicians, many full time, comes the inevitable result: a politicization of the delivery of public services in the communities and more churn in the public service. (The

⁴² One indicator of the underdeveloped private sector is entrepreneurship. According to the 2001 Census, 7.89 % of non-Aboriginal Canadians of working age were self-employed. The corresponding figure for Aboriginal Canadians on reserve was 2.16%, more than a three fold difference.

⁴³ Indian Act, Section 74(2). The Act provides that First Nations can adopt a custom election code and thereby alter this ratio.

job of band manager becomes especially challenging, especially if the First Nation adopts a portfolio system⁴⁴.) Further, the elected positions, because they carry full time salaries, are hotly contested, resulting in a high turnover of political leaders and public servants. The outcome is a lack of stability, certainly compared to other levels of government in Canada. This might be less problematic in governments with small per capita expenditures. But such is not the case as we have illustrated above.

From an accountability standpoint, this lack of stability (one exception are communities with long standing, charismatic chiefs) increases risk in any funding arrangements and therefore colours the accountability relationship. Moreover, it makes the determination of risk an ongoing challenge. Elections can have a major impact almost overnight on the direction of the community.

4. The Dependence on Federal Transfers and the Lack of a Tax Relationship between First Nation Citizens and their Government

As the previous section illustrated, Canada as a federation does well in one respect of its fiscal arrangements with the provinces. The taxing powers of the provinces are sufficient to generate own source revenue (OSR) that is a high percentage of their expenditures. This is fundamental to sound accountability in a federal system. The same can be said about municipalities. They generate about 85% of their expenditures through own source revenue. In addition, the federal, provincial, territorial and municipal governments all have a tax relationship with their citizens. As we will argue in the next section this tax relationship is fundamental to sound accountability and good governance.

The situation for First Nations is entirely different. While growing, own source revenue remains on average only a small percentage of total revenue (in one study, now three years old, the IOG through a sample estimated OSR to be about 7% of total First Nation revenues). Further, the capacity to generate OSR varies widely among First Nations.

In terms of a tax relationship, First Nations, outside of those with self-government agreements, do not have a personal income tax power. And very few collect property tax, sales tax or user fees from their members.

The implications for accountability are therefore important. The funding relationship with the federal government is central to their capacity to deliver high quality programs, both in terms of the amounts they receive and the conditions tied to the funding. The result among other things is a highly unbalanced relationship with all of the ‘cards’ stacked in favour of the federal government, a source of some considerable resentment to First Nations and a reminder of their former colonial status. Further, from the public’s (and opposition party’s) standpoint, the federal government becomes the obvious target to blame if anything goes wrong, a state of affairs that First Nations communities have long exploited. All of this heightens risk from the federal perspective and makes monitoring, conditional funding and high reporting levels almost

⁴⁴ See John Graham, “Clarifying Roles of Aboriginal Leaders and their Staff: Perils of a Portfolio System”, Policy Brief No.28, May 2007, www.iog.ca

inevitable. And finally, without a solid tax relationship with its citizens, First Nation governments may have great difficulty fashioning a solid accountability regime, a theme we will return to in next section.

5. Fundamental Differences about the Status of First Nation Governments

To say that fundamental differences exist on the meaning of Aboriginal and treaty rights and fiduciary duties, among other things, between First Nations and the federal government is to state the obvious. Less obvious are the implications for an accountability relationship.

One such implication is the difficult challenge of developing a forum to discuss accountability and related matters such as funding arrangements on an ongoing basis with First Nations at a national level, a development that the AFN is calling for and that would be in line with the new Transfer Policy to be discussed in the next part. Such a forum might never get off the ground because of differences on the rights issues. Another implication is the ongoing difficulty of getting First Nation co-operation on respecting reporting requirements embedded in funding arrangements. And finally, for many INAC employees they have to wear two competing ‘hats’: the preferred one as a facilitator and helper; and a second, as a ‘policeman’ vis-à-vis a resentful First Nation partners who don’t regard conditional transfers with their reporting requirements as being legitimate.

In sum, it’s as if the two partners in the relationship were living on different planets.

B. The Government’s New Policy on Transfer Payments

The Treasury Board’s new Policy on Transfer Payments and the accompanying Directive on Transfer Payments came into effect on October 1, 2008. With regards to the Panel’s and the AFN’s view that transfers to First Nations ought to be intergovernmental in nature, the Directive is especially telling in rejecting this advice. It has a separate sections on transfer payments to “other orders of government” (section 6.7 and Appendix I) and “to Aboriginal recipients” (Section 6.9 and Appendix K).

Importantly, for departments other than INAC and Health Canada, the Directive provides for a greater array of funding vehicles, vehicles that the latter two departments by and large have now. For INAC, however, the Policy and Directive sets out three important challenges. The first is risk. This term is a central theme to both the Policy and Directive and occurs repeatedly in both documents. The Policy objective, for example, is the following:

“The objective of this policy is to ensure that transfer payment programs are managed with integrity, transparency and accountability in a manner that is sensitive to risks; are citizen- and recipient focused; and are designed and delivered to address government priorities in achieving results for Canadians”⁴⁵

The Directive provides further details on the implications of various risk levels. They can affect:

⁴⁵ Treasury Board of Canada Secretariat, “Policy on Transfer Payments”, 2008, P.2

- The selection of the appropriate transfer payment instrument
- The extent of funding agreement requirements (conditionality)
- Cash management practices
- Reporting requirements, and
- Monitoring and auditing of recipients

For two of the instruments – flexible and block contribution funding – the Directive provides even more direction on the type of elements that will need to be assessed in determining risk levels:

- Governance structure
- Organization for purposes of program management, financial and administrative experience and capacity to deliver programs
- Processes and procedures for program management and financial control
- Accountability mechanisms for transparency, disclosure, responsibility and redress; and
- Financial position.

In addition to the challenges posed by the centrality of risk, the department will need to engage applicants and recipients in support of “innovation, continuous improvement and the establishment of fair, transparent and positive relations with them”. One specific endeavour is the establishment of departmental service standards for transfer payments.

Finally, the Policy and Directive will call for new leadership within the department in two ways: first, to get its own house in order and second, although this is not in the Policy and Directive, to lead an interdepartmental committee to focus on Aboriginal recipients with a specific mandate, among other things, to achieve greater cross-departmental harmonization.

Before proceeding to policy implications for INAC in light of the analysis to this point, it is useful to have a brief snapshot of the current situation as it relates to funding arrangements with First Nations. This is the topic of the part that now follows and will help illustrate the challenge now facing INAC managers..

C. The Current Situation

The Institute On Governance has just completed a special study on INAC’s funding arrangements. One of the study’s principal observations is the centrality of these arrangements in defining the relationship between INAC and First Nations, especially in regards to accountability.

Here are the study’s major conclusions:

- **Despite their central importance, there is a lack of clarity about the overall objectives of the funding arrangements and a lack of leadership**

“There is a lack of clarity about the overall objectives of the funding arrangements, a lack of coherence among programs and funding authorities that make up the arrangements, and no clear leadership at INAC Headquarters. There is limited engagement of the recipients. The movement

of First Nations, Tribal Councils and other Indian-administered recipients towards increasingly responsive, flexible, innovative and self-sustained policies, programs or services is not being promoted.”

- **There has been little or no progression to more flexible arrangements**

“Our investigations of the status of funding arrangements indicate that there has been no progression in terms of the movement of First Nations and Tribal Councils into block funding arrangements over the past ten years. There is a reluctance to move into more flexible arrangements or multi year agreements because of concerns about annual adjustments, particularly for income assistance and primary and secondary education.

There was no assessment conducted of the capacity of recipients with CFAs in our sample and no capacity building plans developed to guide their progression to more control over their funding. Intervention is focussed primarily on debt reduction and not on sustainable capacity building.”

- **Risk management leaves much to be desired**

“In terms of risk management, there are only two funding arrangements for non self-governing First Nations and Tribal Councils despite the huge diversity of capacity and risks within these groups. Funding authorities are linked to the method of calculating the funding (formula-driven or fixed costs versus proposal-driven or variable costs) and not to the capacity of the recipient. Program authorities vary in terms of their approach to risk management. Often very small programs are monitored very closely whereas very large programs are monitored very loosely.

Similarly, single year CFAs and funding authorities are used with other Aboriginal organizations regardless of the nature of the relationship, the program being funded or the track record of the recipient. Some of these organizations were micro-managed whereas a more strategic approach was taken with others, but the differences seemed to be linked to differences in INAC’s staff rather than differences in the capacity of the organizations.”

- **Reporting requirements do not vary much between arrangements**

“There is not much difference between the reporting for First Nations and Tribal Councils under CFAs versus DFNFAs. The amount of reporting was not commensurate with the amount of the funding, and there was some duplication across reports.”

- **For many, there is a significant reporting burden; there is little understanding of the value of the reports**

“The administrative burden for some First Nations and Tribal Councils and most of the other Aboriginal organizations was onerous whereas for others it was considered to be manageable. The funding provided for management and administration was considered to be inadequate by all. In general, INAC’s resources in the regions were focused more on following up on reports, compliance reviews and audits rather than preventive and proactive measures.

Of more concern to the First Nation and Tribal Council recipients was the value of the reports to INAC since they did not receive feedback. There was a lot of frustration in all three regions about INAC losing or misplacing reports and holding back funding.”

- **Very little of the reporting relates to outcomes or program results**

“In terms of the effectiveness of funding arrangements in meeting INAC’s policy and program objectives, there is very little information about what results are being achieved since most of the reporting relates to inputs, activities or outputs and very little about outcomes or results. Risk management, accountability and flexibility are not well balanced within the funding arrangements in terms of the amount of money involved, the nature of the program, or the capacity of the recipients.”

- **There is little in the way of coordination of arrangements across the federal government**

“There is little coordination of funding arrangements across the federal government, few CFNFAs, and widely varying terms and conditions across departments. We identified a number of constraints to interdepartmental coordination or harmonization.”

- **Overall the accountability relationship is not sound**

“An appropriate accountability framework needs to be in place to support strong accountability relationships based on clear roles and responsibilities, clear performance expectations, balanced expectations and capacities, credible reporting, and reasonable review and adjustment. Effective accountability is therefore not defined solely by funding arrangements. Our study indicated that accountability is not working well because there is inadequate reporting on performance; no serious informed review of the program information reported; and no appropriate program changes, incentives for good performance, or consequences for poor performance.”

“Some FNs and TCs also raised the issue of increased accountability from INAC to them. Examples of this included: ...responding to the results of reviews and evaluations conducted over the past ten years that have recommended changes in the way services are funded and the amount of funding that is provided; ...setting standards for FSOs and regional offices in terms of acknowledging and reviewing reports, responding to inquiries, and releasing funds; and making the program authorities publicly available”.

- **There are an increasing number of new funding programs relating to water, education, housing and infrastructure, programs that reduce the flexibility of funding arrangements with self-governing and other high performing First Nations**

In light of these findings, especially when juxtaposed against the new Policy on Transfer Payments, INAC would appear to need a major overall in its approach to funding arrangements with First Nations and more broadly their accountability relationship.

D. Reworking the INAC-First Nation Accountability Relationship

Many within the department would describe INAC's role as principally that of a funding agency, a throwback to a number of significant organization changes effected in the 1990s. This despite the fact that i) the department's logic models for its programs ultimately point to community and individual well-being as the ultimate outcome; ii) the Auditor General in numerous reports has chastised the department for not providing sufficient information to Parliament on the value achieved from its programs; and iii) the media, general public and at times First Nations themselves hold INAC responsible for the poor living conditions in First Nation communities.

The department, of course, is not in control of what happens in these communities. That said, it does have significant influence and for this reason the moniker of "just being a funding agency" does not fit.

Within this general understanding of its role – that ultimately it is about working with First Nations to improve individual and community well-being – we suggest the following steps to improve its accountability relationship with First Nations.

a) Appoint senior departmental officials at both HQ and in the regions to take the lead on reworking INAC's funding arrangements.

At headquarters, this official should be likely at the ADM level, preferably with program and regional responsibilities (as opposed to the Chief Financial Officer). In regions, the Associate Regional Director General may best fit the bill. More and better-trained staff will also be needed both at headquarters and in the field if this new leadership is to be effective in promoting change.

b) Develop permanent forums with First Nation representatives to institute ongoing discussions about funding arrangements and accountability

Some regions (e.g. British Columbia) already have such a forum and other regions should do the same. We do not underestimate the difficulty of creating something similar and useful at the national level, given the wide differences of opinion between the AFN and the department on funding arrangements and more generally on rights issues. Furthermore the existing 2% cap may overhang all discussions. In light of these difficulties the department may wish to begin at the regional level and then develop a national group linked to the regional groups. Alternatively the Minister might appoint his own Blue Ribbon panel made up jointly of departmental and First Nation officials and leaders.

In order to renew any funding authorities after October 2010, INAC will need to develop service standards for managing its funding arrangements. Developing these standards might be done in conjunction with First Nations in these regional and national forums. Judging from the complaints of INAC's funding recipients that the IOG heard as part of the Special Study noted in Part C above, this will be no easy task.

c) Rework the INAC funding arrangement architecture in light of the new Policy on Transfer Payments

As this section has illustrated, the department needs a higher degree of differentiation in its funding arrangements than now exist. In some cases this may mean imposing more conditionality on First Nation recipients. For example a recent audit of the Capital and Facilities Maintenance Program called for a re-examination of the flexibility of funding arrangements with regards to O&M and minor capital in light of evidence that there is early ‘rust-out’ of capital facilities on many First Nations because of poor maintenance practices. For the very high performers on the other hand, a more flexible arrangement is required, perhaps akin to the block grant that the Conne River/Miawpukek First Nation enjoys. (See Appendix B for a summary of the largely positive evaluation of the Conne River/Miawpukek experience.)

In reworking the funding architecture, there should also be increased differentiation in terms of reporting requirements. Uniform reporting requirements make no sense, given the extreme variation in governance and managerial capacity of First Nations. Furthermore as the discussion in Section I pointed out, developing results or outcome oriented information is challenging (and expensive) for governments with much greater capacity than First Nations. One alternative that might merit additional study is to develop a sampling approach for capturing information relevant to outcomes, perhaps in collaboration with the newly established First Nations Statistics.

Finally, the department needs to consider developing appropriate incentives (and capacity building approaches) to encourage movement along the funding continuum.

d) Develop a sophisticated approach to assessing risk

A more differentiated funding architecture will demand a sophisticated approach to measuring risk. And given the volatility of the governance of many First Nations this approach will need to go beyond a one time assessment approach.

The implications for the workload on existing regional and HQ staff, the need for significant training and the resentment of First Nations of any kind of departmental control or monitoring – all of these factors suggest that the department should give serious consideration to a third party undertaking these ongoing risk assessments through, for example, an accreditation-like system. The Office of the Federal Interlocutor has recent experience in this regard, experience that may be worth sharing with the rest of department.

e) Develop a strategy for dealing more effectively with communities under extreme distress

A more differentiated approach to the INAC-First Nation accountability relationship might assist those high performing First Nations through the development of a multi-year funding arrangement based on a grant. Similarly such an approach should produce changes in the relationship with those First Nations under major distress, occupying the extreme end of the well-being continuum. Such communities exhibit many or all of the following characteristics:

- High levels of social pathologies such as substance abuse, suicides, family violence, crime

- High levels of dependency on social assistance and low levels of economic activity outside the public sector
- Poorly functioning government services (education, health, policing, and so on)
- Poor housing conditions
- Run-down (premature rust-out of) public infrastructure (roads, public buildings, water and sewer systems)
- A governance system (including chief and council and senior staff) that appears highly dysfunctional—in other words, marked by high levels of churn, is in a chronic deficit position, and is incapable of making and implementing decisions
- Little in the way of cultural activities
- No discernible pattern of progress over a five year time frame

Anecdotal evidence suggests that somewhere in the range of 10 to 15% of First Nation communities fall into this category. INAC needs to develop a strategy for how it (and the government as a whole) can interact more productively with these communities.

f) Determine if and when OSR should be a factor in determining transfer amounts

Own source revenue (OSR) is a factor in determining fiscal transfers from the federal government to provinces and territories and to Aboriginal governments under self-government agreements. As levels of OSR mount, pressures will increase on INAC to take OSR into consideration in determining funding amounts to all First Nations, not just those under self-government agreements. This will particularly be the case if there is evidence of increased disparity among First Nations in their capacity to generate OSR.

Defining and accounting for OSR are no easy tasks, not to mention the political difficulties of instituting an OSR regime. For these and other reasons, the department may wish to study this area carefully.

This brings to a close the discussion on the INAC-First Nation accountability relationship. In the next section of the essay we turn to the second principal accountability relationship of concern to INAC – that between First Nation governments and their citizens.

IV. The Accountability Relationship Between First Nation Governments and Their Citizens

For some, there is a simple relationship regarding First Nation accountabilities: less accountability to the federal government will mean better accountability to its citizens. The point of this section is to argue that the issue is more complicated than this simple formulation suggests. Moreover, the federal government and INAC in particular can play a significant role in helping First Nations improve their accountability to their citizens.

This section builds on two observations we made in the previous one – that First Nation governments are very large as measured by per capita expenditures with few checks and balances

and that First Nations, without a tax relationship with their citizens, face significant challenges in creating a sound accountability relationship with them.

A. The Challenge of Large Governments with Few Checks and Balances

International evidence suggests that countries ranking highest on good governance indicators tend to have relatively balanced systems – that is, they have a robust and effective government sector balanced by a strong private sector, an independent media and an active and large set of voluntary organizations (sometimes referred to as civil society). Such organizations cover all aspects of society, from sports clubs to service delivery agencies to church groups to public policy advocacy groups (see Figure 1 below).

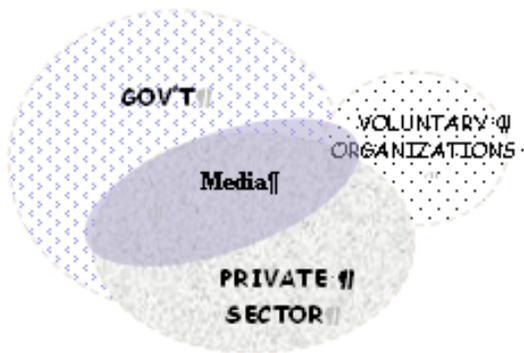


Figure 1

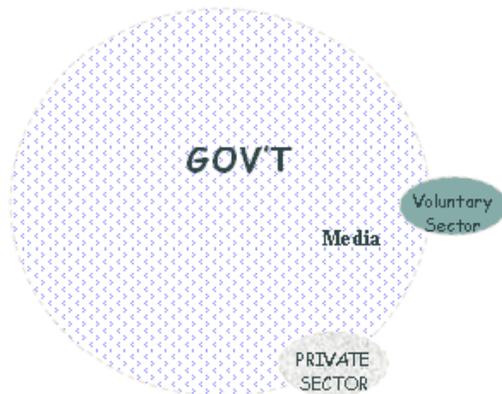
In earlier publications⁴⁶ the Institute On Governance has argued that there are five universal principles of good governance: legitimacy and voice; accountability; fairness; performance; and direction. Balanced governance systems like the one portrayed in Figure 1 respond well to all these principles.

First and foremost, such systems provide checks and balances on the exercise of power by all players in the system, thus promoting accountability and legitimacy and voice. Other benefits include encouragement and support of individual entrepreneurship and initiative (performance and direction); of people helping themselves and others (performance and fairness); and of options and choice for citizens in employment (fairness and performance). Moreover, the system is resilient in that all society's 'eggs' are not in one 'basket' (performance and direction).

Figure 2 depicts an unbalanced system, with its large and even domineering government, its small private and voluntary sector and its media captured largely in the government.

⁴⁶ See, for example, John Graham, Bruce Amos and Tim Plumptre, "Principles for Good Governance in the 21st Century: Policy Brief No. 15," www.iog.ca/publications.

Figure 2



Unbalanced systems are less accountable and perform worse due to the lack of a media watchdog and other checks and balances such as a vigilant voluntary sector. They are riskier, in that losing a charismatic and resourceful leader could disrupt the entire system (thus negatively affecting performance and direction). They have too many functions for their limited capacities (performance and direction); and they provide an easy target – government – to blame, thereby affecting legitimacy and voice. Finally, such governance systems create ‘in’ and ‘out’ groups (often defined by family affiliations) with few options for the ‘outs’ other than to blame and complain, thereby undermining legitimacy and fairness. To the extent that government attempts to engage in functions it is not well designed to perform – such as running businesses – it affects such good governance factors as performance, fairness and legitimacy.

This description of a large, unbalanced governance system might look familiar to many Aboriginal peoples, especially those living in First Nation communities⁴⁷. As noted earlier in this essay, measured by per capita spending, First Nations communities already have by far the largest local governments in Canada, if not the world.

Further, these large First Nation governments do not have the usual array of checks and balances that are found with other governments: not only are the voluntary and private⁴⁸ sectors underdeveloped, but there are few independent review mechanisms like ombudspersons, First Nation-run courts, auditing agencies, or ethics commissions. And as we also noted earlier, the numerous regulatory voids exacerbate the problem.

To deal with this situation INAC could adopt two broad strategies:

a) Encourage a greater dispersion of power within First Nation Communities

Examples include:

⁴⁷ For some graphic examples of the “lamentable status of Aboriginal democracy,” see Calvin Helin, *Dances with Dependency: Indigenous Success through Self-reliance* (Vancouver: Orca Spirit Publishing, 2006), especially pp. 141–61.

⁴⁸ One indicator of the underdeveloped private sector is entrepreneurship. According to the 2001 Census, 7.89 % of non-Aboriginal Canadians of working age were self-employed. The corresponding figure for Aboriginal Canadians on reserve was 2.16%, more than a three fold difference.

- Creating arms-length bodies within the community in order to reduce the concentration of power in Chief and Council (economic development, health, policing, public works and housing are areas where some First Nations have already moved in this direction). The critical consideration here is defining the notion of arms-length⁴⁹. First Nation councils need to retain control over strategies, key policies and global budget levels but leave day to day operating decisions to others.
- Creating bodies within the existing provincial government public sector that are governed by First Nation individuals other than members of Council. There are examples of this already in the area of Child and Family Services. Education is another area for further development. The advantages are several: i) creating capacity through economies of scale and by relying on long-standing provincial resources and networks; and ii) giving others in the community a chance to serve in positions of authority. Creation of such bodies could lead in the future to semi-independent boards within a First Nation government system.

b) Assist First Nations in developing some countervailing pressures to the public sector

Examples include:

- Encouraging the private and voluntary sectors. This will entail the First Nation Council redefining its role in such diverse areas as housing, economic development, culture and recreation.
- Creating appeal mechanisms at the provincial or regional levels for governance issues relating to elections, membership and leadership conduct. The Métis Settlements of Alberta and the Alberta government, for example, have created the Métis Settlements Appeal Tribunal,⁵⁰ an administrative appeals body for land and membership issues that may be expanded to deal with electoral as well as questionable conduct matters. This body has been in existence for some seventeen years and now has created a sizeable body of Métis-specific law. The Settlements and the Province have more recently created an ombudsman. Both these mechanisms are good examples of building accountability mechanisms that respect Aboriginal cultural norms.
- Continuing to fill existing regulatory voids (water and matrimonial real property are recent initiatives) by, for example, incorporating provincial standards into a federal statute and creating administrative units in provincial governments staffed principally by First Nation individuals. These units might eventually provide the basis for a regulatory body within a First Nation government system.

⁴⁹ For an example of a model policy which attempts to define the relationship between an economic development corporation and Chief and Council, see John Graham, “Rethinking Self-government: Developing a More Balanced Evolutionary Approach,” Policy Brief No. 29, 2007 www.iog.ca

⁵⁰ For a fuller description of these two bodies, see Catherine Bell and Harold Robinson, “Government On The Métis Settlements: Foundations and Future Directions; John Graham, “Advancing Governance of the Métis Settlements of Alberta: Selected Working Essays”, www.iog.ca/publications/2007wkgessays_Métis_settlements_alberta.pdf ; Frederica Wilson and Melanie Mallet (eds.), *Symposium on Métis-Crown Relations* (Toronto: Irwin Law, 2007 forthcoming). The Symposium was jointly sponsored by the Law Commission of Canada and Métis National Council. See also the Métis Settlements Appeal Tribunal’s web site at www.msat.gov.ab.ca.

- Encouraging the development of voluntary accreditation systems as noted in the previous section.

B. The Challenge of Building a Tax Relationship between First Nation Governments and Their Citizens

The word ‘taxes’ evokes a shudder among most Canadians, but especially among many First Nations people. The Indian tax exemption has become a key symbol of their unique relationship with Canada, whether its source is seen as the treaties, an inherent Aboriginal right, or Section 87 of the *Indian Act*. A survey by the Indian Taxation Advisory Board suggests that First Nations people object to taxation not only by provincial and federal governments but by their own First Nations governments too.⁵¹

But what if taxation by their First Nations governments were to improve governance in their communities? In exploring further the connection between governance and taxation, we turn to the negative case—the effects of the absence of a need to tax, as presented in the literature on international development.

Canadians are broadly familiar with the notion of the “curse of oil,” the thesis that oil wealth impedes democratic governance. Much international literature suggests that sudden oil wealth inflicts even greater damage on democratic practices in poor states than it does in rich ones. Economist Paul Collier cites dependence on natural resource exports as one of three economic characteristics that make a country prone to civil war (the other two being low income and slow economic growth). There are two major difficulties face developing countries rich in natural resources. First, their main revenue source is volatile, which contributes to poor planning. Second, the abundance of public money makes it more effective for incumbents simply to buy votes to stay in power. Where patronage politics is not only feasible, but cost-effective, those attracted to public life tend to be crooks seeking a share in the spoils.⁵²

Extending the curse of oil logic to sub-national governments receiving large fiscal transfers, political scientist Carlos Gervasoni reminds that the ‘curse’ arises less from the fact that revenues arise from natural resources than from the fact that they do not arise from taxation. Yet such funds can also flow from central governments to sub-national ones in any country practicing fiscal federalism. Based on a study of sub-national governments receiving large fiscal transfers in Argentina, Gervasoni observed similar effects to those of the natural resource curse. Among the symptoms were a disproportionately large public sector, a bloated public payroll, widespread patronage politics, and a notable lack of political competition for incumbents.⁵³

⁵¹ Results of ITAB First Nation Taxation Questionnaire, cited in Fiscal Realities, “First Nation Taxation and New Fiscal Relationships,” essay presented to the ITAB and Department of Indian Affairs and Northern Development (August 1997).

⁵² Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford: Oxford University Press, 2007), 32, 40 – 41, 44–46.

⁵³ Carlos Gervasoni, “A Rentier Theory of Subnational Authoritarian Enclaves,” essay delivered at the VIII Congreso Nacional de Ciencia Política de la Sociedad Argentina de Análisis Político (Buenos Aires: November 2007).

How might the public finance theory and international research outlined above apply to First Nations? Questions surrounding natural resource revenues and the effects of fiscal transfers have long bedevilled commentators in Canada. Some, for example, question the effects of Alberta's sudden oil wealth on the governance of that province. Others ask whether heavy fiscal transfers to have-not provinces serve only to depress their economies further. First Nations in Alberta have experienced the mixed blessings of natural resource wealth firsthand. The patronage and cronyism combined with appalling social conditions that plagued the Stoneys outside Calgary or the Samson Cree Nation in the late 1990s amply attest to the magnifying effects sudden resource wealth can have on pre-existing social and governance issues in a First Nation community.⁵⁴

Less pronounced, but still palpable, are the effects felt by First Nations that depend almost solely on federal fiscal transfers for their revenues. In 2001, Fiscal Realities estimated that, on average, fiscal transfers comprise 90 or even 95 percent of the revenues of First Nations governments. Manifesting a situation of “extreme fiscal imbalance,” this level was more than double that of the poorest province in the country.⁵⁵

Public finance theory would predict serious accountability issues to this state of affairs — in that there is little correspondence between the revenues collected and the services delivered. As a result, one would expect lower satisfaction levels among citizens and poor upkeep of services. The funding government, after all, is far removed from service recipients and gains no political advantage for being responsive to their demands. Conversely, one would also expect community members, who are not paying for services, to demand more services than they are willing to pay for. In terms of governance, the adverse effects closely mirror those described in the Argentinian study. First Nations communities tend to have a very large public sector—in part, to be sure, because of the broad scope of services First Nations governments deliver to their citizens, but also perhaps due to the effect of the transfer.⁵⁶ Politics can be highly factional and patronage-based and the media and other organizations have reported cases of election fraud and vote buying.⁵⁷

Of course it would be false to depict all First Nations governments as corrupt or elitist, just as it would be wrong to say that a government's revenue source is the sole determinant of the quality of governance. Indeed, some First Nations are very well governed despite absent taxation regimes. In general, however, both governance and service quality suffer within a governance system that lacks the crucial tie of a direct reliance upon its citizens for survival.

It should be noted that such a tie appears to have been constant in traditional First Nations practice. A First Nations Tax Commission guide reminds that First Nations prior to contact and beyond practiced a form of taxation in things like paying tribute for occupying or using territory

⁵⁴ For a description, see Jean Allard, “Big Bear's Treaty: The Road to Freedom,” *Inroads* 11, 145–49.

⁵⁵ Fiscal Realities, “Getting First Nations Government Right—Tax and Related Expenditure,” essay presented to Indian and Northern Affairs Canada and the Indian Taxation Advisory Board (June 2001).

⁵⁶ See here John Graham, “Rethinking Self-Government: Developing a More Balanced, Evolutionary Approach,” Institute On Governance, Policy Brief 29 (September 2007).

⁵⁷ See especially the work of the Frontier Centre for Public Policy, which has also created an “Aboriginal Governance Index,” available at www.fcpp.org.

or distributing wealth through ceremonies like the potlatch or giveaway dances. Cree storyteller Joy Asham describes how the leader of the buffalo hunt, the Poundmaker, was the last to receive the meat, relying on what the warriors gave him as expressions of gratitude and respect. Thus, while First Nations people on reserves are not accustomed to feel the tax ‘touch,’ things have not always been that way. Traditional Aboriginal practices both shared resources within the community and manifested and ensured the leader’s accountability.

It is also noteworthy that both the Royal Commission on Aboriginal Peoples and the Harvard Project on American Indian Economic Development recommended that First Nation governments will need to start taxing their citizens for many of the reasons cited in this essay.

The above analysis leads to the following suggestions for INAC and the federal government to pursue:

a) Develop a more effective promotion strategy for increased taxation of First Nation citizens by their governments

There are formidable barriers to the implementation of tax regimes on First Nations. No one likes paying a new tax and beyond that, the Indian tax exemption is a powerful, long-standing symbol of the unique position of First Nations people within Canada. One obvious hurdle is the political sensitivity of the issue of taxation and the danger to any leader attempting to introduce it. Another is that those who would implement taxation regimes as a public good—the band Council and administration—would be the most likely to pay taxes and as such would stand to lose the most privately from it. A third difficulty is the relatively time-consuming process of negotiating a tax agreement with Canada.

Despite the substantial political hurdles of occupying tax room, a handful of First Nations have succeeded in the task. They have reported impressive results, including new funds for projects of priority to the First Nation, a priority on excellence in service provision and economic development, increased citizen participation, a new source of pride vis-à-vis their neighbours (“we pay taxes too”) and a general premium on transparency, accountability and performance. The benefits are most obvious to First Nations with a significant non-member population in their communities, but even small First Nations located in remote places gained a significant source of revenue (on average about 8 percent of total revenues)⁵⁸.

Our interviews with taxing First Nations yielded some key tips to successfully introducing taxes in communities.

- Link the introduction of a new tax to a broad, community development strategy aimed at improving overall community wellbeing. The strategy might begin with identifying concrete projects—like a new community cultural centre—that would be financed with revenue from a new tax.
- Add to the attractiveness of the proposition among members by including non-members in the First Nations tax base. While the beneficial effects of taxation arise from taxing a First

⁵⁸ See John Graham and Jodi Bruhn, “In Praise of Taxes: the Link Between Taxation and Good Governance in A First Nation Context”, www.iog.ca, March 2008, P. 26-27

Nation's own membership, there are still advantages—and considerable revenues—to including non-members in the tax base.

- Canvas the experiences, both positive and negative, of other First Nations that have instituted tax regimes.
- Ensure fair treatment, effective service provision, and adequate representation on decisions affecting them to non-member taxpayers. This applies in particular to the property tax, where non-members pay the tax in most cases and members do not.

First Nations are in many cases wary of any discussions that would affect the Indian tax exemption. Their wariness is compounded by their sense of benefits that would flow to the federal government through reduced fiscal transfers to First Nations communities. Given this mistrust, the federal government is in a poor position to advocate the benefits of taxation to First Nations. To this end, we suggest that the government partner with a credible First Nation organization to develop a more effective strategy: the First Nation Tax Commission and/or the National Centre for First Nation Governance. A first step here might be to partner in conducting joint research on the experience of First Nations that have already developed tax regimes.

b) Introduce legislation that provides First Nations with a taxing power, should they wish to use it, for taxing the income of residents on reserve, subject to a harmonization agreement with the federal government

First Nations already having a property tax power and can enter into an agreement to utilize a sales tax power under the First Nations GST Act (FNGSTA). The next step would be to mirror this voluntary GST taxing power with a similar voluntary personal income tax power.

This brings to a close the principal arguments and proposals of this essay. What remains is to present a summary of its major themes.

Conclusions

The purpose of this essay has been to analyze and make recommendations about two principal accountability relationships of import to INAC: its accountability relationship with First Nations and that between First Nation governments and its citizens. The major themes of this analysis are the following:

- a) Accountability is critical to good governance. That said, it is far easier to define than put into practice. Accountability between governments is especially challenging. Because of history and other factors, INAC and First Nations face even greater obstacles to developing a good accountability story, a story which is critical to garnering increased funding levels.
- b) As one of the world's oldest federations, Canada has adopted some innovative features in developing its accountability relationship between the federal and provincial/territorial governments. Still, strongly competitive, executive federalism, among other factors, has hindered Canada from adapting its 19th century federal model to 21st century realities. First Nations have participated in some of these innovations but equally have not been immune to some of the challenges.
- c) The First Nation perspective, as espoused by the Assembly of First Nations, would see an accountability relationship with the federal government mimicking closely that between the federal and provincial governments. Its position is based on its understanding of Aboriginal and treaty rights and the Crown's fiduciary obligations to First Nations. Key attributes would be a constitutionally recognized order of government; the federal government being as much accountable to First Nations as the reverse; significant own source revenue for First Nations (but not from taxing its own citizens); and unconditional fiscal transfers determined by legislation and resembling equalization and other federal transfers in the health and social fields. The Penner Committee, RCAP and more recently the Blue Ribbon Panel have provided varying degrees of support for this position, albeit with some nuances.
- d) Leaving aside the validity of the AFN's assertions on rights and fiduciary issues, there are attributes of First Nation government's that cast doubt on the desirability of the AFN position. One of the most important is the vast difference among First Nations in their capacity to govern. This suggests a highly differentiated approach to accountability to reflect these differences. Other important features of these governments are their large size (as measured by per capita spending) coupled with few checks and balances; their volatility caused in part by the rapid churn of political leaders and staff; the large number of regulatory voids in which they operate; and the high dependence on federal transfers coupled with the near absence of a tax relationship with their members. All of these factors have an important bearing on a government to government accountability relationship in the First Nation context.
- e) In fashioning an improved accountability relationship with First Nations, INAC officials will need to take into account the important directions as set out in the recent Treasury Board Policy on Transfer Payments, which, among other things, calls for a risk-based and recipient focused approach to fashioning and managing funding programs. The less than stellar state

of its current funding arrangements coupled with the vastly different First Nation perspectives on accountability will provide INAC senior managers with significant challenges in implementing the new Treasury Board Policy and Directive.

- f) As a first order of business INAC officials should see the department as more than just a funding agency. Its own program logic models, the Office of the Auditor General, Parliament, the media, the general public and of course First Nation themselves all attribute significant influence to INAC in determining levels of well-being in First Nation communities.
- g) In terms of recasting the accountability relationship with First Nations, primarily through its funding arrangements, this essay argues for:
 - Renewed leadership and more staff within INAC, both at headquarters and in the regions, in managing the accountability relationship with First Nations
 - Developing permanent forums with First Nation representative, first in the regions and then nationally, to develop better approaches to funding arrangements and related reporting requirements
 - Reworking the INAC funding arrangement architecture to provide a higher degree of differentiation to reflect the capacity differences among First Nation
 - Assigning more staff at both headquarters and in regions to manage the accountability relationship while developing more sophisticated approaches to assessing risk
 - Developing a strategy to dealing more effectively with communities under extreme distress
 - Experimenting with sampling techniques to obtain results-based information
 - Determining if and when OSR should be a factor in determining transfer amounts
- h) The other important accountability relationship on which this essay focuses is that between First Nation governments and their members. The issue is far more complex than just reducing federal accountability requirements on First Nations so that they can fashion sound accountability mechanisms and practices with their members. Factors canvassed earlier in this essay – in particular, the large size of First Nation governments coupled with a lack of checks and balances and the lack of a tax relationship with their members – cast doubt on achieving a quick fix in this accountability relationship.
- i) INAC has some influence on this accountability relationship and how it evolves. Particular policy approaches include:
 - Encouraging more arms-length bodies within and among First Nation communities to reduce the concentration of power
 - Encouraging more integration within provincial systems of First Nation controlled institutions especially at higher levels of aggregation than single communities
- j) Developing a more effective promotion strategy for increased taxation of First Nation members by their governments and introducing legislation to provide First Nations with a voluntary personal income tax power.

Like other aspects of sound governance, achieving solid accountability relationships involves a lot of hard work over many years. It's about a journey, not a destination.

Appendix A: Major Federal-Provincial/Territorial Transfers

A. Federal Provincial

The following are included in the *Federal-Provincial Fiscal Arrangements Act*.

Canada Health Transfer (CHT)

Annual federal transfer provided to each province and territory in support of provincial health care. CHT funding is provided through cash payments and tax transfers and is subject to the five principles of the *Canada Health Act* and the prohibition of minimum residency requirements for social assistance.

Canada Social Transfer (CST)

Annual federal transfer provided to each province and territory in support of post-secondary education, social assistance and social services, including early childhood development and early learning and childcare. CST funding is provided through cash payments and tax transfers and supports the Government of Canada's commitment to maintain the five principles of the *Canada Health Act* and to prohibit minimum residency requirements for social assistance.

Equalization

Annual federal transfer program that allows all provinces, regardless of their ability to raise revenue, to provide roughly comparable levels of services at roughly comparable levels of taxation. Eligibility to receive equalization funding is determined by a formula measuring each province's revenue-raising capacity against a five-province standard. Currently, eight provinces receive equalization: Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Manitoba, Saskatchewan and British Columbia. Points of note include:

- 50% of natural resource revenues are excluded in determining each province's fiscal capacity and the standard.
- The new Equalization program includes a fiscal capacity cap to ensure that Equalization payments do not raise a province's total per capita fiscal capacity above that of any non-receiving province.
- Provincial fiscal capacity is measured using five tax bases – personal income tax, business income tax, consumption tax, property tax and natural resources.
- To ensure stability and predictability, Equalization payments are made based on a single estimate system. Payments will be based on a three-year weighted moving average of provincial fiscal capacity lagged two years. Payments will be determined in advance of the year and will not be subject to revision.

C. Territorial Formula Financing

This financing arrangement is also laid out in the *Federal-Provincial Fiscal Arrangements Act*.

Unconditional annual federal transfer to the territorial governments to assist them in providing public services. The transfers are based on a formula that fills the gap between the expenditure requirements and revenue-raising capacity of the territories. Points of note include:

- Budget 2007 returns TFF to a principles-based program, with three separate gap filling formulas to recognize the unique circumstances of each of the territories. The TFF grant will again be based on the difference between a territory's assessed expenditure needs (the Gross Expenditure Base, or GEB) and its capacity to generate revenues.
- Each territory's GEB is adjusted annually to ensure that territorial spending can grow in line with increases in relative growth in population in the territories and provincial-local spending.
- The measurement of territorial revenue capacity is simplified, by using a Representative Tax System, similar to that used by the Equalization program, for seven of the largest own-source revenues for the territories. A revenue block will be established for the remaining eleven own-source revenue sources.
- The new TFF includes improved incentives for the territories to increase their own revenues and develop their economies by excluding 30 percent of territories' measured revenue capacity in the TFF formula.
- Finally, a simplified estimate and payment system is used to improve the predictability and stability of TFF grants.
- Natural resource revenues continue to be treated outside of TFF.

C. Other Contribution Agreements

Various contribution agreements occur between the federal government and the provinces/territories on an ad hoc basis. For example, the federal government's Health Integrated Fund of \$150 million supported 140 projects across Canada to test and evaluate innovative ways to deliver health care services.

Appendix B: Conne River/Miawpukek First Nation

Background

The Miawpukek First Nation, also known as the Conne River First Nation, is located on the south-eastern shore of Newfoundland and on the east coast of the Bay d’Espoir. As of August 2006, the First Nation has 787 members living on-reserve and 1,779 living off-reserve.

The use of a grant authority as the basis of INAC’s funding relationship with the Miawpukek First Nation (MFN) arose as an historical accident. When Newfoundland joined Canada in 1949, the MFN was not recognized as enjoying status under the *Indian Act*. It gained this only in 1984, when the federal government recognized community members as Status Indians. Once the MFN was officially recognized as a band in 1985, its fiscal relationship with Canada began. In the 1984/85 fiscal year, Miawpukek negotiated its first grant authority with the federal government. This process led to the establishment of the Conne River Agreement in 1986—an agreement that was unique for its reliance on a grant authority. This arrangement followed from the way the community had been funded through federal-provincial arrangements prior to its being recognized as a reserve.

Features of the MPW Grant Authority

The Miawpukek Grant Authority enables the First Nation to design its own programs and allocate funds in accordance with community priorities—provided it meets certain broad standards set out by INAC.⁵⁹ With its initial funding set at \$5 million/year, the agreement was designed to be renegotiated every five years. The risk management practice in place is same as the one used for the CFNFA.

Similar to the proposed multi-year community fiscal transfer program, the funding arrangement includes the following features:

- Enhanced flexibility
- Reduced administrative burden
- Community-oriented accountability

Results

When the MFN reserve was established in 1987, it was a poor and isolated community with an unemployment rate of almost 90 percent. In the twenty years since the first Conne River Agreement was signed, the community has been transformed from a poor Newfoundland out-port to a vibrant, well-governed community that is now on the road to self-government. It is also a growing community, with membership—albeit most of it off-reserve—having increased

⁵⁹ The minimum requirements for program and service administration include: on-reserve housing, construction, First Nation-operated schools, Indian government support, band support funding, band employee benefits, and community economic development.

significantly since 1990. By contrast to Newfoundland as a whole, the community is growing and has a younger population. “The demographic trends reflect the fact that few young people are leaving the community and a number are returning.”⁶⁰ This alone speaks well for the performance of its government in the past twenty years.

Several other indicators do as well. The priorities placed on education, economic development and active employment measures have shown results in the profile of individual and community well-being. On income, employment and education indicators, the Miawpukek Reserve fares well compared to the Bay d’Espoir area and the province as a whole:

- At \$20,162 per year compared to \$22,620 for Newfoundland, the average income in the MFN is slightly lower than the provincial average. But it is also up from previous years, when per capita income on reserve was \$15,700 in 2001 and only \$6,000 in 1996. The employment rate is high, with a labor force participation rate of 78.6%. This is compared to a national average of 66.4 percent—although much of the work is seasonal.⁶¹
- MFN has a highly educated population for a community of its size. Its high school dropout rate is well below both the provincial average rate (42.36 percent) and the rate for registered Indians living on reserve throughout Canada (58.88 percent). MFN also has a higher level of combined trade/college and university training than other groups, with 48.6 percent compared to 39.02 percent for the province and 23.6 for registered on-reserve Indians throughout Canada
- In terms of financial management, the 2005 evaluation deemed the MFN’s approach to financial management generally effective—despite the recent failure of a First Nation-owned business that resulted in a deficit. In response to this crisis, MFN immediately developed a remedial plan that included a number of sound practices for managing budgets and expenditures.⁶²

Conclusion

Despite both its geographic location in terms of economic development and its starting point in 1987, the Miawpukek First Nation has thrived in the twenty years since it began receiving grant-based funding. It would be inaccurate to credit the grant funding authority itself with this achievement; those responsible were clearly the First Nation and its highly capable government. Clearly, however, the MFN found its funding authority a highly effective instrument through which to achieve its goals.

⁶⁰ Goss Gilroy, “Evaluation of the Miawpukek First Nation Grant Authority—Final Report” (2005), i.

⁶¹ From Miawpukek First Nation, “Renewing Our Destiny,” 14–15. All statistical data provided is based on information from Statistics Canada.

⁶² Ibid.