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THE CONCEPT OF GOVERNANCE AND ITS IMPLICATIONS FOR FIRST NATIONS

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**THE HARVARD PROJECT ON
AMERICAN INDIAN ECONOMIC DEVELOPMENT**

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THE CONCEPT OF GOVERNANCE AND ITS IMPLICATIONS FOR FIRST NATIONS¹

Stephen Cornell, Catherine Curtis, and Miriam Jorgensen

What is governance? What is government? What does each do? And what distinguishes good governance—or good government—from bad? Why is the quality of governance important to the success of human societies? And what is the significance and meaning of *self-governance*? What does effective self-governance involve and how can self-governing systems be built?

This paper explores these questions and their implications for First Nations, drawing in particular on a large body of research on governance and development among indigenous nations in the United States and Canada. However, the topic of governance is an enormous one, and we can only begin to address these questions here.

THE CHALLENGE OF GOVERNANCE

Human beings are social animals. We suffer and fail in isolation; we thrive in groups. It is only in networks of relationships—from small families to large societies—that human beings are able to survive for very long. We meet our needs by developing relationships of trade, cooperation, association, intimacy, and so forth. Through such relationships, we provide ourselves with the necessities of life and manage to do the things we wish to do.

¹ In 2003 Satsan, British Columbia Regional Vice-Chief of the Assembly of First Nations, commissioned a series of five papers on topics within the broad theme of indigenous governance. The Vice-Chief asked the Native Nations Institute for Leadership, Management, and Policy at the University of Arizona, in conjunction with the Harvard Project on American Indian Economic Development, to address the question, “What is governance, and what are its implications for First Nations?” This report is the result.

But this enormous dependence on each other—this interdependence—also presents us with a particular set of issues. How can we work together? How should we make decisions? What should our expectations of each other be? Who will do what? Who gets to have power over whom? When we have disputes with each other, how can we resolve them? What set of rules or understandings should control how we interact with each other?

These are urgent matters. To do the things we need to do—to build a house, to teach our children, to start a corporation, to defend our homes, to carry out a ceremony, to manage the forest, to put food on our table, to heal us when we're ill, to obtain the many things we use or want, and so on—we need each other, and we have to be able to work together effectively. How can we do that?

We could do it task by task and person by person. Every time we need to do something or work with somebody, we could renegotiate the terms, deciding what the rules are, deciding who will have what authority, deciding how we will resolve any disputes that come up, and deciding all the other things that make it possible to cooperate effectively and get things done. But doing it over again every time or with each person is time-consuming and burdensome, and it can be complicated in situations where we need to work with lots of people, many of whom we may hardly know.

Alternatively, we could establish and enforce an overarching set of rules that tells all of us—in most of the situations we are likely to encounter—how to do things and how to relate to each other. We could come to an agreement that says, in effect, “when we do things together, this is how we do them.” The rules we come up with may be very strict or very loose. They may be specific or flexible. We may change them from time to time. But they become the basis of the cooperation on which we depend for our success.

This is *governance*: establishing rules we can depend on to coordinate our actions and achieve our goals. Certainly there is

more to governance than that. It also involves making decisions and establishing policies and getting things done. But the basic rules are the critical piece of the puzzle. Without them, decision making and implementation are likely to be inconsistent, conflicted, and difficult.

But we could do even more. In addition to adopting a set of rules that we all follow when we interact with each other, we could identify a set of offices or positions that are charged with determining for us what those rules should be, enforcing them, making and implementing decisions, and resolving the disputes among us, and then we could choose individuals to fill those positions or offices and carry out these essential tasks. In short, we could create an organization to do these things: a *government*.

The more complex the society is and the more complicated the things are that it needs to do, the more important governance and government become. Why? By establishing rules that we all follow—by engaging in group governance—we bring predictability and familiarity to our interactions. The rules tell us how decisions are made; they specify who has what responsibilities and obligations; they tell us how to resolve our disputes; and they tell us what to expect from the relationships we depend on.

If we go the next step, not only setting up rules but creating positions charged with maintaining the rules, resolving disputes, making major decisions, and putting them into action—that is, a government—then we gain even more power to work together effectively. We specialize. By assigning certain functions to particular persons, we free others to do other things. We let the government worry about rules and their enforcement and about policies and their implementation while we *use* the rules and policies to do the things we want to do.

In sum, governance is what human beings engage in so that they can get more things done. As one student of the topic put it, establishing a government “enables humans to operate as a

group” (Fromkin 1975, p. 91). Without effective governance, cooperation becomes cumbersome and difficult, disputes become more common and are more likely to go unresolved or to be resolved in violence, social relationships deteriorate, and the society fails to achieve its goals.

THE VARIETIES OF GOVERNANCE AND GOVERNMENTS

All human societies—from Asia, Africa, and Europe to the first peoples of North America—have some kind of governance to assist them in doing the things they want to do. Decisions are made, disputes are resolved, and social life moves forward.

However, there is great variety in governance and governments. In some societies, rule-making and decision making are simple; in others these processes are hugely complex. In some societies, the rules are spelled out in written constitutions, codes, and procedures, and the structure of government is obvious. In other societies, the rules are not spelled out anywhere; instead, they exist in traditions or practices that everyone understands and participates in, and people learn the rules by being effectively socialized to them by parents, teachers, and elders. In one society, people may be content to concentrate authority in single persons—chiefs or governors or presidents. In another society, people may be much more comfortable dispersing power among councilors or families or subgroups. One society may give individuals lots of autonomy while another may demand that people act and think alike. In one society, elders or spiritual leaders may interpret the law, while in another, secular courts do the same job.

Governments also vary in how they are chosen. Some societies choose their own ways of governing. Others have governments chosen for them by somebody else. The imposition of rules on one society by another has been common in human history. This is part of the story of colonialism. But to the extent that a nation is able to make and enforce its own rules, resolve disputes, problem-solve when the rules don’t work as well as people might like, and establish its own governing institutions to carry out

these tasks, it is engaging in *self-governance* and *self-government*.

Finally, not all approaches to governance are equally successful. It is obvious even to the most casual observer that some governments are more effective than others. Some societies have governments that use the rules in creative and effective ways, solving numerous problems, growing their economies, carrying out the functions of government smoothly, and giving their people rich opportunities to live productive and fulfilling lives. Other societies have governments that are confused about their responsibilities and functions, abuse the rules, or even rewrite them so that a few people can enrich themselves at the expense of others. Sometimes governments make such a mess of things that the society itself is threatened with collapse.

One of the things that appears to distinguish effective governments from ineffective ones is the trust and acceptance they engender in their own citizens and in outsiders who need to deal with them. Effective governments are not perfect, but they enjoy legitimacy with the people they serve and tend to have the respect of outsiders. At the other end of the spectrum, some governments breed distrust among their citizens and are treated with contempt by outsiders.

In short, governance is something that has to be done, it exists in many forms, and it can be done either well or poorly. As the next section shows, the *quality* of governance, much more than its specific form, turns out to have a huge impact on the fortunes of human societies. Those societies that govern well tend to do better—economically, socially, politically—than those that don't. To govern well is to increase the society's chances of effectively meeting the needs of its people.

CAPABLE GOVERNANCE AND INDIGENOUS NATIONS

The necessity for capable governance appears to be as true for indigenous nations as it is for others. They, too, benefit from good governance and suffer from its absence.

The most comprehensive data on this point comes from work carried out by the Harvard Project on American Indian Economic Development at Harvard University and, more recently, its sister organization, the Native Nations Institute for Leadership, Management, and Policy at The University of Arizona. Beginning in the late 1980s, Harvard Project researchers set out to determine the necessary conditions for successful economic development among indigenous nations in the United States. The research was driven by the apparent divergence in development fortunes among American Indian nations. Some of those nations were significantly more successful than others at building sustainable economies. Harvard Project researchers wanted to know why.

The answers were intriguing. It turned out that the most reliable predictors of development success on American Indian reservations were not the obvious factors such as natural resource endowments or education or access to capital—although these certainly were helpful. The keys were political, having to do with the powers, organization, and quality of government.

Three factors in particular were crucial: *practical sovereignty* (real decision-making power in the hands of indigenous nations), *capable governing institutions* (an institutional environment that encourages tribal citizens and others to invest time, ideas, energy, and money in the nation's future), and *cultural match* (a fit between those governing institutions and indigenous political culture—in short, the institutions had to match indigenous ideas about how authority should be organized and exercised; otherwise, it would lack legitimacy with the people being governed and would lose their trust and allegiance).

Two other factors also played a part in development success: *a strategic orientation* (an ability to think, plan, and act in ways that support a long-term vision of the nation's future) and *leadership* (some set of persons who consistently act in the nation's interest instead of their own and can persuade others to do likewise).

Briefly put, the research concluded that, other things being equal, those nations that had taken control of their own affairs and had backed up that control with capable, culturally appropriate, and effective governing institutions did significantly better economically than those that had not. In short, self-governance matters for indigenous peoples as much as it does for others. They have to govern themselves, but they also have to do it well.²

INDIGENOUS SELF-GOVERNANCE IN CANADA AND THE U.S.

Of course, governing themselves is what indigenous peoples did for centuries before the arrival of Europeans in North America: they governed themselves. They did so in diverse ways, and some presumably did it better than others. But their survival over many generations as viable, productive societies is evidence that, for the most part, their governing systems worked.³

This situation eventually changed. Over the last century and a half, as indigenous nations throughout North America came under the domination of outsiders, many of them have been allowed neither the power to govern themselves nor a set of governing institutions that could exercise that power effectively. Admittedly, during much of that period they have had governments. But to the extent that indigenous governance was allowed at all, it tended to be imposed and organized by outside governments and designed both to control what Native nations did and to promote the continuing assimilation of indigenous peoples into these encompassing societies.

Today, for example, many of these nations have councils and chiefs, chairs, governors, or presidents that typically are elected

² These research results are available in a number of publications. See, for example, Cornell and Kalt (1992, 1995, 1997a, 1997b, 1998, 2000), Jorgensen (2000), Jorgensen and Taylor (2000).

³ For an interesting argument in support of just this point for indigenous societies of what is now the northwestern coast of the U.S., the Pacific coast of Canada, and southeast Alaska, see Trosper (2002).

by their own people, and First Nations or tribal administrations run lots of programs. But by and large, these governments are based on templates developed by the respective federal governments of Canada and the United States: Indian Act governments in Canada and Indian Reorganization Act governments in the United States.

Furthermore, particularly in Canada, the jurisdictional powers of these governments remain limited. In many cases, they do few of the things that governments are supposed to do. They run programs, but most of the programs are designed in Ottawa or Washington or in provincial or state capitals, where the funds for those programs originate as well. First Nations or tribal governments, in many of these cases, are essentially extensions of federal or local administrative apparatuses, dependent on outsiders for funds and often dependent on outsiders for permission to do the things they wish to do.

This has had a number of unfortunate effects. Among other things, it has encouraged a very limited idea of government among indigenous peoples themselves. For many members of First Nations and of American Indian tribes, government has come to be seen as little more than a manager of programs—health, housing, welfare, etc.—and a distributor of resources—jobs, money, connections, and services. The idea of government as law-maker, dispute-resolver, or vehicle for pursuing collective goals has been buried beneath the need for services and the fact that indigenous government is the funnel that brings services to those who need them. This in turn leads to battles over who controls the programs, the jobs, the services. Government becomes the boxing ring in which various community factions fight for resources. Whoever wins gets to control the distribution of those resources, confirming the idea that this is what government is really about.

Under these conditions, self-government is little more than self-administration. The major decisions are made somewhere else while the First Nation or American Indian nation simply gets to implement them.

Genuine and productive self-government requires more than this. The challenge facing indigenous nations is to solve difficult social problems, protect indigenous cultures, build productive economies, effectively manage lands and resources, effectively manage social and other programs, construct mutually beneficial relationships with other governments and with surrounding communities, and rebuild societies that work. To do all that requires genuine jurisdiction. Such functions are impossible to accomplish without placing power in the hands of indigenous peoples to make critical and far-reaching decisions for themselves.

Of course another lesson about government from around the world is that power is subject to abuse. Those who have power may misuse it. Thus, jurisdiction alone is not enough. Successful societies also require effective and culturally appropriate rules that make it possible to get things done and at the same time protect those societies—and others—from the misuse of power. These complex tasks may require, among other things, different and sometimes new rules, institutions, and patterns of behavior on the part of indigenous nations themselves.

This is the challenge of self-government: to exercise power effectively and responsibly and lead the effort to reclaim the nation's future. In practical terms, what does this involve?

THE ESSENTIAL ELEMENTS OF GOVERNANCE

Governments do a great many things, some of them necessary and some of them not. What are the critical things they accomplish? In particular, what are the things they do that, when done well, provide a firm foundation for self-determined community and economic development? The following elements appear to be essential:

- ***Providing a constitutional foundation for self-rule***
Effective self-government requires a foundation of basic rules that spell out *how* the nation will govern itself. This is what a constitution does. It typically includes what the

fundamental purposes of the nation's government are, how that government is organized, who has what authority and when that authority can be exercised, what the basic rights of citizens are, and how changes in government can be made. Along with a treaty, if the nation has one, it is a foundational agreement—in this case among citizens themselves—establishing the institutions and the rules through which the society intends to pursue its purposes and the means by which additional rules can be made.

Not all constitutions are written down. For example, a number of indigenous nations in the United States, including the Navajo Nation and several of the Pueblos in New Mexico, have no written constitutions. But they do have established and enforced rules. In the Navajo case, those rules are embedded in Navajo common law. In the case of some of the Pueblos, there are unwritten rules embedded in still vibrant and compelling indigenous cultures that specify appropriate forms of behavior and how power can legitimately be exercised.

On the other hand, the constitutions of most Native nations in the U.S. are written documents. Many are outdated; many were written by outsiders decades ago and imposed on Indian nations; many fail to address the challenging issues that Native nations are dealing with today. As a result, a number of nations are currently writing or rewriting constitutions, from the Cherokee Nation to the Northern Cheyenne Tribe, and making those constitutions the foundation of comprehensive, assertive, and responsible tribal governance.

- ***Making laws*** Laws specify relationships and rules of behavior for citizens, outsiders, businesses, and even agencies of government. They indicate what things are permissible and what things are not in a variety of specific areas.

Most nations have a law-making body composed of representatives of the citizens. Legislative bodies draft, vote on, and enact ordinances and statutes that then become the law of the land and the basis for numerous actions by both citizens and the nation as a whole.⁴

Like a constitution, not all law must be written down. A nation's "common law" is its unwritten set of rules generally derived from culture, history, and tradition. Again, the canonical example is the Navajo Nation, which recognizes Navajo common law as standing beside the Navajo Tribal Code as the law of the land. The tribal council, the president, and the nation's courts all rely extensively on common law in their decision making, additional rule making, and other activities. Navajo custom and tradition is thus incorporated into the day-to-day governance of the nation.

- ***Making day-to-day decisions*** The governments of Native nations typically are confronted with a vast range of decisions, from whether to enter into litigation in a dispute with another government to how to respond to the needs of a family in trouble, from whether to change the management regime in a nation-owned forest to responding to morale problems in a Native-run social program. Much of government's time is spent in making decisions, large and small.

One of the keys to effective government is the ability to make informed decisions in a timely fashion. This requires ways of obtaining the necessary information on which to

⁴ Such rules often are collected in topic areas as "codes"—for example, a children's code (governing adoption and fostering relationships, child protective services, issues surrounding abuse and neglect, etc.), a criminal code (defining and providing penalties for criminal acts within the Native nation's territory), or a commercial code (specifying what businesses have to do to operate within the Native nation, what their rights are, and what the obligations are of the First Nation government to businesses).

base decisions and an effective decision-making process that everyone understands and supports.

- ***Implementing decisions*** Once decisions have been made, they have to be implemented. This typically is the task of a bureaucracy or administration: Employees of the government carry out decisions made by legislators and policymakers. This is a crucial element of government because it determines how the rules are applied, how policies are implemented, how functions are carried out, and how services are delivered. It shapes much of the citizens' experience of their own government, good or bad. An effective government has an administrative system that is capable, predictable, well understood by those dealing with it, and perceived as fair.
- ***Providing for the fair and non-political resolution of disputes*** The government also needs to assure the nation's citizens that when they have disputes, either with each other or with the government itself, they will be dealt with fairly. This requires some sort of mechanism to resolve the disputes—a First Nation court, a council of elders, or some other body that can be empowered to evaluate and adjudicate competing claims. The most effective dispute resolution mechanisms are well insulated from other functions of government and from other elected officials such as legislators. This sends a clear message to citizens and outsiders alike that their claims will not be hostage to politics.

That message is critical to the nation's success. As long as people feel their claims will not be fairly addressed or that court decisions or appeals will be politicized, they will tend to mistrust their government and may take their knowledge and their energy and go somewhere else to live their lives, draining crucial assets from the nation.

This same mechanism—a court or other body—also may be charged with interpreting the rules established in the

nation's constitution, codes, and common law. Here again, insulation from politics is essential if the nation's citizens are to trust the rules themselves.

MOVING TOWARD SELF-GOVERNANCE

As First Nations, individually or in association with each other, try to move away from self-administration and toward genuine self-governance, they need to focus on certain key tasks that lay the foundation on which self-determined community and economic development can be built. What, specifically, should they do?

We list several core tasks below, based on the preceding section and on the experience both of various American Indian nations and of a growing number of innovative First Nations in Canada. These tasks are daunting, and they cannot be accomplished by First Nations alone. First Nations not only need to support each other; they need the support of federal and provincial governments as well. Therefore, we also suggest ways that those governments can support First Nations in the process of nation building.

Tasks for First Nations:

- ***Expand jurisdiction*** For First Nations, as for other societies, the core question of self-government is jurisdictional: what is the extent of self-governing power? A government without jurisdiction isn't worth much—it has nothing to govern.

To a significant degree, federal and provincial legislation defines First Nations' jurisdiction. But First Nations can contribute to the definitional process themselves as they claim jurisdictional power over matters of significance to them. Rather than simply accepting the jurisdiction allowed by other governments, First Nations can advance their inherent governing powers by building up and extending their own jurisdictional reach.

There are several ways to do this, among them litigation and negotiation (an approach that may be particularly successful in Canada, where some First Nations, such as Nisga'a, have reclaimed substantial jurisdiction this way). Another strategy is to look for ways to build on existing jurisdiction. For example, if a First Nation is already working with federal or provincial authorities on the development of child welfare policies, why not expand the scope of the work by developing a more comprehensive body of family law? And finally, there is the "just do it" approach in which a First Nation simply begins to exercise decision-making authority in a particular policy area. This may be easier in some policy areas than others. For example, it may be difficult to do where major natural resources are at stake and easier to do in the social service area.

There is no one set of jurisdictional powers that determines whether or not a First Nation is truly self-governing. The powers that each community needs or desires to pursue will vary. One of the most useful nation-building steps a First Nation can take is to determine which policy areas are priorities. For instance, social services may be a priority for a community that is in healing from a history of conflict or abuse, while resource use may be a priority for a community with a large land base. This flexibility is a feature of the Council of Yukon Indians' approach to self-government. The Council's Umbrella Final Agreement with the federal and territorial governments provides a general framework within which individual First Nations can develop their own detailed self-government arrangements.

The nation also has to consider which jurisdictional powers it wishes to keep to itself and which ones it needs to share or is willing to share. Self-rule does not necessarily mean absolute sovereignty across the board. For example, very small nations wishing to build court systems may want to grant jurisdiction to an inter-First

Nations or intertribal court or agree to the jurisdiction, for certain purposes, of a non-Native court. Similarly, effective law enforcement and prosecution of crimes may require shared jurisdiction with other governments. The effective management of mobile resources such as wildlife or water may require intergovernmental jurisdiction with non-Native governments. Throughout northern Canada, for example, First Nations and Inuit communities have opted to pursue resource co-management by participating equally or significantly in public-land and resource-management boards.

Sharing jurisdiction in these and other areas, assuming it is appropriately worked out, need not weaken First Nations. On the contrary, it can strengthen them by enabling them to do things they could not effectively do alone. Self-rule does not mean doing everything yourself. It means deciding for yourself how to get things done, and one option for getting some things done is through building close, cooperative, binding relationships with other governments.

As First Nations expand jurisdiction, whether shared or not, they grow beyond the “government as resource distributor” model to a vision of government as law-maker, dispute-resolver, and vehicle for pursuing collective goals. In the process, they significantly increase their chances of successful economic and community development.

However it is achieved, the expansion of jurisdiction must be backed up by capable government. The best argument for sovereignty is its effective exercise. A First Nation should try to create a virtuous cycle: as it demonstrates its ability to manage a particular matter or policy area competently, other governments will become more comfortable with the First Nation’s power and more likely to accept its jurisdictional assertions. In other words, a positive track record pays off. Notably, a positive track

record convinces not only outsiders of a nation's governmental competence but the nation's own citizens as well. In some First Nations, opposition to self-government comes from within. Some citizens view self-government with a jaundiced eye, fearful that their leaders will squander resources or enrich themselves at the expense of the community as a whole. These citizens, too, have to be persuaded that self-government will lead to an improvement in their lives and in the government's performance.

- ***Build capable and appropriate governing institutions***
Institution building begins with the creation or recognition of “constitutional” agreements or ideas, which answer the questions posed earlier: what is the structure of government and who does what?

In Canada, First Nation constitutions are rare—largely because the Indian Act has been seen as constraining the structure and responsibilities of First Nation governments and the rights of First Nation citizens. However, a small but growing number of First Nations—among them Little Pine, several Yukon First Nations, and others—have completed or are in the middle of constitution-writing processes. In other words, it can be done.

An idealized version of the constitution-writing process begins with a nation generating discussions about what belongs in the constitution and making drafts, and eventually proceeds to the formal adoption of a document by the community as a whole. But there are other paths to the creation of foundational agreements as well. Some First Nations have found that the treaty and self-governance negotiation processes are ripe opportunities for engaging in constitutional work—that is, for identifying and clarifying the ideas on which the First Nation is founded. And there are other documents that may contain constitutional ideas. Mikisew Cree First Nation uses a mission statement to express the goals of government and

some of its functions. More commonly, many First Nations use custom election codes to break away from the one-size-fits-all structure of the Indian Act and to create a set of elected offices that better reflects the needs and traditions of the First Nation. If a First Nation forgoes constitution writing in favor of these other approaches, however, it must nonetheless recognize the constitutional nature of the work it is pursuing. Agreeing on a mission statement, writing a custom election code, establishing new membership/citizenship guidelines, etc.—all are actions that lay the foundation of, or “constitute,” the First Nation as a political body.

Dispute resolution mechanisms are a critical set of institutions for First Nations to develop in the process of institution building. Preferably, provisions for independent judicial functions would be specified in a constitution and backed by statute and common law. We recognize, however, that true First Nation courts are rare. Yet there are many opportunities for First Nations to develop a degree of adjudicative power over a relatively wide range of jurisdictional areas. For example, First Nations may write by-laws to the Indian Act governing a variety of on-reserve activities, and dispute resolution mechanisms and penalties may be written directly into by-laws. The Canadian court system’s “circle sentencing” policy provides for First Nation sentencing of some juveniles (particularly first offenders) who have been found to violate federal and provincial laws. Some provincial statutes refer much of the work of child welfare law enforcement for Aboriginals to on-reserve committees. Election and membership codes must have appeal mechanisms built into them. Such opportunities provide substantial scope for the creation of dispute resolution mechanisms. Indeed, if a First Nation were to pursue them all and collect the responsibilities within one institution, it would have the beginnings of a functioning court system.

Institution building can occur across First Nations' boundaries as well, either at the tribal level or in other associations of First Nations that share culture, ecosystem, history, or other substantive bonds. Already, many First Nations participate in political organizations that help advance shared goals, such as the Grand Council of the Crees (*Eeyoo Istchee*) and the Treaty 8 First Nations of Alberta. Institutions that serve and are built by several First Nations may turn out to be the most effective way to carry out certain governmental functions or deliver certain services, increasing the pool of available talent, cutting costs, or otherwise improving those Nations' abilities to do what needs to be done. Choosing to build such institutions is itself an act of self-governance: nations deciding how best to meet their needs.⁵

As this suggests, the specific form that governing institutions may take is potentially endless. Certain design principles, however, can help First Nations ensure that these institutions effectively contribute to good government and to the nation's economic and social well-being. First, as we noted earlier and as Harvard Project research shows, governing institutions must be viewed as legitimate by the First Nation's citizens if they are to be effective. This means institutions have to match citizens' ideas of how authority should be organized and exercised; otherwise, citizens are unlikely to view the institutions as their own and are unlikely to support them (see Cornell and Kalt 1995). This suggests further that the process of institution building has to find ways to directly involve First Nations' citizens.

⁵ An example from Alaska: Native nations in the Bering Straits Region operate certain programs jointly through a consortium of tribes called Kawerak, Inc. "Early on," according to Kawerak's executive director, "our councils made the decision to concentrate on exercising their governance versus running programs" (Bullard 2003). The tribal councils govern; Kawerak runs the programs that deliver services.

Second, the way the institutions of government work needs to be clear, predictable, consistent, and understood by citizens, non-citizens, and partner governments. Unstable, inconsistent, or confusing rules are rules citizens do not trust. This means the rules shouldn't change just because a new chief or council has been elected. It means the rules should not be subject to politics; instead, politics should be subject to the rules. Harvard Project research is quite clear on this last point: governments achieve greater predictability, clarity, and success by keeping politics out of administrative and business dealings (see Cornell and Kalt 1992; Jorgensen and Taylor 2000).

Third, the institutions have to be capable of getting the job done. First Nation citizens may want governing institutions that are familiar, but they also have to have governing institutions that are *effective*. The ultimate test of a governing institution is whether it provides a means for the nation to effectively achieve its goals. If not, it needs to be changed.

- ***Diversify revenue sources*** All governments face the challenge of finding sufficient funds to do the things they need to do. For most First Nations, those funds traditionally have come from the federal government. While such funds have been essential, they exact a price: dependency. And this is not simply dependency on federal dollars; it also is dependency on an unpredictable political process that is dominated by a wide assortment of interests who may or may not support the goals of First Nations.

Such dependency can be counterproductive. It can place First Nation governments in a reactive mode, deciding what they do based on what outsiders are willing to support. The vagaries of outside political processes also reduce the ability to plan ahead; you don't know what you can do until you see next year's federal budget. Finally, First Nations lose valuable energy making constant

appeals for more funding and meeting oversight requirements for the funding they receive.

Reducing this dependency could have enormous benefits for First Nations. This is not to argue that federal funding is bad. On the contrary, federal funds are often essential and are surely justified in light of the extraordinary extent of crippling resource loss historically imposed on Aboriginal peoples. But over reliance on *any* single source of revenue can make the nation vulnerable to unpredictable policy or market events. Diversity of revenue sources increases freedom of action. As First Nations increase and diversify revenues, the ability of their governments to take on new responsibilities and deliver needed services to their peoples rises as well.

Of course developing alternative sources of revenue can be difficult; some First Nations may have few options, and only a relatively few First Nations may either wish to or be able to escape federal funding altogether. But most First Nations can develop at least some additional sources of funds through profit-making enterprises, licensing and permit fees, taxation of businesses and citizens, provision of services to non-community members, or other means.

Certainly, one item on the above list might raise eyebrows—taxes levied on First Nation businesses or citizens. Opposition to raising government funds from the community in this manner may be strong (as it is for all governments), but there are significant advantages to this strategy. Not only does money bring power with it, but raising revenues in this way is an important step in shifting accountability to the First Nation (more below). Citizens and businesses will be reluctant to part with their own funds; therefore, they will demand that those funds be well spent. The government's desire to overcome resistance to raising funds this way gives it a major incentive to deliver high-quality governance in ways that citizens want.

For those nations with limited opportunities to raise revenues of their own, the emphasis ought to be on convincing partner governments to provide funds in a manner that allows longer-term planning and flexibility in meeting the First Nation's changing needs. The multi-year funding agreements that some First Nations have secured are an example of this sort of partnership.⁶

- ***Broaden accountability*** Accountability is a critical aspect of government: those who govern have to be accountable for their actions. The question is: to whom are they accountable, and how?

First Nations' governments have to be accountable to their funders for how funds are used. This usually has meant accountability to the federal government and, in some cases, provincial governments. But they also have to be accountable to their citizens, and not only for how funds are used. They have to be accountable for all of their decisions.

This notion of accountability to citizens deserves additional emphasis. Many First Nation governments might claim that they are accountable to the electorate—if the chief and council don't do what the membership wants, they simply get voted out of office. That is a form of accountability, but we are talking about something more comprehensive. As jurisdiction expands and the government moves from being a mere resource distributor to having more substantial decision-making authority,

⁶ These are referred to generally as Financial Transfer Agreements. As of 2003, they exist in two primary forms: a Department-First Nation Funding Agreement (DFNFA) refers to agreements with a single federal government department; a Canada-First Nation Funding Agreement (CFNFA) refers to agreements with more than one federal department (for example, Indian Affairs and Health Canada). Both such agreements typically cover a 3-5 year period.

accountability is not just about giving a large enough group of citizens enough resources to guarantee reelection of current leaders. It is about providing citizens with adequate information about the decisions made in government for them to be able to weigh governmental performance, asking, “Even if I/my family/my clan/my faction didn’t get the majority of resources controlled by our government, do I think the government is generally doing a good job? Is it serving the interests of the nation?” As First Nation governments increase their accountability to their own citizens, they are moving toward genuine *self-governance*.

Tasks for Other Governments:

Both the Canadian government and provincial governments have an expansive web of relationships with First Nations. From many First Nations’ standpoints, these relationships have been characterized by federal and provincial dominance and First Nation dependency rather than partnership. From the federal and provincial standpoint, it seems these relationships have been characterized by continuing First Nation demands for financial support, goods, and services and for the more general satisfaction of fiduciary duties. The tension between these two viewpoints discourages effective nation building and genuine self-governance, which require intergovernmental cooperation in place of conflict.

We have outlined above what we think the central, nation-building tasks facing First Nations are. How can federal and provincial governments partner with First Nations to advance a nation-building agenda and enhance the prospects of economic and community development?

- ***Support expanded First Nation jurisdiction*** As we have argued above, effective self-government is a key to the success of First Nations. As we have argued further, effective self-government requires substantive decision-making power. This means that not only First Nations but

federal and provincial governments as well have a practical interest in expanding First Nations' jurisdiction.

For federal and provincial governments, this means giving up or sharing some of their own decision-making power. Admittedly, ceding or sharing jurisdiction does not come easily to any government, but only in this way will First Nations have the power to develop their territories and best serve the social, economic, and cultural needs of their people.

Discussions about returning jurisdiction to First Nations are a crucial component of the current self-government negotiations in which First Nations and the Canadian government are engaged. This is commendable. It is a way for individual First Nations to candidly assess their capacities and priorities and work with federal authorities to reclaim such decision-making power as they feel is appropriate.

Unfortunately, however, this nation-by-nation and policy area-by-policy area process is also cumbersome and time consuming. Neither First Nations nor provincial and federal governments should have to wait so long to gain the benefits that arise from expanded First Nation jurisdiction. Instead, federal and provincial governments should be looking across the policy areas they control for opportunities to expand First Nation jurisdiction. The circle sentencing procedures mentioned above are one example: if a First Nation has established a circle sentencing body, federal policy allows the return of the penalty phase of certain juvenile adjudications to the Aboriginal community. This narrow example is similar to the success the United States' government has had in expanding tribal jurisdiction. Through self-determination and self-government policies, the U.S. has enabled American Indian nations to take over management control—and, in the case of self-government compacts, even the design—of programs currently managed by the

Bureau of Indian Affairs or Indian Health Service. Interested Native nations participate as their capacities allow.

As this suggests, the U.S. situation has been similar in some ways to the Canadian one: program administration has been the first element of returned jurisdiction. But it is important for both First Nations and American Indian tribes to do more than simply carry out provincial or federal policy in various program areas. This is why self-governance amendments to the self-determination statute in the U.S. have been so critical. They allow Native nations to take the next step: design their own programs. Substantive jurisdiction over a particular policy domain means not only managing a program but designing it as well so that it reflects Aboriginal concerns, knowledge, and governmental practices.⁷

Of course true decision-making power accepts the possibility of making mistakes. Our sense is that non-indigenous governments in Canada are often nervous that, without careful limits on their self-governance powers, First Nations will make costly and possibly dangerous errors. But such possibilities are part of self-government, and non-indigenous governments are hardly immune to the same problem. Here again, the U.S. experience is instructive. Where adequate incentives for sound

⁷ The process in the U.S. is somewhat more complex than this brief description suggests. For an American Indian nation to gain broad jurisdictional control in the area of social services, for instance, it must not only contract or compact with the Bureau of Indian Affairs and Indian Health Service, but must work closely also with relevant state governments that manage a variety of federally funded social service programs. However, it is federal law that makes it possible for tribes to seek such funds from states. In other words, crafting jurisdictional control over a policy domain takes creativity and persistence on the part of a Native nation in working with partner governments, but the federal government in particular plays a key role in making such jurisdictional transfers possible. For a discussion of this topic, see Brown, Cornell, et al., (2001).

management exist, expanded jurisdiction has had relatively few negative outcomes (see, for example, Curtis and Jorgensen 2002).

- ***Invest in institutional capacity building*** Nation building requires investment. If First Nations are to exercise governmental power effectively, they will need support in building the necessary governing institutions.

This is capacity building, but of a particular kind. “Capacity building” has become a buzzword in Aboriginal circles. Too often, it refers primarily to education and training. The concept has to be expanded to embrace the design of governing institutions themselves. Institutional capacity building refers to the process of developing governing institutions and systems that (1) fit indigenous concepts of how to govern and (2) are capable to doing the tasks of government effectively under contemporary circumstances. Without such institutions, not only will trained people be unable to succeed in government, but they will be more likely to leave their community in sheer frustration, joining the Aboriginal brain drain that denies First Nations some of their own, most powerful assets.

Investments in institutional capacity building might include, among other things, tracking and analyzing cases of First Nation success in self-governance; assembling alternative models of governing institutions that both reflect First Nations’ cultures and preferences and are demonstrably capable of getting the job done; providing technical advice; and supporting First Nations’ efforts at constitution-making, the development of courts or alternative dispute resolution mechanisms, and other institutional development.

- ***Do not allow fiduciary responsibility to become a barrier to creative policy development*** While it does not appear to be a majority opinion, we have heard national-level policy makers insist that the Canadian government’s fiduciary

responsibility cannot be reconciled with nation-building processes. To allow First Nations to design their own governments and make major decisions without federal oversight, they claim, is to abandon a critical responsibility that rests on the shoulders of the Crown.

This interpretation is potentially immobilizing. At one stroke, it closes down the very set of policy options that, according to a growing and compelling body of research, is most likely to increase the chances of sustainable development in Aboriginal communities. Worse, it perpetuates the cycle of dependency by, in effect, accepting the idea that the primary objectives of Aboriginal policy should be to protect First Nations from themselves and provide First Nations with goods and services.

But are the fiduciary responsibility and Native self-government necessarily at odds? We don't think so. There is an enormous range of possibilities that lie between a position that says the federal government must oversee all that First Nations do with federal funds—or all that they do with any funds—and a position that says First Nations should do whatever they please. Finding viable middle ground in which First Nations have the necessary powers to build societies that work within the ultimate protection of the federal sovereign will require creative work on both sides—but it can be done.

What's more, the key to good decision making in First Nations is not federal oversight. It is the construction of capable First Nations governments that are staffed by dedicated, skilled persons serving communities that are well educated and that have a clear sense of their own priorities. This is the challenge that both First Nations and Canada face. In our view, the ultimate fulfillment of the fiduciary responsibility would be to assist First Nations in

returning to a situation in which they successfully govern themselves.⁸

CONCLUSION

We do not mean to suggest in this paper that it will be easy for First Nations to achieve genuine self-government. If anything, the opposite is true. Transforming government structure and practice is no small task, and First Nations have a number of characteristics and a history that make the task particularly challenging. Among other things, after years of band council governments, it may be as difficult for First Nations as it is for federal overseers to shed the habits of colonialism or self-administration and tackle the formidable tasks of nation building. For some people, the status quo works and serves their interests; for some, old habits die hard; for others, change is frightening. There also can be very real tensions between current and traditional practices, and it can be difficult to find ways to mix the two.

But there are some choices to be made. In Table 1 (pp. 30-31) we present a schematic version of two very different notions of self-government. One we have called, earlier in this paper, self-administration. It is a model in which indigenous government is designed by someone else (for example, through the Indian Act), major decisions are made by someone else (typically the federal government or other outside funder), funding comes from someone else, accountability is to someone else, and programs are designed and evaluated by someone else. First Nation government becomes little more than an extension of someone else's administrative apparatus, implementing programs and

⁸ Of course some First Nations interpret the federal fiduciary responsibility to mean that the federal government should fund everything First Nations choose to do or design. We do not claim to have any privileged interpretation of fiduciary responsibility, but we worry about nations that seek to preserve a potentially crippling level of dependency on outsiders. See our discussion of diversifying revenue sources (above).

distributing resources. Some people may call this self-government, but it is hardly worthy of the name.

The alternative *is* worthy of the name. True self-government places significant jurisdictional power in the hands of First Nations, singly or in association with each other in tribal councils or other organizations. The governments of those nations perform a wide array of functions through institutions that the nations themselves designed. The governments are accountable to their own citizens not only for how they spend funds but for where they are taking the nation. While these governments may not be able to completely fund their programs, they pursue diverse revenue streams. They work with other governments—both Native and non-Native—as partners in a broad, cooperative effort designed to serve the interests of both.

The choice facing both First Nations and Canada is which model to pursue. To us, the second model wins hands down, and for a simple reason. There is ample evidence that this second model—the model of genuine self-governance instead of simple self-administration—is far more likely to produce societies that prosper. For this reason, among others, it deserves the support not only of First Nations but of other governments that wish to see those nations emerge at last from decades of poverty and despair.

TABLE 1
Self-Administration vs. Self-Government

	Self-Administration	Self-Government
Jurisdiction	Vested in First Nations but limited to narrow policy domains and subject to federal or provincial veto	Vested in First Nations, tribes, or other associations of First Nations and covering a wide array of policy domains
Governing institutions	Designed largely by outsiders, usually the federal government (e.g., the Indian Act in its various versions)	Designed by First Nations, tribes, or other associations of First Nations
Core functions of First Nations' governments, perhaps in cooperation with other governments	<ul style="list-style-type: none"> • Administer programs • Distribute resources such as jobs, money, services • Manage the internal affairs of the nation to the extent allowed by Canadian or provincial law 	<ul style="list-style-type: none"> • Establish a constitutional foundation • Make and enforce laws • Make and implement decisions • Provide for the fair and non-political resolution of disputes • Administer programs • Manage the internal and external affairs of the nation as allowed by First Nations' laws

TABLE 1
Self-Administration vs. Self-Government

	Self-Administration	Self-Government
Revenue	Largely from federal government; First Nations' efforts to increase revenues focus largely on grantsmanship and lobbying for increased federal funding	From diverse sources, including but not limited to federal funds; First Nations' efforts to increase revenues focus on enterprise development and other revenue-generating options
Accountability	Typically uni-directional, having to do largely with First Nations' accountability to funders, especially the federal government, for how funds are used	Multi-directional, having to do with (1) First Nations' accountability to their own citizens for governing well, (2) First Nations' accountability to funders for use of funds, and (3) federal accountability to First Nations for policy decisions
Inter-governmental decision-making processes	Consultation (other governments "consult" with First Nations, then decide what to do); the assumption is that other governments know what's best for First Nations but should at least talk to them about it	Partnership (decisions are made jointly where substantive First Nation interests are involved); the assumption is that First Nations and other governments can work together to determine what's best for both

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