



**Towards Sound Government to Government
Relationships With First Nations:
A Proposed Analytical Tool**

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EXECUTIVE SUMMARY

In responding to the findings of the Royal Commission on Aboriginal Peoples (RCAP) through its Gathering Strength initiative, the federal government committed itself to "...working out government-to-government relationships at an agreed-upon pace acceptable to First Nations".¹

This commitment to developing a government-to-government (G to G) relationship begs two important questions:

1. What constitutes an effective or sound G to G relationship within Canada's federal system?
2. How does our understanding of such a relationship have to be modified or refined to take into account the special place of First Nations in Canada?

The purpose of this paper is to answer the above two questions and in doing so provide affected parties with a tool in order to a) analyze more effectively initiatives being proposed by governments or b) craft their own proposals which affect the G to G relationship. The nature of this tool is a series of criteria and related questions organized around five good governance principles that are based on work done by the United Nations Development Program (UNDP). The five principles are Fairness, Direction, Legitimacy and Voice, Accountability, and Performance. The analytical tool consists of the following five panels.

THE TOOL: QUESTIONS AND CRITERIA FOR EVALUATING NEW INITIATIVES

I. Fairness

- **Respecting Legal Rights and Jurisdictions** – Is there recognition that lands occupied by First Nations are not a subset of federal lands? Is there acknowledgement that First Nations have large, active local governments with a wide range of responsibilities that combine those assigned to both municipal and provincial governments? Is there recognition of the numerous regulatory gaps on lands occupied by First Nations and that, for various reasons, both First Nations and INAC have limited means to close these gaps effectively? Does the initiative account for any fiduciary duties owed by the Crown? In particular has the Honour of the Crown been upheld?
- **Equitable Treatment of First Nations** – Does the initiative treat First Nations equally? If not, is there a sound reason for the difference in treatment?

II. Direction

- **Principles** – Is there a clear statement of principles in the initiative of how the relationship is to be conducted and are these principles broadly compatible with those outlined by the RCAP (Mutual recognition, mutual respect, sharing, and mutual responsibility)?

¹ INAC, "Agenda for Action with First Nations", at http://www.ainc-inac.gc.ca/gs/agn_e.html.

- **Strategic Vision** – Is the long term goal of the initiative compatible with the eventual implementation of the inherent right to self-government (i.e. does the initiative help move affected First Nations along the governance continuum)? Will the initiative help build capacity of First Nations to manage their growing governance responsibilities? Does the initiative affect areas where there is no consensus with First Nations (e.g. treaty implementation) and if so how do the authors intend to manage this difference?
- **Ongoing Machinery** – Does the initiative establish any ongoing machinery to help manage the relationship with First Nations? Does it include the major players affected and will the machinery be effective?
- **Review** – Does the initiative call for a review of the relationship being established, and if so, is it clear when the review will occur, its scope, who will conduct the review and how it will be funded?

III. Legitimacy and Voice

- **The Quality of the Collaboration** – Are there elements to the relationship that mimic those found in the SUFA (joint planning; collaboration on implementation; advance notice of changes; funding predictability; avoidance and prevention of disputes)? Is there recognition of the constitutionally protected Aboriginal and treaty rights? Does consultation reflect the basic principles laid out in the “Consultation Plus” document (transparency of purpose; the establishment of a joint process at the outset; sufficient time frames and First Nation capacity to participate meaningfully; participation through to the legislative process etc.)?
- **The Quality of the Participation of Key Stakeholders and Citizens** – Does the relationship include the participation of other First Nation stakeholders in addition to First Nation governments?
- **Respect for and Valuing Diversity** – Is there recognition of the vast diversity existing among First Nations? Has the role of First Nation traditional knowledge and practices been adequately taken into account? Have Canada’s international and national commitments concerning traditional Aboriginal knowledge and participation been respected?

IV. Accountability

- **Managing the relationship** – Are there forums in place or to be established whereby the accountability relationship can be adequately managed?
- **Rendering accountability less hierarchical** – Has the accountability framework been jointly conceived by the various parties? Are there obligations identified of all parties, not just First Nations?
- **Transparency** – Have the roles of the partner governments been clearly defined and made public? Will there be public reporting of results? Will the accountability framework produce information on outcomes? Will there be sharing of best practices among the parties?

- **Fiscal Arrangements** – Are the funding sources available to the parties adequate to allow them to perform their responsibilities? Are funding conditions well conceived and necessary? Will there be adequate notice given of funding changes? Is there agreement that the funds transferred will be used for their intended purpose?
- **Reporting Burden** – Will this initiative increase the reporting burden of First Nations? Will the information be used by the recipient party? Is the information required of First Nations potentially useful to them?

V. Performance

- **Cost Effectiveness** – Are the objectives of the initiative and the roles of the parties clear? Is there a specific commitment to measure and analyze outcomes as opposed to inputs and outputs? Is there a future review or evaluation built into the initiative?
- **Harmonization** – Are there any harmonization requirements that are part of the initiative? Is the complexity of these well understood and are resources requirements to effect these requirements sufficient?
- **Dispute prevention and resolution** – How does the design of the initiative help prevent disputes from occurring? Are there dispute resolution mechanisms in place and if so are these compatible with First Nation world views? Specifically have the design principles for sound dispute resolution systems been followed?
- **Managing horizontally** – How significant are the challenges of horizontal management of the parties? What particular measures are contemplated to manage these challenges?

Conclusions

Government to government relationships are important in any governance system, and especially so in a federation like Canada. As First Nations and other Aboriginal Peoples develop a third order of government within this system, the stakes for all Canadians to get these relationships on a sound footing become only greater.

This paper is based on the premise that governance systems, to be sound, must respond to five principles: direction; legitimacy and voice; fairness; accountability and performance. With few exceptions the Social Union Framework Agreement does just that and consequently has been a major inspiration for this paper. That said, we have attempted to ensure that the unique experience, history and culture of First Nations have significantly influenced both our application of the principles in this context, and our development of the analytical tool to help judge the soundness of new intergovernmental initiatives affecting First Nations.

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INTRODUCTION

In responding to the findings of the Royal Commission on Aboriginal Peoples (RCAP) through its Gathering Strength initiative, the federal government committed itself to "...working out government-to-government relationships at an agreed-upon pace acceptable to First Nations".² This commitment to developing a government-to-government (G to G) relationship begs two important questions:

1. What constitutes an effective or sound G to G relationship?
2. How does our understanding of such a relationship have to be modified or refined to take into account the special place of First Nations in Canada?

Answers to these questions are taking on increasing urgency because of two important trends. The first is that a growing number and variety of federal, provincial initiatives with direct implications for First Nation communities. This is the case in a wide range of areas: environmental protection, fisheries, historic sites, law enforcement, and so on. Consequently it is important for affected parties to have a coherent concept of what a sound G to G relationship might look like.

The second trend is that the relationship between First Nations and the federal and provincial as well as territorial governments is evolving rapidly as First Nation governments – already highly diverse – conclude self-government agreements, aggregate certain governance functions to regional or Tribal tiers of Aboriginal government, and improve their governance capacity through a complex range of institutional arrangements and administrative mechanisms. To have a clear set of ideas to help guide this newly emerging relationship would be useful to say the least.

The purpose of this discussion paper is to answer the above two questions, and in doing so, to provide affected parties with a tool – in the form of a set of questions and criteria – to use in:

- Assessing the extent to which initiatives being proposed by governments are consistent with a sound G to G relationships; or
- Crafting their own proposals that affect this relationship.

We will organize our analysis around five good governance principles – direction, legitimacy and voice, fairness, accountability, and performance. Based on work done by the United Nations Development Program (UNDP), the IOG has developed and applied these five principles as a powerful analytical framework in a variety of international and Aboriginal contexts.³

We begin by elaborating on governance and good governance in conceptual terms, and make the case for why our five principles of good governance are universally relevant and applicable in the Aboriginal context in Canada. We then proceed to use these five principles as a framework

² INAC, "Agenda for Action with First Nations", at http://www.ainc-inac.gc.ca/gs/agn_e.html.

³ See for example, John Graham, Bruce Amos, and Tim Plumptre, "Principles for Good Governance in the 21st Century", IOG Policy Brief #15, 2003, at www.iog.ca/publications/policybrief15.pdf; John Graham, Bruce Amos, and Tim Plumptre, "Governance Principles for Protected Areas in the 21st Century", 2003 at: www.iog.ca/publications/pa_governance2.pdf; John Graham and Jake Wilson, "Aboriginal Governance in the Decade Ahead: Towards a New Agenda for Change", IOG framework paper, forthcoming.

for our discussion of G to G relationships. Each of the five sections – one for each principle – is itself divided into three subsections, which develop the following points:

- a) implications for a G to G relationship in general;
- b) how these reflections need to be modified in a First Nation context; and
- c) resulting criteria to assist INAC officials in analyzing new initiatives.

The concluding section draws together the paper’s key reflections and then proposes a set of action steps for promoting the use of the analytical tool within the federal government.

GOVERNANCE AND GOOD GOVERNANCE

There is mounting evidence that sound *governance* is a necessary condition for communities and nations to make rapid progress in improving the well-being of their citizens. This evidence comes from a wide variety of sources including the World Bank, operating in developing countries;⁴ the Harvard Project on American Indian Economic Development;⁵ and in British Columbia where researchers identified a strong correlation of First Nations with low suicide rates to those with significant initiatives relating to self-government.⁶ Indeed UN Secretary-General Kofi Annan has stated, “Good governance is perhaps the single most important factor in eradicating poverty and promoting development”.⁷ And First Nations share this view: a 2001 Ekos poll of more than 1400 First Nations people found that 71% agreed that “providing the tools for good governance will improve conditions for economic and social development”.⁸

Governance is about much more than just the structures of government: it can be defined in broader terms, as a process whereby societies or organizations make their important decisions, determine whom they involve in the process and how they render account. The formal elements of these processes – agreements, procedures, conventions, policies, institutional arrangements – are most easily observed and analysed. But there are also a number of less tangible factors such as history, culture, technology and traditions – factors that also influence how decisions are made.

An important part of governance processes is the dynamic between government, the private sector, civil society, and the media which moderates their communication. In the First Nations context in Canada, however, the governance roles of the private sector, media, and civil society are relatively weak, and the system of governance is thus dominated by the public sphere – and the complex dynamic between First Nations leaders and the federal government in particular. If these players are to advance to an effective ‘government-to-government’ relationship which reflects the needs and aspirations of First Nation citizens, it would be useful to refer to an established set of ‘good governance’ principles to guide their progress.

⁴ Daniel Kaufmann et al, “Governance Matters”, August 1999, www.worldbank.org

⁵ Stephen Cornell and Joseph Kalt, “Sovereignty and Nation-Building: the Development Challenge in Indian Country Today”, Harvard Project on American Indian Economic Development, 2001.

⁶ Michael Chandler and Christopher Lalonde, “Cultural Continuity as a Hedge against Suicide in Canada’s First Nations”, *Transcultural Psychiatry*, v. 35, June 1998.

⁷ Kofi Annan, at www.unu.edu/p&g/wgs/

⁸ Cited in “Highlights of First Nations Survey On-Reserve”, www.inac.gc.ca/nr/prs/s-d2001

Because governance affects all societies, defining ‘good governance’ principles in universal terms is difficult and controversial. The 1997 UNDP document “Governance and Sustainable Human Development” enunciates a set of nine principles which, with slight variations, appear in much of the literature. To minimize overlap and maximize their analytical value when applying them to practical circumstances, we have consolidated the list to five (see *Box 1*).

<i>Box 1: Principles of Good Governance</i>	
<i>IOG Principles</i>	<i>UNDP Principles</i>
Direction	Strategic vision – leaders and the public have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.
Legitimacy and Voice	Participation – all men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their intention. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively. Consensus orientation – good governance mediates differing interests to reach a broad consensus on what is in the best interest of the group and, where possible, on policies and procedures.
Fairness	Equity – all men and women have opportunities to improve or maintain their well-being. Rule of Law – legal frameworks should be fair and enforced impartially, particularly the laws on human rights.
Accountability	Accountability – decision-makers in government, the private sector and civil society organizations are accountable to the public, as well as to institutional stakeholders. This accountability differs depending on the organizations and whether the decision is internal or external. Transparency – transparency is built on the free flow of information. Processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.
Performance	Responsiveness – institutions and processes try to serve all stakeholders. Effectiveness and efficiency – processes and institutions produce results that meet needs while making the best use of resources.

There are strong grounds to argue that five UNDP-based principles have a claim to universal recognition because they are based to significant degree on a large body of international law pertaining to human rights⁹ (see *Annex 1*). That said, support at a high level of abstraction is one thing; their application is another. In this regard the following are useful reminders:

- These principles represent an ideal that no society has fully attained or realized. As the UNDP notes, democracy and human development are a ‘journey’ not a ‘destination’

⁹ For an elaboration of this argument, see John Graham et al, “Governance Principles for Protected Areas for the 21st Century”, 2003, at www.iog.ca.

- The principles are not ‘water-tight’ compartments; they overlap and sometimes reinforce one another – e.g. sound accountability buttresses legitimacy and voice
- On the other hand, these principles are not absolute; most conflict with others at some point and this calls for balance and judgment in their application
- Societal context – history, culture and technology – will be an important factor in how this balance is determined and how these principles play out in practice
- Complexities abound in the application of these principles: ‘the devil is indeed in the details’
- Governance principles are both about ends and means – about the results of power as well as how it is exercised.

The case can also be made that the five principles outlined above are applicable in the Aboriginal context in Canada. In RCAP, nine key aspects of Aboriginal traditions of governance were identified: the centrality of the land, individual autonomy and responsibility, the rule of law, the role of women, the role of elders, the role of the family and the clan, leadership and accountability, and consensus in decision-making.¹⁰ In a similar vein, Haudenosaunee (Mohawk) political theorist Taiaiake Alfred, from Kahnawake, has outlined eight characteristics of strong indigenous communities, including: wholeness with diversity, shared culture, communication, respect and trust, group maintenance, participatory and consensus-based government, youth empowerment, and strong links to the outside world.¹¹

From these two lists and the full explanations in the actual texts (see *Annexes 2 and 3*), it is clear that the principles relate closely to those of ‘good governance’, although particular emphasis in many Aboriginal cultures on certain aspects of each of our five categories must be noted:

- *Legitimacy and voice* are achieved through a strong emphasis on consensus rather than simple majority rule
- *Direction*, or leadership, tends to derive from adherence to common culture, community identity, and the promotion of collective well-being
- *Fairness*, in terms of conceptions of *equity*, involves a unique view of and respect for the roles of elders, women, and youth in society; while in terms of a system of *rule of law*, it is rooted in spiritual learnings and oral traditions rather than written legislation
- *Accountability* relationships are built in to family, kinship, and community structures and as such may not resemble the formal institutions of European cultures
- *Performance*, particularly in terms of use of resources, is based in a holistic view of people’s place in nature and a deep respect for the land and all its creatures.

As we apply these principles to the concept of a ‘government-to-government’ relationship in the next sections of the paper, it is important to remain mindful of these characteristics of Aboriginal social organization and culture, albeit tempered with the useful reminder of David Newhouse of Trent University that “Tradition is a guide not a jailor”.

¹⁰ RCAP Report, “Restructuring the Relationship”, Vol. 2, Part 1, p. 116.

¹¹ Taiaiake Alfred, *Peace Power, Righteousness: an Indigenous Manifesto* (Oxford University Press, Don Mills, 1999), p. 82.

There are a number of sources of experience to draw on in developing the central elements of an effective government-to-government relationship in a federal context. Chief among these sources is the Social Union Framework Agreement (SUFA) signed in 1999 by Canada's federal, provincial and territorial governments (with the exception of Quebec) after two years of negotiations.¹² The SUFA outlines a useful approach for the signatory governments to take in coordinating a wide range of social policies and programs. There are other examples, however, that we will employ to elaborate further how the five principles play out in practice.

We begin with the principle Fairness, which allows us to consider the legal and philosophical basis for all the other elements of a G to G relationship.

I. FAIRNESS

The principle of fairness encompasses two UNDP governance concepts: a) the rule of law, that is, legal frameworks should be fair and enforced impartially; and b) equity, that is, all men and women have equal opportunities to improve or maintain their well-being. In a G to G context, this principle translates into two elements:

- Respecting the legal rights and jurisdictions of the governments
- Treating various governments in an equitable fashion

As with all five of the sections, we look at how these elements play out in practice in a G to G relationship in general, then turn to the First Nation context, and finally conclude by developing specific criteria in the form of questions to start building the analytical tool for examining future initiatives.

A. FAIRNESS IN A GOVERNMENT TO GOVERNMENT RELATIONSHIP

Respecting the legal rights and jurisdictions of the governments

This is a central aspect to any well-functioning relationship among governments. In the SUFA, for example, the governments' commitments are made "within their respective constitutional jurisdictions and powers".

The intergovernmental arrangements for the National Building Code provide an even more striking example of respecting constitutional jurisdictions while at the same time achieving a high degree of national harmonization. Under the Canadian constitution, jurisdiction for building regulation rests with the provinces. That said, the advantages of having a single building code for the entire country are numerous. Consequently, at the behest of the Department of Finance, the National Research Council (NRC) began development of the first building code in 1937 and published the first edition in 1941. It is important to note that the National Building Code has no statutory basis. In essence, it is a code that the federal government, provinces and territories can use or modify, however they please. On federal lands, use of the code is up to the key departments involved. Public Works and Government Services, Canada Mortgage and Housing Corp., and INAC are important federal players in this regard.

¹² At http://socialunion.gc.ca/news/020499_e.html

It became apparent in the process of updating the code approximately every five years that the NRC needed broader input from provinces, territories and the various private sector interests. Thus, by the mid-fifties a governance system had been put in place, and it evolved substantially over the next 35 years. The latest review of this system occurred in the late 1990s with an objective of integrating provincial/territorial involvement more closely into the governance system so as to ensure fewer provincial variations from the National Code. Resulting from that review will be a new system consisting of two principal bodies (neither of which have any statutory basis):

- The Canadian Commission on Building and Fire Codes, and
- Provincial Territorial Policy Advisory Committee on Codes (PTPAC).

NRC officials judge the Code to be a major success in federal/provincial/territorial co-operation. Key factors in the governance system that have led to this success have been the following:

- the code is a national and not a federal government code
- the NRC sees the provinces and territories as its principal clients for the Code
- the governance system is transparent and involves experts from all parts of the country who volunteer their time
- the system manages to separate the ‘technical’ aspects (largely the Commission’s concern) from the policy aspects (largely the concern of the PTPAC)
- the new reforms hope to keep this separation but integrate the policy and technical aspects of Code changes earlier in the process of revising the code.

A somewhat less successful intergovernmental mechanism concerns the development of the Guidelines for Canadian Drinking Water Quality. These Guidelines specify maximum acceptable concentration limits for certain microbes, chemicals and physical properties. They also set out standards regarding the frequency and testing of drinking water.

The system for establishing a national set of standards for drinking water has some similarities to the National Building Code system. The first is that the guidelines have no legislative basis to them. They are developed with the understanding that provinces and territories are at liberty to adopt or modify them as they wish. Similarly in terms of federal lands, while the Guidelines have been incorporated in Part IV of the *Canada Labour Code*, there is no requirement on the part of federal departments (e.g. National Defence, Parks Canada, Indian and Northern Affairs) to apply the guidelines let alone enforce them.

Developing and approving the Guidelines is the responsibility of a thirteen-member federal/provincial/territorial committee (the Federal-Provincial Subcommittee on Drinking Water). Supported by Health Canada, which provides the ‘science’ underpinning the Guidelines, the subcommittee operates on the basis of consensus. In other words all thirteen members must agree before any change can be made to the Guidelines.

The O’Connor Commission, established by the Ontario Government following the Walkerton tragedy, was highly critical of the Subcommittee on two principal grounds. First, the consensus decision rule meant that there was the danger of a “race to the bottom” whereby one jurisdiction could hold up all the others in terms of realizing necessary reforms. (This indeed occurred in a

number of cases). Secondly, O'Connor attacked the committee for its lack of transparency and public involvement. The Subcommittee meets in secret. There are no minutes of its meetings published. Studies it conducts are not routinely published. And proposed changes to the Guidelines are not subject to a rigorous process of public participation.¹³

Valuable lessons here include aspects to avoid: the lack of transparency and public involvement, and the possible 'race to the bottom' of standards.

Treating various governments in an equitable fashion

The examples of the Building Code and the Water Quality Guidelines cited above illustrate intergovernmental relations where provinces and territories are treated as equals. That is, they have the same 'clout' when it comes to decision-making. In other cases, parties have arrived at different decision rules to arrive at more equitable treatment, especially when large disparities exist in terms of population or economic strength. For example, the European Union has fashioned different decision rules for different circumstances. On critically important matters such as the admission of new members to the Union, unanimity is required. In less critical matters, member countries have weighted votes according to population and unanimity is not required.

The SUFA also has this combination of different decision rules. For new Canada-wide initiatives in health care, post-secondary education, social assistance and social services that are funded through intergovernmental transfers, the federal government will "...not introduce such new initiatives without the agreement of a majority of provincial governments". On the other hand, for any new Canada-wide social initiatives, "...arrangements made with one province/territory will be available to all provinces/territories...".

In sum, *equitable* treatment of the parties may not necessarily translate into *equal* treatment.

B. FAIRNESS IN A FIRST NATION CONTEXT

In applying the fairness principle in a First Nation intergovernmental context, the critical nuances revolve around the respect for the legal rights and jurisdictions of the parties. In particular, the following points require elaboration:

- lands occupied by First Nations should not be treated as if they were like any other federal lands
- the Crown's fiduciary responsibilities apply to all government departments, not just to INAC; further any legislative initiative must uphold the "Honour of the Crown"

We look at each of these points in turn.

¹³ O'Connor Report, at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/walkerton/part1/>

*First Nation Lands and Federal Lands*¹⁴

Federal departments often view land-related issues involving First Nations as being the sole responsibility of INAC. This perspective derives from the belief that First Nations communities reside on reserves administered under the *Indian Act* and are situated on federal crown lands under the management of the Minister of Indian and Northern Affairs.

While these views are correct to some extent, they also embody certain misperceptions.

- **First, not all reserves are federally-owned.** In part this derives from the variety of ways in which reserves have been created.
 - In eastern provinces, for example, the land underlying a reserve is typically owned by a province, and upon an absolute surrender, reverts to the provincial Crown unless there is an agreement in place between the province and the federal government. The provincial Crown can therefore insist on its ownership rights even if Canada was instrumental in arranging for the surrender.
 - There are also “special reserves” under the *Indian Act*. These are lands that have been set apart for the use and benefit of a band but their legal title is not vested in Her Majesty.
 - There are lands other than “reserves” which First Nations nonetheless use and occupy and which do not easily fit within any of the *Indian Act* definitions. For example, some lands have never been surrendered and are still subject to Aboriginal title. In that sense, they have never been “set apart” for the use and benefit of a band by Her Majesty — First Nations peoples have simply never left them.
- **Second, mineral rights on reserves differ across Canada.** Title to reserve minerals is an area of considerable legal uncertainty. In some cases, the federal government has the underlying title to minerals, while in others, it is the provinces. Federal-provincial mineral agreements try to address uncertainties regarding the administration of minerals on Indian reserves and the benefits from their disposition. Where the province holds the underlying legal title to reserve minerals, however, and no agreement exists, it is difficult for the federal Crown to administer minerals for the benefit of a band, without provincial consent.
- **Third, the manner in which reserves are described legally can vary within federal legislation as well.** It is important not to describe “reserve lands,” “federal lands” and “Indian lands” as if these terms are legally synonymous. While some legislation defines “federal lands” and includes reserve lands in these definitions, other legislation refers to “reserve lands” and “Indian lands” quite separately. Still other legislation makes reference to “federal lands” and “Aboriginal lands” as distinct and quite different from each other.

In addition to these legal arguments there are other compelling reasons not to treat lands occupied by First Nations as simply a subset of federal lands. Perhaps the most important of these is that these lands, unlike any other federal lands, have active local governments with wide responsibilities.

¹⁴ For an elaboration of these arguments, see Institute On Governance, “Federal Initiatives Affecting Federal Land: Implications for First Nations and the Government of Canada”, January 2004

Indeed, there is no country in the world that has local governments which have developed to the extent seen in First Nation communities that, on the one hand, serve so few citizens and, on the other, have such a wide range of responsibilities. The only close parallels are tribal governments in the United States, which are larger on average. In the rest of Canada and elsewhere in the western world, the local governments of communities of around 600 people (the First Nations average) generally have responsibilities limited to recreation, sidewalks and streets, and perhaps water and sewers. No countries assign such small communities responsibilities in the “big three” areas of education, health, and social assistance, let alone the vast range of other responsibilities including policing, natural resource management, housing, economic development, environmental management and so on, that are managed by First Nation governments in Canada.

Another important factor that distinguishes lands occupied by First Nations from other federal lands is the nature of significant regulatory gaps that have implications for any land-related federal initiatives. Because the federal government has jurisdiction over “Indians and Lands reserved for the Indians,” under s. 91(24) of the *Constitution Act, 1867*, and has enacted the *Indian Act* in furtherance of this authority, it is sometimes believed that INAC can deal with any regulatory needs which arise concerning either Indians or reserve lands. Unfortunately, this is not the case.

Many provincial laws of general application apply on reserves, and most provinces have special departments or secretariats to deal with Aboriginal affairs, such as the Ontario Native Affairs Secretariat in Ontario. The provinces regulate a number of important areas such as education, policing and more recently, on-reserve casinos. The fact that some provincial laws apply on reserves and others – especially those relating to land use – do not add to the complexity of the situation.

For a variety of reasons – the lack of a legislative mandate and poor enforcement powers to name two – neither INAC nor First Nations can satisfactorily close these gaps in an effective manner. The rapid expansion of the reserve land base – primarily from Treaty Land Entitlement agreements in the three prairie provinces – will only serve to heighten the importance of the regulatory gap issue and the need for other departments to participate in developing long term solutions to deal with them.

Fiduciary Responsibilities and the Honour of the Crown

Numerous Supreme Court decisions have made it clear that the Crown’s fiduciary responsibilities do not rest solely with INAC. Indeed, the Crown’s fiduciary responsibilities apply to both federal and provincial governments. Within the federal government, the responsibilities extend to all departments and agencies, not solely to INAC. Further, there is a special relationship between the Crown and Aboriginal peoples, described by the Supreme Court in *Sparrow* as involving the “honour of the Crown.” Because of this, the way in which a legislative objective is to be attained must both uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s Aboriginal peoples.

This requires that relationships between the Crown and Aboriginal peoples be “trust-like rather than adversarial,” and that “[t]he special trust relationship and the responsibility vis-à-vis Aboriginals ...be the first consideration in determining whether the legislation or action in

question can be justified.” *Sparrow* also held that the words “recognition and affirmation” outlined in s. 35 of the *Charter* require sensitivity to and respect for the rights of Aboriginal peoples on behalf of the government, courts and indeed all Canadians.¹⁵ Recently, in *R. v. Marshall*, the Court repeated and affirmed the significance of the ‘honour of the Crown’.¹⁶

Whatever form “Indian lands” take, and whatever legislation is involved, the strong statements in *Sparrow* and *Marshall* suggest that *all* departments must show sensitivity and respect when dealing with Aboriginal rights. They suggest that *all* legislative action and policy that might infringe Aboriginal or treaty rights must meet the *Sparrow* tests, such as the duty to consult.

Implications for future initiatives now follow.

C. IMPLICATIONS FOR FUTURE INITIATIVES

The above analysis leads to the following set of criteria and questions:

Tool I: Fairness in a G to G Relationship

- **Respecting Legal Rights and Jurisdictions** – Is there recognition that lands occupied by First Nations are not a subset of federal lands? Is there acknowledgement that First Nations have large, active local governments with a wide range of responsibilities that combine those assigned to both municipal and provincial governments? Is there recognition of the numerous regulatory gaps on lands occupied by First Nations and that, for various reasons, both First Nations and INAC have limited means to close these gaps effectively? Does the initiative account for any fiduciary duties owed by the Crown? In particular has the Honour of the Crown been upheld?
- **Equitable Treatment of First Nations** – Does the initiative treat First Nations equally? If not, is there a sound reason for the difference in treatment?

¹⁵*R. v. Sparrow* [1990] 3 C.N.L.R. 161 (S.C.C.) at 180-181, 187.

¹⁶*R. v. Marshall (Marshall # 1)* [1999] 3 S.C.R. 456 (S.C.C.) at para. 92.

II. DIRECTION

Achieving a long term, stable direction in the context of a G to G relationship revolves around four elements:

- Adopting guiding principles – how should governments treat one another?
- Agreeing on a long-term strategic vision – what is the relationship trying to achieve?
- Establishing an ongoing political and administrative machinery – how will the governments manage this relationship?
- Conducting periodic reviews – how can the parties make necessary adjustments?

We look at each of these in turn, first in a general G to G context and then in G to G relationship involving First Nations, before developing the part of the analytical tool related to Direction.

A. DIRECTION IN A GOVERNMENT TO GOVERNMENT RELATIONSHIP

Guiding Principles

Achieving a real sense of direction in a G to G relationship requires a solid foundation of trust. As the SUFA explains at its outset, what is required is a basis of “mutual respect between orders of government and a willingness to work more closely together to meet the needs of [citizens]”.

Within the SUFA, there are other general principles to guide the conduct of the relationship, including agreement to:

- undertake joint planning and share information
- collaborate on implementation of joint initiatives
- treat all of the partners in equitable fashion (new arrangements made with one province/territory will be available to all in a manner consistent with diverse circumstances)
- provide advance notice on new initiatives.

The European Union (EU) provides another example of a set of principles to guide relationships between the EU and member governments. Its draft constitutional treaty that is currently under debate has the following three principles to guide “Relations between the Union and the Member States”, summarized thus:

- to respect the identities, jurisdictions, constitutions, territorial integrity and maintenance of internal security of Member States and their regional and local governments;
- to provide mutual assistance on tasks flowing from the Constitution; and
- to refrain from measures that could jeopardize the attainment of the Constitution’s goals.¹⁷

¹⁷ Article 5, at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>

Strategic Vision

In the opening section of the Agreement the SUFA signatories provide a compelling vision of what they intend the partnership to achieve:

- to treat all citizens equally;
- to meet citizens' needs equally and effectively with social programs and services of reasonably comparable quality anywhere in the country;
- to promote the full and active participation of all in the country's social and economic life;
- to work in partnership with stakeholders, and to ensure opportunities for citizen input;
- to ensure adequate, affordable, stable and sustainable funding for social programs; and
- to respect Aboriginal, treaty, and self-government rights.

To take a dramatic example of why such vision is important, Europe's steady unification following the devastating effects of two world wars has been based throughout on a single, firm strategic vision: that the only way to secure a lasting peace in a war-ravaged continent is to unite its countries economically and politically. This powerful strategic vision has overcome deep national divisions, and continues to inform debates over the need for an EU constitution, presidency, or a common foreign and defence policy.

In other cases where the federal system is more firmly established and publicly accepted, the strategic vision may be less obvious, but it does not mean that it is absent. It can be argued that in the US, for example, a single strategic vision – balancing states' rights with the need for a strong central government – has guided the G to G relationship for most of the federation's history since the Civil War.

Absence of consensus on a strategic vision can seriously undermine the functioning of a G to G relationship. If successive administrations on either side of the relationship fail to maintain consistency in their general approach, or if there is a strong possibility that a competing political force will come to power and change direction fundamentally, partners in the relation may have incentives to undermine one another or put off pressing issues in the hope for a more conducive political climate in the future.

Thus strategic vision should be based on consensus from the broadest possible political spectrum, not just between the particular government administrations currently engaged in the relationship. If broad consensus is unachievable, a more modest approach to a G to G relationship, with softer guiding principles and strategic visions, should probably be adopted.

Ongoing Machinery of the Relationship

Considering the wide range of factors that may affect a G to G relationship, achieving policy consistency and consensus on strategic direction usually requires the creation of ongoing machinery to guide the nuts and bolts of the relationship. One approach is to establish a structure of political and administrative institutions. The European institutional machinery is instructive (see *Box 2*), as it shows the wide variety of fora and institutions that can be created to represent different groups and governments of various levels.

Box 2: Three Spheres of European Institutions

<i>Umbrella Organization</i>	<i>Description</i>
<i>Chief Institutions</i>	
Council of Europe (CoE)	A consultative council of 45 European nations both inside and outside of the EU (no law-making powers)
Committee of Ministers	Permanent body composed of 45 Foreign Ministers (or alternates)
Parliamentary Assembly	Composed of 313 selected parliamentarians (and 313 alternates) of the 45 national parliaments
Chamber of Local Authorities	Members of local assemblies within the 45 countries
Chamber of Regions	Members of regional assemblies within the 45 countries
Secretariat	1800 employees
European Union (EU)	15 member nations in political and economic union, to expand to 25 in May 2004 (the Union has been accorded significant law-making powers in a wide range of areas through treaties)
Commission	Function equivalent to Canadian cabinet – 20 commissioners
Commission bureaucracy	More than 20,000 public servants support the EU Commissioners
Council of Ministers	Comprises the national Ministers responsible for the issue at hand
Convention on the Future of Europe	Separate group of political figures, handles constitutional negotiations and the like
Leaders' Summit	15 heads of state/government meet yearly in rotating venues
Presidency (<i>under consideration</i>)	Currently under debate
European Monetary Union (EMU)	12 of the 15 EU member nations are also in monetary union, use the Euro currency, and belong to the European Central Bank (ECB)

Smaller and more straightforward federations might not need such an exhaustive set of institutions, but the European model offers some interesting ideas nonetheless, including the following points:

- sovereignty rests within the member nations;
- power is shared through treaties that must be ratified by a nation's legislature in order for the treaties to take effect;
- the guiding principle of 'subsidiarity' limits EU authority to areas that are not effectively handled at a national or local level but could be better managed continent-wide;
- evolution has taken place over time, taking on new members, sharing more powers and creating new institutions;

- the political leadership in charge of restructurings of the relationship (i.e. the Convention on the Future of Europe) is separate from the political leaderships that work within the established structure (i.e. the Commission, Council and Parliament);
- legislation is subject to multiple decision rules (i.e. unanimity among nations is required on major issues such as enlargement, smaller nations have slightly more voting weight than their proportion of the European population);
- councils of the relevant Ministers from each nation are employed to handle specific issues;
- several spheres of union are in place with different memberships, depending on the intensity of the relationships (the 45-member CoE, the 15-member EU, and the 12-member EMU);
- two types of European-level fora have been established: one composed of delegates from national and subnational assemblies (e.g. the EU's Council of Ministers, and the various CoE fora), another composed of popularly-elected representatives (e.g. the European Parliament);
- the various institutions and agencies of the EU are distributed throughout its member states;
- by acting together, member states have enjoyed a greater level of economic success and political "clout" than if they had not been a part of the EU.

As comprehensive and innovative as the institutions of the European federation may be, however, they have faced one important criticism: that they are overly complex, bureaucratic, and unresponsive to the needs and views of European people. This critique has proven to resonate powerfully with much of the public throughout Europe, and has considerably slowed the European unification process. In their enthusiasm to move forward on unification, the architects of the EU have tended to neglect the following important point: in order for the strategic directions of G to G relationships to be achieved, the institutional machinery set up to implement them must be publicly understood, accepted and legitimated as well.

In the Canadian federal context, there exists a vast array of ongoing organizational mechanisms to help guide federal, provincial and territorial efforts to collaborate in areas of overlapping jurisdiction. Given the range of existing ministerial committees and supporting structures of officials, the ongoing machinery of the SUFA took a 'lean' approach in establishing solely a Ministerial Council, which is mandated simply to "support sector Ministers by collecting information on effective ways of implementing the agreement and avoiding disputes and receiving reports from jurisdictions on progress on commitments".

Sometimes, intergovernmental machinery can include non-governmental stakeholders as well as governmental officials. This is illustrated in *Box 3* on the following page, which describes the machinery established to maintain Canada's National Building Code and to ensure harmonization among this national code and those adopted by the various provinces.

Box 3: National Building Code Machinery

Canadian Commission on Building and Fire Codes

Membership

- Consists of not less than 27 members, chosen by the National Research Council (NRC) on the advice of the Provincial-Territorial Policy Advisory Committee on Codes (PTPAC) and of a nominating committee
- Members act in their individual capacity and do not 'represent' a constituency
- Composition is roughly 1/3 industry, 1/3 regulators (fire marshals, building inspectors) and 1/3 general interest. Geographic balance is also an important consideration.
- The Commission has seven standing committees, the chairs of which are non-voting members of the Commission (all told about 200 people are involved in the commission's work)

Mandate

- The commission is responsible for the content of the Code and all related documents
- Suggested changes to the Code can come from anyone in Canada
- The Commission meets about once a year; it has a secretariat of about 17 individuals housed within the NRC. Mainly technical experts, these officials provide research and logistical support to the Commission and its committees
- The work of the Commission is largely free from any political direction from federal ministers

Decision Rule and Public Involvement

- The Commission works hard to generate a consensus, both within its own members and with the Provincial Territorial Policy Advisory Committee; that said, a change to the Code requires a 2/3 majority of Commission members
- Prior to undertaking any changes, the Commission has an extensive consultation process in close co-operation with the provinces and territories – the intent is to have a single consultation process for changes to both the national and provincial codes
- The public can observe Commission meetings and individuals can request an opportunity to address the Commission or its committees

Review of the Relationship

Participants in sound G to G relationships understand that changing circumstances require that the relationship be reviewed periodically to ensure ongoing relevance and effectiveness. On this point the SUFA provides for leaders to participate in a full review of the Agreement after three years, and to ensure opportunities for input and feedback from citizens and stakeholders.

To ensure that the conduct of the review itself does not become a major cause for contention among the parties, experience suggests the following features, at a minimum, should be built into any G to G agreement:

- a commitment to conduct a review within a certain time period by an independent third party
- the scope of the review
- how the review will be funded, and
- how the entity conducting the review will be chosen.

B. DIRECTION IN A FIRST NATION CONTEXT

The question to which we now turn is whether the above four elements critical to Direction – principles, strategic vision, ongoing machinery and review – require adjustment in a First Nation G to G context.

It is our judgment that the latter two elements, ongoing machinery and review, require no special treatment. This is not the case for principles and strategic vision, the focus of the next subsection.

Principles

Lack of agreement on principles – ‘how the relationship should be conducted’, and on strategic vision – ‘what the relationship is intended to accomplish’, has been the basis of well over two centuries of acrimony between First Nations and the federal government. Happily, the last few decades have witnessed some significant convergence but the parties are nonetheless at a considerable distance from unanimity. Take for example the differences of opinion on the implementation of treaties or the nature of the federal government’s fiduciary responsibilities.

The Royal Commission on Aboriginal Peoples proposed four principles to guide the conduct of the relationship into the future. These are summarized in *Box 4* below, and for our purposes will be a starting point for the principles in the analytical tool we are creating.

Box 4: RCAP’s Four Principles

- **Mutual recognition** – three facets of which are equality, co-existence and self-government
- **Mutual respect**
- **Sharing** – based on the long overdue recognition that Canada’s past and present prosperity rests on a relationship of sharing extended by Aboriginal peoples
- **Mutual responsibility** – involving the transformation of a colonial relationship into a partnership with joint responsibility for the land

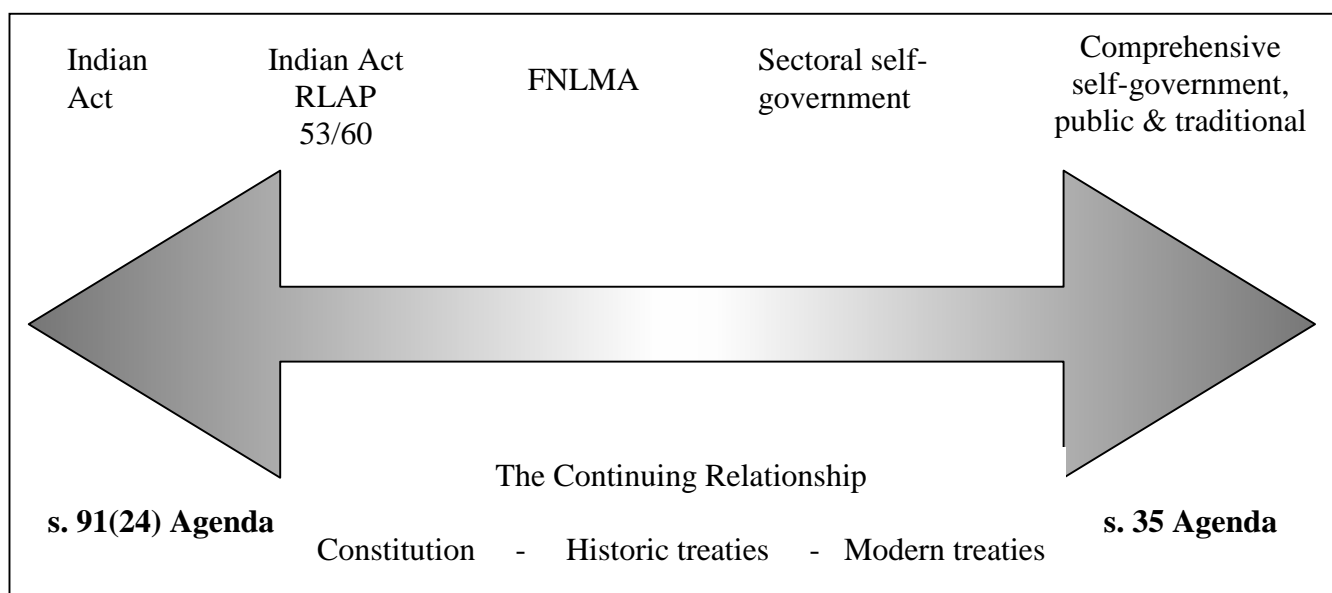
Strategic Vision

On the issue of strategic vision, there is agreement among the parties on the need to move away from the *Indian Act* toward the implementation of the inherent right to self-government, a right that both agree lies within Section 35 of the *Constitution Act of 1982*. The federal government adopted the Inherent Right Policy in 1992 as its statement of the nature of the inherent right to self-government¹⁸ and how it proposed to achieve its implementation.

More recently, INAC officials have developed a ‘governance continuum’ (see *Figure 2* below), which stretches from the colonial agenda founded upon s. 91(24) of the *Constitution Act of 1867* granting the Crown legislative authority for “Indians, and Lands reserved for the Indians”, to the goal of comprehensive Aboriginal self-government envisioned in s. 35. Between these two points are a number of other initiatives. Examples include:

- the Regional Land Administration Program (RLAP), whereby a First Nation, through funding provided by the department, handles the everyday land management within the community, even though the signing authority remains with the Minister’s representative
- the delegation under Section 53/60 of the *Indian Act* which provides a First Nation with the power to manage and approve specific land transactions
- the First Nations Land Management Act (FNLMA), which places additional regulatory powers in the hands of First Nations with regards to land management and environmental protection
- Other sectoral self-government agreements in areas such as education
- other various comprehensive self-government agreements involving the Nisga’a, the James Bay Cree and the Yukon First Nations

Figure 2: Governance Continuum



¹⁸ The Government view is that this right applies in relation to “matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources”.

In addition to agreement on the need to implement the inherent right to self-government, the federal government and First Nations are also in general agreement on the need of First Nations to restore their capacity to exercise this right. Adopted in 1998, *Gathering Strength: Canada's Aboriginal Action Plan* was the government's response to the Royal Commission on Aboriginal Peoples and it laid out a game plan including the following elements:

- fostering a reconciliation between Aboriginal and non-Aboriginal people in Canada
- building the capacity of Aboriginal people to manage their growing governance responsibilities
- improving Aboriginal fiscal autonomy and financial capacity
- supporting social and economic development through improved government programs.

More recently, the Government in the February 2004 Speech from the Throne announced its intention to develop a First Nation Government Centre in co-operation with First Nations.

C. IMPLICATIONS FOR FUTURE INITIATIVES

The above analysis on the importance of Direction in crafting a sound G to G relationship and the special considerations in a First Nation context leads to the following analytical framework for assisting INAC officials in judging future initiatives.

Tool II: Direction in a G to G Relationship

- **Principles** – Is there a clear statement of principles in the initiative of how the relationship is to be conducted and are these principles broadly compatible with those outlined by the RCAP (Mutual recognition, mutual respect, sharing, and mutual responsibility)?
- **Strategic Vision** – Is the long term goal of the initiative compatible with the eventual implementation of the inherent right to self-government (i.e. does the initiative help move affected First Nations along the governance continuum)? Will the initiative help build capacity of First Nations to manage their growing governance responsibilities? Does the initiative affect areas where there is no consensus with First Nations (e.g. treaty implementation) and if so how do the authors intend to manage this difference?
- **Ongoing Machinery** – Does the initiative establish any ongoing machinery to help manage the relationship with First Nations? Does it include the major players affected and will the machinery be effective?
- **Review** – Does the initiative call for a review of the relationship being established, and if so, is it clear when the review will occur, its scope, who will conduct the review and how it will be funded?

III. LEGITIMACY AND VOICE

In a government to government context, the principle of legitimacy and voice revolves around three critical aspects of the relationship:

- the quality of the collaboration among the governments
- the ability to involve other stakeholders to contribute to the joint undertaking
- respect for diversity among the governments – that is, not treating all in necessarily a homogeneous fashion.

We look at each of these attributes in the context of the Canadian federation and then turn to how these aspects might be considered in a relationship involving First Nations, before further developing the tool.

A. LEGITIMACY AND VOICE IN A G TO G RELATIONSHIP

The Quality of the Collaboration among Governments

The parties to the SUFA went to considerable lengths to ensure a high degree of collaboration among them on social policy issues. Specific measures included commitments to:

- Undertake joint planning
- Collaborate on implementation of joint priorities through developing joint objectives and principles, clarifying roles and responsibilities and being flexible
- Give one another advance notice prior to implementation of a major change in a social policy
- Offer to consult prior to implementing new social programs and programs that are likely to affect the other parties
- Ensure some degree of funding predictability by having the federal government consult with the other parties at least one year prior to renewal or significant funding changes, and
- Work collaboratively to avoid and resolve intergovernmental disputes.

Participation of Key Stakeholders and Citizens

In addition to the interaction among governments, sound G to G relationships will ensure the active participation of stakeholders and citizens. The SUFA, for example, commits the parties to “work in partnership with individuals, families, communities, voluntary organizations, business and labour and ensure appropriate opportunities for Canadians to have meaningful input into social policies and programs.”

A more concrete example of such collaboration in action is the Governance arrangement for the Canadian Heritage River Systems summarized in *Box 5* on the following page.

Box 5: Canadian Heritage Rivers System

The Canadian Heritage Rivers System (CHRS) was established in 1984 by the federal, provincial and territorial governments to conserve and protect the best examples of Canada's river heritage, to give them national recognition, and to encourage the public to enjoy and appreciate them. It is a co-operative program of the governments of Canada, all 10 provinces, and the three territories.

A 15-member national Board of Directors administers the program. This Board is made up of private citizens and senior officials from government departments responsible for the protection of the Canadian environment (1 member from each of the Provinces/Territories and two members from the federal government – 1 from INAC, and 1 from Parks Canada). The provinces and territories can appoint either an official or a private citizen (presently 3 Board members are private citizens). There has been an increasing trend towards appointing private citizens to the Board (resulting in a greater representation within the board of river advocates). This has been regarded by many as a move in the positive direction (i.e. representation based on a mix between officials and experts/advocates).

The Canadian Heritage Rivers System Charter outlines the Board's mandate. The Charter has no legal effect, although it has been signed by all provinces, territories and the federal government. The Charter has a 10 year life-span (due to expire in 2006), at which point it may be re-enacted. The Charter promotes a cooperative model of governance. The Board reviews guidelines for recognition every two years although, if significant issues arise in the interim, amendments to the guidelines may be made by unanimous Board approval.

Canadian Heritage Rivers are managed in accordance with plans devised by all affected interests with lands along the corridors, including federal, territorial, First Nation, and municipal governments and private landowners. All parties are responsible for managing their portions of the river in the manner agreed to in the management plan. Conditions or restrictions may be attached to land use permits to help meet objectives of the management plan.

The governing structure for the development of the National Building Code, described earlier in the direction section of the paper is yet another example of the creative combination of multiple governments and stakeholders in the development of a key aspect of Canada's construction industry.

Respect for and Valuing Diversity among the Parties

In Canada there has been a long tradition of recognizing the diversity of the provinces and territories in crafting federal, provincial and territorial arrangements. A defining feature of Canadian federalism, for example, has been the fiscal transfer regime which recognizes the need for equalization payments for those provinces with modest revenue generation powers relative to other, richer provinces. Moreover, the fiscal transfer arrangements between the federal government and the territories are quite distinct from those in place vis-à-vis the provinces.

The SUFA also recognizes the diversity of the partners. For example, for any new Canada-wide social initiatives, arrangements made with one province/territory "...will be made available to all provinces/territories in a manner consistent with their diverse circumstances". The Agreement also calls for "flexibility" in the implementation of any joint initiatives.

B. LEGITIMACY AND VOICE IN A FIRST NATION CONTEXT

The first element (the quality of the collaboration among the parties) and the third (respect for diversity) call for special comment in the First Nation context.

Effective Collaboration among Governments

The quality of the collaboration with First Nations and other governments must reflect the special constitutional status of existing Aboriginal and treaty rights protected under Section 35 of the Constitution Act of 1982. Within the last fifteen years, the courts have rendered a number of important judgments, some at the level of the Supreme Court, judgments that have had and continue to have important ramifications for G to G relationships with First Nations. One of the more critical was the Supreme Court decision in *R. v. Sparrow* in 1990. This decision requires that federal and provincial governments justify a proposed infringement (for example, through legislation, regulations or policy) of a constitutionally protected Aboriginal or treaty right. Depending on the circumstances, such justification will include the following elements (this is often referred to as the Sparrow test):

- a valid legislative objective such as conservation;
- minimum infringement on the right necessary to accomplish the objective;
- consideration of whether fair compensation has been paid in an expropriation of a right; and
- provision that, where an allocation of resources is at stake (like wildlife), the Aboriginal right takes priority over all other users after provision for conservation, at least where the resource is for food, social or ceremonial purposes.

Subsequent judgments have further refined what constitutes an Aboriginal right (*R. v. Pamajemon*), and what purposes other than conservation might justify an infringement of an Aboriginal right (*R. v. Gladstone* and *R. v. Adams*). They have also clarified that certain regulatory practices like user fees do not constitute an infringement on an Aboriginal right (*R. v. Cote*).

This trend of important jurisprudence will also have long-term impact on the relationship between Aboriginal peoples and the forest industry. Examples are the judgment of a court in New Brunswick on the right of an Aboriginal person to harvest a valuable species of maple on Crown land, land that had been licensed to a forestry company (*R. v. Thomas Peter Paul*); and the Supreme Court decision in the *Delgamuukw* case. The *Marshall* case, among others, has also been seminal in terms of the interpretation of constitutionally protected treaty rights.

Constructive work on the principles that should underlie consultations has already been accomplished by a recent AFN/INAC Think Tank that also included representatives from the Native Women's Association of Canada and National Association of Friendship Centres.

Calling for a higher consultation standard than has applied in the past – “consultation plus” – the Think Tank proposed a number of principles, outlined in *Box 6*:

Box 6: “Consultation Plus” – Joint AFN/INAC Think Tank

- There is a duty to consult
- First Nations want to be directly involved in decision-making
- We need to ensure transparency, being clear about what we are doing and why we’re doing it
- Citizen engagement is important
- Effective and joint communications about the process and subject matter are critical
- A joint process should be established at the outset, to include strategies for resolving disputes and dealing with anticipated challenges
- The joint process must continue up to and including the legislative process
- Timeframes and First Nation capacity (human and financial resources) must be sufficient to ensure consultations are meaningful
- First Nations will only support a final product that jointly and accurately reflects consultations

Respect for and Valuing Diversity among the Parties

As with provinces and territories, First Nation governments exhibit a high degree of diversity in terms of conventional measures such as size, geographic location, income per capita, educational attainment levels and so on. But in addition, First Nations have historical, cultural and language diversity which sets them apart from one another and from non-Aboriginal society.

Over the past decade and a half there have been a plethora of international and national initiatives in the management of the natural environment to incorporate Aboriginal rights and values along with increased Aboriginal participation. Some of these initiatives include the following:

- **The Rio Declaration** - To which Canada was a signatory and which stated among other things that “Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”
- **United Nations Convention on Biological Diversity in 1992** - Article 8 of the Convention commits the parties to “...as far as possible and as appropriate... (j) subject to national legislation, respect, preserve and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biodiversity and promote their wider application...”.

- **Canadian Biodiversity Strategy** - The product of extensive consultations that included Aboriginal organizations, the strategy points out the need to find mechanisms to implement Article 8 (j) of the Biodiversity Convention. The strategy also references the success of the Beverly-Qamanirjuaq Caribou Management Board in integrating specialized knowledge held by traditional resource users with the scientific knowledge of biologists (this Board was established as a co-management structure in 1982). A final chapter of the strategy outlines three strategic directions that Aboriginal communities can take to implement the Convention: promotion of traditional knowledge; protection of traditional knowledge through, for example, intellectual property rights; and finally cooperation with indigenous groups inside and outside Canada.
- **Canadian Environmental Protection Act** - In the preamble to this legislation, the federal government "...recognizes the integral role of science, as well as the role of traditional Aboriginal knowledge, in the process of making decisions relating to the protection of the environment and human health".¹⁹
- **Canadian Environmental Assessment Act (CEAA)** - The federal government's environmental assessment process as defined in CEAA provides a legal requirement on the part of federal agencies to consult Aboriginal people when undertaking a project, approving project funding or adopting a new policy, law or regulation. In particular, CEAA includes, among the factors that an assessment must take into account, the effects of the project on "...the current use of lands and resources for traditional purposes by Aboriginal persons...".
- **Canada's National Forest Strategy** - The Strategy, developed under the auspices of the Canadian Council of Forest Ministers (CCFM), deals specifically with Aboriginal issues in Strategic Direction Seven, of which two principles are as follows:
 - "i. self-sufficiency of Aboriginal communities through economic development requires increased access to resources and business development support as well as the preservation of traditional activities, and
 - ii. Aboriginal people have an important and integral role in planning and managing forest resources within areas of traditional use."
- **Sustainable Forest Management System** - Published by the Canadian Standards Association in 1996, the Sustainable Forest Management System lays out both the requirements that an owner or forest manager must meet to gain registration and the auditing procedures to be used by the registering organization. A subsection of the standard states in part:

"The Sustainable Forest Management System recognizes that Canadian forests have a special significance to Aboriginal peoples. It further recognizes that the legal status of Aboriginal peoples is unique and that they possess special knowledge and insights concerning sustainable forest management derived from their traditional practices and experience. Aboriginal forest users and communities thus require particular consideration in the public participation process.

Aboriginal peoples who have an interest in or who are affected by forest management in a Defined Forest Area shall be given an opportunity to contribute their special knowledge to the process of setting values, criteria, indicators and objectives. In some cases, this may require a separate process of consultation."

¹⁹ *The Canadian Environmental Protection Act, 1999*, at <http://laws.justice.gc.ca/en/c-15.31/28915.html>

All of these developments – and this is by no means a comprehensive list – suggest an important trend of recognizing and indeed valuing the diversity of First Nation world views and incorporating these in government to government relationships.

C. IMPLICATIONS FOR FUTURE INITIATIVES

The above analysis leads to the following analytical framework for assisting INAC officials in judging future initiatives from the perspective of legitimacy and voice.

Tool III: Legitimacy and Voice in a G to G Relationship

- **The Quality of the Collaboration** – Are there elements to the relationship that mimic those found in the SUFA (joint planning; collaboration on implementation; advance notice of changes; funding predictability; avoidance and prevention of disputes)? Is there recognition of the constitutionally protected Aboriginal and treaty rights? Does consultation reflect the basic principles laid out in the “Consultation Plus” document (transparency of purpose; the establishment of a joint process at the outset; sufficient time frames and First Nation capacity to participate meaningfully; participation through to the legislative process etc.)?
- **The Quality of the Participation of Key Stakeholders and Citizens** – Does the relationship include the participation of other First Nation stakeholders in addition to First Nation governments?
- **Respect for and Valuing Diversity** – Is there recognition of the vast diversity existing among First Nations? Has the role of First Nation traditional knowledge and practices been adequately taken into account? Have Canada’s international and national commitments concerning traditional Aboriginal knowledge and participation been respected?

IV. ACCOUNTABILITY

Accountability is central to a democracy. 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. On a more mundane level, 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 it carries out its functions. They expect, therefore, that their political leaders will be held accountable for their actions.

Another fundamental aspect of accountability is between levels of governments. Usually this accountability relationship is shaped by one level of government providing funds to another through a fiscal agreement to deliver certain programs or services or, more generally, to provide a level of service comparable to other jurisdictions. At first blush, considering how well

established these relationships are, achieving effective accountability should be a straightforward matter. Unfortunately, accountability has an elusive quality to it. Some reasons why:

- Political leaders and their officials are involved in a wide variety of accountability relationships – including to citizens, stakeholders, other governments, outside organizations, media, their own public servants – all of which are related and often pull in opposite directions.
- Accountability arrangements differ markedly from one system of government to another. For example, approaches to accountability in a presidential-congressional system – with its separation of powers, undisciplined political parties, and a “politicized” public service – may be inappropriate in a cabinet-parliamentary system.
- Accountability has a cultural aspect to it: in the Netherlands, the frequency of coalition governments – and the attendant need to build cross-party consensus on policies – has influenced the nature of public sector accountability. Statutes are written in general terms on the understanding that political actors will negotiate implementation.
- Finally, accountability regimes must deal with conflicting values. Controls put in place to ensure financial probity, for example, may conflict with efforts to achieve efficiencies or innovation in the delivery of public services. Accountability, therefore, is about achieving appropriate balance among potentially conflicting objectives.

In the next section we look at some of attributes of a sound accountability relationship, again relying of the SUFA for illustrative purposes.

A. ACHIEVING SOUND ACCOUNTABILITY IN A G TO G RELATIONSHIP

The following appear to be some important points on which to build sound accountability between governments.

Manage the relationship and be aware of the interconnections

Given the importance and elusiveness of accountability, it is not sufficient for one government simply to provide periodic reports to another with serious discussions occurring only at the expiry of a fiscal agreement. Rather, a serious effort is required on all governments to manage their fiscal arrangements on an ongoing basis. At a minimum this would mean adopting long established practices in the conduct of federal-provincial relations: politicians and officials meet regularly in a series of committees to monitor the relationship, identify emerging problems, undertake joint projects for improving information and data management, and initiate studies to address issues of concern. The SUFA, as we already noted, relies on a number of ongoing sectoral structures as well as establishing a new Ministerial body.

Take some of the ‘negativeness’ and hierarchy out of accountability

Accountability carries a negative connotation: control, blame, punishment, culpability are often words used in discussing the outcomes of accountability. Recent commissions of inquiry such as the Krever Commission into the tainted blood scandal and the Somalia inquiry are examples of what appear to be deep-seated urges to fix blame rather than deal with causes. Other

accountability mechanisms such as audit reports and the annual reports of other ‘watch dog’ agencies, while not as extreme as commissions of inquiry in their tendency to highlight culpability, nonetheless come across as negative and critical. These tendencies are aided to a significant degree by competing political parties and the media with their inclinations to amplify criticism.

In addition to negativeness, the traditional notion of accountability – premised on the delegation of authority from one party to another – establishes a hierarchical and therefore an uneven relationship. Control, blame and punishment tend to be natural outcomes of such a relationship.

Some have recognized the problem and are proposing solutions. For example, in a discussion draft of a joint paper by the Office of the Auditor General of Canada and the Treasury Board of Canada entitled “Modernizing Accountability Practices in the Public Sector”, the authors propose the following definition of accountability, which suggests a more consensual relationship between the parties:

“Accountability is a relationship based on the obligation to demonstrate and take responsibility for performance in light of agreed expectations”.

How such a definition might work in practice in a government to government context is illustrated in the SUFA. The Agreement managed to transform a one-sided relationship where the federal government distributed funding to the provinces and territories based on a series of conditions, to one where there are mutual obligations. For example, all governments, not just the recipient governments, are obligated to “monitor and measure outcomes of [their] social programs and report regularly to [their] constituents on the performance of these programs”. Similarly, all governments undertake to have appeal mechanisms for unfair administrative practices and to report publicly on citizen’s appeals and complaints.

Systematize Information Sharing and Transparency

Our good governance principle of ‘accountability’ subsumes the UNDP principle of ‘transparency’: the two concepts are so closely related that it is difficult to separate one from the other. The SUFA recognizes the importance of transparency, and includes significant commitments to improve information sharing, performance measurement, and reporting. In the Agreement, governments agreed to do as follows:

- “Publicly recognize and explain the respective roles and contributions of governments”;
- “Make eligibility criteria and service commitments for social programs publicly available”;
- “Report publicly on citizens’ appeals and complaints, ensuring that confidentiality requirements are met”;
- “Monitor and measure outcomes of ... social programs and report regularly to ... constituents on the performance of these programs”; and
- “Share information and best practices to support the development of outcome measures, and work with other governments to develop, over time, comparable indicators to measure progress on agreed objectives”.

Develop Effective Fiscal Transfer Arrangements

Effective fiscal transfer arrangements are also integral to smooth accountability regimes in the context of G to G relationships. The SUFA makes several important commitments in this regard:

- “When the federal government uses ... conditional [social] transfers, whether cost-shared or block-funded, it should proceed in a cooperative manner that is respectful of the provincial and territorial governments and their priorities”. These initiatives shall furthermore not be undertaken without the agreement of a majority of provincial governments.
- “The Government of Canada will consult with provincial and territorial governments at least one year prior to renewal or significant funding changes in existing social transfers to provinces/territories, unless otherwise agreed, and will build due notice provisions into any new social transfers to provincial/territorial governments”.
- “Governments shall use funds transferred from another order of government for the purposes agreed and pass on increases to residents”.

These three commitments – to cooperation, to consultation and due notice, and to respecting appropriate conditionalities – are the cornerstones of effective fiscal transfer arrangements in federal systems. There are further building blocks to consider, however, as the IOG noted in an comparative study of international best practices relevant to the Canadian federal and Aboriginal context. This study included analysis of systems employed in Sweden, Denmark, the UK, and Australia, as well as in Canada.²⁰ These best practices are summarized in *Annex 4*.

B. ACCOUNTABILITY IN A FIRST NATION CONTEXT

In applying these accountability concepts in a First Nation context, at least two points need to be born in mind.

Reporting

The first is that First Nations already face an enormous reporting burden, which has been poorly planned and coordinated by various federal funders. This has been amply demonstrated by a recent report of the Auditor General, who in December 2002 identified as many as 168 reports that were required of First Nations annually from the four departments most involved in First Nations programming. Furthermore, it was often the case that the reports

- (a) were demanded without community consultation or review of existing requirements
- (b) did not provide relevant information
- (c) did not reflect community needs and priorities
- (d) were not being employed to useful effect by the recipient departments
- (e) did not prompt feedback from the federal government, and
- (f) did not provide adequate information on actual performance or results.

²⁰ Institute On Governance, “Intergovernmental Fiscal Relationships: An International Perspective”, February 24, 1998, at www.iog.ca

Financial Management

A second point is this: transforming accountability relationship into less hierarchical, more collaborative forms will be challenging in the best of times but, even more so, should a significant number of First Nation governments continue to experience financial deficits serious enough to warrant co-management or even third party management.

The example of the Membertou First Nation in Nova Scotia suggests an intriguing alternative to reliance on a top down, hierarchical accountability framework. In January 2002, it became the first native government in North America to receive certification for an international set of business standards by obtaining an ISO 9001:2000 compliance rating. The rating by the International Organization for Standardization, according to Chief Terrance Paul, will ensure accountability, transparency and openness in business.

This example points to an interesting possibility: accountability and governance more generally could be improved through a *voluntary* system, where First Nations would seek to be accredited by a non-profit institute, or certification agency, which would be administered by Aboriginal people.²¹ Incentives for certification would come from three sources: private sector investors and creditors, who would be attracted to the investment opportunities in certified First Nations; the federal government, which could reduce its reporting requirements for certified First Nations; and, most importantly, First Nation community members, who might demand improved financial management and accountability from their leaders.

Such an institute would be set up by a group of prominent First Nations people, and could include members of the Aboriginal Financial Officers Association and the Canadian Institute of Chartered Accountants. It would need start-up, government funding, although applicant First Nations would pay some of the costs of certification. The standard would include various elements, many from the proposed FNGA – ranging from conflict of interest guidelines, codes for leadership selection to conflict resolution processes – and would have varying degrees of complexity, depending on the size of the community involved.

²¹ For more information, see IOG policy brief #8, “Getting the Incentives Right: Improving Financial Management of Canada’s First Nations”, at www.iog.ca

C. IMPLICATIONS FOR FUTURE INITIATIVES

The above analysis suggests the following set of criteria and questions for analyzing future initiatives.

Tool IV: Accountability In a G to G Relationship

- **Managing the relationship** – Are there forums in place or to be established whereby the accountability relationship can be adequately managed?
- **Rendering accountability less hierarchical** – Has the accountability framework been jointly conceived by the various parties? Are there obligations identified of all parties, not just First Nations?
- **Transparency** – Have the roles of the partner governments been clearly defined and made public? Will there be public reporting of results? Will the accountability framework produce information on outcomes? Will there be sharing of best practices among the parties?
- **Fiscal Arrangements** – Are the funding sources available to the parties adequate to allow them to perform their responsibilities? Are funding conditions well conceived and necessary? Will there be adequate notice given of funding changes? Is there agreement that the funds transferred will be used for their intended purpose?
- **Reporting Burden** – Will this initiative increase the reporting burden of First Nations? Will the information be used by the recipient party? Is the information required of First Nations potentially useful to them?

V. PERFORMANCE

Good governance is about both means and ends, about issues relating to both process and performance. To this point in the paper, our focus has been primarily on means – structures and processes to ensure sound collaboration among the parties. But if governance systems are to warrant the label ‘good’ they must also produce concrete goods and services that meet the needs of citizens. And it is to this issue that we now turn.

A. GENERAL CONSIDERATIONS RELATING TO PERFORMANCE

For the purposes of government to government relationships in general, there are four critical performance-related factors worthy of further elaboration:

- Cost Effectiveness
- Harmonization
- Dispute Avoidance and Resolution
- Managing ‘horizontally’

Cost Effectiveness

Any intergovernmental relationship should be judged on whether it achieves its goals in an efficient manner – this ‘test’ is often referred to by the term “cost effectiveness”. In reviewing a new intergovernmental relationship, analysts might look for at least the following attributes of the proposed undertaking: (a) is the objective of the initiative clearly stated and understood by both parties? (b) is there provision for the collection of information on results or outcomes as opposed to inputs? And (c) is there provision for a review of the arrangements at a given time?

The SUFA appears to pass all three tests. There is provision in the Agreement for the roles of the parties to be made public; for the monitoring and measuring of “outcomes of [their] social programs”; and for the conduct of a full review of the Agreement and its implementation by the end of the third year.

Harmonization

Closely related to effectiveness is the degree to which the various governments can harmonize their efforts in areas of overlapping responsibilities. The SUFA deals with this aspect of performance through a variety of means: joint planning; collaboration on implementation; and the opportunity for the provinces to comment on federal initiatives prior to their initiation and implementation.

In the case of the National Building Code, harmonization of building codes among provinces and at the federal level is a key objective of the elaborate intergovernmental mechanisms in place. The Canadian Commission on Building and Fire Codes – the ‘technical’ body that approves changes to the Codes – works hard to generate a consensus, both among its own members and with the Provincial Territorial Policy Advisory Committee (PTPAC). Prior to undertaking any changes, the Commission undertakes an extensive consultation process in close co-operation with the provinces and territories – the intent is to have a single consultation process for changes to both the national and provincial codes.

Dispute Avoidance and Resolution

A certain level of discord is unavoidable in government to government relations. As former Intergovernmental Affairs Minister Stéphane Dion explains:

There will inevitably be disagreements among our federation’s partners. Ottawa will never transfer enough money to satisfy the provinces, and the provinces will never co-operate enough to please all the federal ministers. Federalism necessarily creates a tension among governments – let it be a creative tension.²²

A number of intangible factors also colour G to G relationships, in particular the personal compatibility of the players involved. In many cases leaders from different parties or ideological persuasions have succeeded in working together effectively (consider for example the close relationship of French conservative President Jacques Chirac and German Social Democrat Gerhard Schroeder); however in other cases personality factors have led to difficulties (The

²² Stéphane Dion, “There’s more than one clear voice for unity”, *Globe and Mail*, December 20, 2003.

relationship between former Ontario premier Mike Harris and former Prime Minister Jean Chrétien may have been an example of this).

Throughout the SUFA there are commitments which should reduce the likelihood of disputes including agreements to provide for “information sharing, joint planning, collaboration, advance notice and early consultation, and flexibility in implementation. In the event of a dispute, the Agreement states that the parties will utilize “joint fact-finding” as a dispute resolution device; that a written fact-finding report will be submitted to the governments involved; and that governments may seek the assistance of third parties “...for fact-finding, advice or mediation”.

Managing ‘Horizontally’

The problem of ‘turf’ or the lack of collaboration and cooperation among departments is a long standing one, which, if anything may be getting worse, at least at the federal level. An IOG study completed in the mid 1990s concluded:

“Fixing the problem of turf is no trivial matter. The analysis undertaken in this study to isolate the causes of the problem revealed that turf is deep-rooted. Some 60 contributing factors were identified.”²³

Underlying the complexity of the problem was the large number of recommendations proposed in the report – some 33 – to deal with the turf issue. These fell into the following general themes:

- Developing a collaborative corporate culture, to include a set of values or desired characteristics to guide behaviour
- Having “positive” leadership who “walk the talk”
- Having central agencies provide leadership on the issue of collaboration
- Encouraging leadership of line departments to tackle their issues to include the development of a methodology to diagnose the extent and nature of the turf problem and to develop an action plan
- Developing clearer performance expectations for the public service, expectations that might influence recruitment and promotion, performance appraisals
- Rewarding collaborative behaviour
- Expanding public service skills relating to collaboration through training, career paths etc.
- Encouraging collaborative structures and mechanisms including formal interdepartmental consultations and a whole range of less formal committees, electronic networks and social groups.

One indicator of the need for greater collaboration is the increasing portion of Memoranda to Cabinet (MC) that require the signatures of two or more Ministers. PCO officials recently reported that the percentage of such MCs has been on the rise for years and continues to climb.

²³ Institute On Governance, “Trampling the Turf: Enhancing Collaboration in the Public service of Canada”, a study prepared for the DM Task Force on Horizontal Issues and the DM Task Force on Service Delivery, 1996, www.iog.ca

Poor horizontal collaboration has an obvious impact on the quality of government to government relationships. That said, this was one issue that the SUFA did not tackle head on, perhaps an indication of the increasing difficulties of provinces, territories and the federal government in dealing with turf.

B. PERFORMANCE IN A FIRST NATION CONTEXT

Three of the four issues canvassed above merit commentary in a First Nation context. First, in terms of *harmonization*, this is becoming an increasingly important area in self-government agreements. Many agreements include commitments on the part of the First Nation signatories to meet (or beat) certain provincial or federal standards in jurisdictions they are assuming.

One example in the recently signed agreement with the United Anishnaabeg Councils, a group of seven First Nations in southern Ontario. Among other things they have agreed to adopt laws in the area of drinking water "...equivalent of the relevant Ontario set of standards of the regulation of drinking water." This means not only adopting the equivalent of the Ontario Drinking Water Standards, which outline treatment and quality requirements, but also meeting the equivalent of its standards for:

- Monitoring requirements
- Sampling requirements
- Reporting requirements
- Long-term monitoring and ongoing inspections
- Building and plant commissioning requirements
- Operator requirements (certification)
- Emergency response plans

Standards for source protection (if applicable) should also be put in place. This represents an enormous commitment, not only in the initial implementation stage, but also in the ongoing efforts required to keep UAC standards current in these multiple areas. And this is only one of many such commitments in the area of public works. Building UAC capacity to meet this commitment will be a significant challenge.

With regards to *dispute prevention and resolution*, the federal government and its Aboriginal peoples have become world leaders in designing dispute resolution systems in an intergovernmental context because of considerable experience in crafting claims and self-government agreements.

Part of the challenge of dispute resolution in the Aboriginal context is bridging differing cultural approaches to conflict. Aboriginal perspectives on conflict – and more broadly on the meaning of justice – differ markedly from ‘western’ views. The Aboriginal emphasis is on proactive measures – all of which are contained in traditional teachings about how life should be lived – for maintaining harmony and avoiding conflict. In contrast, western approaches place the emphasis on responding to actual disorder.

In the literature on the subject, there are three broad approaches to dispute resolution commonly identified: power-based, rights-based and interest-based. Benefits for reducing the reliance on power- and rights-based approaches include reduced costs; better quality decisions; greater

satisfaction levels among disputants and the preservation of long-term relationships. There appears to be considerable convergence in the literature on Aboriginal justice to move in a similar direction, that is, to place greater reliance on interest-based approaches, often referred to as alternative dispute resolution (ADR).

There is a wide and growing spectrum of ADR techniques that can be grouped in six categories:

- Preventive ADR – e.g. joint problem solving;
- Negotiated ADR – e.g. principled negotiation techniques;
- Facilitated ADR – e.g. mediation;
- Fact-finding ADR – e.g. neutral evaluation;
- Advisory ADR – non-binding arbitration; and
- Imposed ADR – binding arbitration.

Elders panels and circle techniques are approaches to resolving disputes that have arisen in Aboriginal communities and are being adopted more widely. With the explosive growth in the use of ADR techniques has come a growing literature on the design of dispute resolution systems. Many of these principles resonate well with the findings of the Royal Commission on Aboriginal Peoples in its study of Aboriginal justice.

As the IOG discovered in a major comparative study on this topic, the recent Nisga'a Final Agreement has the most sophisticated dispute resolution system so far designed.²⁴ It would be a good starting point for other negotiating tables. The most significant of the principles derived from this Agreement and some others are summarized in *Box 7* below.

Box 7: Principles for Designing Dispute Resolution Systems

1. Use interest-based approaches wherever possible
2. Develop rights-based mechanisms (e.g. binding arbitration) that are low-cost, flexible and minimize the damage to relationships when interest-based approaches do not work or are not appropriate
3. Provide a clear 'road map' for how the parties move from one stage of the system to the next
4. Ensure that the parties have the necessary knowledge and skills to use interest-based techniques
5. Build in an assessment component to the design process
6. Empower future participants to assist in the design of the system so that it reflects their culture and priorities
7. Recognize the importance of prevention
8. Ensure that the design calls for ongoing maintenance, feedback and reevaluation of the dispute settlement system
9. Keep things simple.

²⁴ See Institute On Governance, "Dispute Resolution Systems: Lessons from other Jurisdictions", March 12, 1999, at www.iog.ca

Finally, in terms of *managing horizontally*, a significant trend has been the increasing number and importance of other federal players dealing with First Nations in addition to INAC. One measure of this trend is the growth in the expenditures of other federal departments in terms of their on reserve programming. Of total federal expenditures of \$8.3 billion in 2002-03 relating to Aboriginal matters, 34 percent were accounted for by other federal departments, up from 31 percent in 1995-96.

The recent changes introduced by Prime Minister Martin may, if anything, complicate the picture even further. There are now three key ministers (Prime Minister Martin, the interlocutor for Métis and non-Status Indians and four Parliamentary Secretaries with identified responsibilities in the Aboriginal area. There is also a new Secretariat in the Privy Council Office. It will be some time before these new systems ‘shake down’ to become workable, as well as familiar to key players in Aboriginal matters.

C. IMPLICATIONS FOR FUTURE INITIATIVES

The above analysis leads to the following set of criteria and questions.

Tool V: Performance in a G to G Relationship

- **Cost Effectiveness** – Are the objectives of the initiative and the roles of the parties clear? Is there a specific commitment to measure and analyze outcomes as opposed to inputs and outputs? Is there a future review or evaluation built into the initiative?
- **Harmonization** – Are there any harmonization requirements that are part of the initiative? Is the complexity of these well understood and are resources requirements to effect these requirements sufficient?
- **Dispute prevention and resolution** – How does the design of the initiative help prevent disputes from occurring? Are there dispute resolution mechanisms in place and if so are these compatible with First Nation world views? Specifically have the design principles for dispute resolution systems outlined above been followed?
- **Managing horizontally** – How significant are the challenges of horizontal management of the parties? What particular measures are contemplated to manage these challenges?

CONCLUSIONS

Government to government relationships are important in any governance system, and especially so in a federation like Canada. As First Nations and other Aboriginal Peoples develop a third order of government within this system, the stakes for all Canadians to get these relationships on a sound footing become only greater.

This paper is based on the premise that governance systems, to be sound, must respond to five principles: direction; legitimacy and voice; fairness; accountability and performance. With few exceptions the Social Union Framework Agreement does just that and consequently has been a major inspiration for this paper. That said, we have attempted to ensure that the unique experience, history and culture of First Nations have significantly influenced both our application of the principles in this context, and our development of the analytical tool to help judge the soundness of new intergovernmental initiatives affecting First Nations. The five panels that make up this tool are displayed together in the Executive Summary.

ANNEX 1

<i>Human Rights and Good Governance Principles</i>		
<i>Good Governance Principles</i>	<i>UNDP Principles</i>	<i>United Nations Universal Declaration of Human Rights</i>
Legitimacy & Voice	Participation	<ul style="list-style-type: none"> • “Everyone has the right to freedom of opinion and expression...” (Article 19) • “Everyone has the right to freedom of peaceful assembly and association” (Article 20) • “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives” (Article 21) • “Everyone has duties to the community...” (Article 29)
	Consensus Orientation	<ul style="list-style-type: none"> • “The will of the people shall be the basis of the authority of government: this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage...” (Article 21) • “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society” (Article 29)
Fairness	Equity	<ul style="list-style-type: none"> • “All human beings are born free and equal in dignity and rights...” (Article 1) • “Everyone is entitled to all the rights and freedoms set forth in the this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2) • “Whereas the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (Preamble)
	Rule of Law	<ul style="list-style-type: none"> • “Whereas it is essential ...that human rights should be protected by the rule of law” (Preamble) • “All are equal before the law” (Article 7) • “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal...” (Article 10) • “No one shall be subjected to arbitrary arrest, detention or exile” (Article 5) • “No one shall be arbitrarily deprived of his property” (Article 17)

ANNEX 2

TAIAIAKE ALFRED'S CHARACTERISTICS OF STRONG INDIGENOUS COMMUNITIES

Wholeness with diversity. Community members are secure in knowing who and what they are; they have high levels of commitment to and solidarity with the group, but also tolerance for differences that emerge on issues that are not central to the community's identity.

Shared culture. Community members know their traditions, and the values and norms that form the basis of society are clearly established and universally accepted.

Communication. There is an open and extensive network of communication among community members, and government institutions have clearly established channels by which information is made available to the people.

Respect and trust. People care about and co-operate with each other and the government of the community, and they trust in one another's integrity.

Group Maintenance. People take pride in their community and seek to remain part of it; they collectively establish clear cultural boundaries and membership criteria, and look to the community's government to keep those boundaries from eroding.

Participatory and consensus-based government. Community leaders are responsive and accountable to the other members; they consult thoroughly and extensively, and base all decisions on the principle of general consensus.

Youth empowerment. The community is committed to mentoring and educating its young people, involving them in all decision-making processes, and respecting the unique challenges they face.

Strong links to the outside world. The community has extensive positive social, political, and economic relationships with people in other communities, and its leaders consistently seek to foster good relations and gain support among other indigenous peoples and in the international community.

Source: Taiaiake Alfred, *Peace, Power, Righteousness: an Indigenous Manifesto*, Oxford University Press, Don Mills, 1999 p. 82.

ANNEX 3

ATTRIBUTES OF ABORIGINAL TRADITIONS OF GOVERNANCE

THE ROYAL COMMISSION ON ABORIGINAL PEOPLES

The centrality of the land – For many Aboriginal peoples, the land, which encompassed not only the earth but water, the sky, all living and non-living entities, is the source and sustainer of life. People must act as stewards of the earth.

Individual autonomy and responsibility – Individuals have a strong sense of personal autonomy coupled with an equally strong sense of responsibility to the community.

The rule of law – For many Aboriginal peoples, the law is grounded in instructions from the Creator or in a body of basic principles. Any failure to live by the law is an abdication of responsibility and a denial of a way of life.

The role of women – In many Aboriginal societies, women's roles were significantly different from those of men in governance. According to the Commission, women must play a central role in the development of self-governing entities.

The role of elders – Elders are the trusted repositories of learning on history, medicine and spiritual matters. Their roles include making of decisions on certain matters, providing of advice and vision, and resolving disputes.

The role of the family and the clan – Traditionally, the family or clan constituted the basic unit of governance for many Aboriginal peoples.

Leadership and accountability – For many Aboriginal societies, especially those that placed little value in hierarchy, leaders were chosen and supported by the entire community and held little authority beyond that earned through respect. Accountability was an ingrained feature of this pattern of leadership.

Consensus in decision-making – Many Aboriginal people speak of the principle of consensus as a fundamental part of their decision-making processes.

Source: *Report of the Royal Commission On Aboriginal Peoples, Volume 2, Part One*, P. 115 – 139.

ANNEX 4

STRUCTURING EFFECTIVE FISCAL RELATIONSHIPS AMONG GOVERNMENTS: SOME INTERNATIONAL LESSONS²⁵

The study came to the following conclusions:

- a. *There is no ‘one best way’ or magic formula* on which to base a fiscal relationship between levels of government. Economic principles and international best practices can be helpful guides but political and historical factors may be as, or even more, important in forging the fiscal relationship.
- b. *Revenue equalization approaches are relatively straightforward* – the tax system generates up to date and reliable data and the relationships between tax and ‘capacity to pay’ is direct. One contentious area is the degree of equalization and whether a ‘Robin Hood’ model (i.e. where tax rich jurisdictions transfer funds to tax poor jurisdictions) is employed.
- c. *Equalization mechanisms should provide an incentive for raising own source revenue* by using tax potential (as opposed to actual taxes raised) and a standard tax rate as the main equalizing variables.
- d. *Establishing a robust set of own source revenues for local/regional governments is of prime importance.* Indeed, it is likely no coincidence that the Scandinavian countries, with the largest portion of own-source revenue, appear to have the most viable partnership arrangements between the various tiers of government. The apparent impracticality of having a tax on business income (a so-called ‘mobile’ factor) at the local level in the Scandinavian countries may also be instructive in the Canadian context.
- e. *Expenditure equalization, in contrast to revenue equalization, appears to be fraught with political controversy,* for a variety of reasons:
 - some indices are at best proxies for what is being measured;
 - data is often out of date or not available;
 - the mathematics becomes complicated (the use of statistical regression techniques, for example);
 - and, more fundamentally, cost differentials between jurisdictions are sometimes difficult to understand or explain.

The result is that expenditure equalization has two, somewhat contrasting characteristics: it is on the one hand highly technical and yet, on the other, highly political. All four countries making up the case studies have employed institutional mechanisms to deal with these controversies from parliamentary commissions to regular ‘negotiating’ fora between levels of government to an ongoing advisory body as in Australia – the Commonwealth Grants Commission. Given the nature of the exercise – dividing a fixed amount of funds among a fixed number of entities – that lies at the heart of a fiscal arrangement, the controversy will be ongoing and will likely be more severe in those case where the own source revenues are relatively minor. Furthermore, expenditure equalization should be attempted only if there is a high degree of consensus around the basic principle of expenditure equity.

²⁵ For the full study, see IOG, “Exploring Machinery Options in Support of Intergovernmental Fiscal Relationships”, 1998, at <http://www.iog.ca/publications/machineoptions.pdf>

- f. *Fiscal transfer mechanisms create continual tension between the principles of simplicity and equity.* In other words, attempts to achieve greater equity invariably lead to higher levels of complexity. Conversely, attempts to realize greater simplicity result in ‘cruder’, and to many, less satisfying approximations of equity.
- g. The experience of the countries making up the case studies suggests that *the borrowing of funds by new local/regional governments should be part of any fiscal arrangements agenda.*
- h. *The case studies have revealed a wide variety of mechanisms to enhance accountability.* Some of these that are worthy of consideration in the Canadian context are:
- an ombudsman (the UK);
 - a common auditing commission (the UK);
 - a mechanism or mechanisms for gathering and reporting performance indicators and doing comparative analysis (the UK, Sweden);
 - a mechanism for creating greater transparency in regards to borrowing (Australia).
- i. *The case studies also reveal a continuing ‘tension’ in the degree to which the central governments ‘control’ or influence the activities of local/regional governments.* Such control and influence can come in the form of conditional grants (the importance of these are on the upswing in two cases – the UK and Australia – and on the opposite cycle in the Scandinavian countries) and through legislation passed by the central governments in unitary states through which they can control to a high degree the activities of local/regional governments. Like expenditure equalization, there appears to be no ‘equilibrium’ point; rather, a continuous cycle from more controls to fewer controls to more controls appears to be the norm. All of this points to the importance of establishing a robust set of mechanisms similar to those outlined in point h) above so as to avoid more intrusive ‘control’ mechanisms, a development which would not be in the best interests of either the federal or local/regional governments.
- j. *Another contentious point in any fiscal relationship between levels of government is the determination of the total amount to be transferred to all local/regional governments.* In all four cases, the central government determines this amount as part of their budget process but in different ways – in the UK, the amount is a function of a set of published factors; in Denmark, there is reliance on a set of principles, backed up by a joint forum for discussing the issue; and in Australia, the amount is determined at an annual Premiers’ conference. The Danish approach may be worthy of careful consideration in the Canadian context.
- k. *An important conclusion to be drawn from the case studies is that the size or scale of local/regional governments appears to matter.* One of the spin-off benefits of expenditure equalization systems is that countries get a better, albeit imperfect, sense of the factors driving the cost of services in the public sector. And the number of inhabitants within a single jurisdiction and their geographic dispersion appear to be important factors. In the three unitary countries (UK, Denmark, and Sweden) there has been a trend toward reducing the number of local governments based to a large degree on questions of scale and efficiency.
- l. *In the Scandinavian countries, a staged implementation of an overall transfer system over several years with set parameters on the degree to which transfers could change from one year to the next has been an effective implementation strategy.* The Danish and Swedish experience suggests that a more incremental approach to implementing change might have resulted in more opposition and have been less successful.

- m. *Another element in the implementation of the transfer systems in the Scandinavian countries has been the use of legislation to set out the major elements of their system., including the factors, their weights and the methods of calculation. In contrast, Australia and the United Kingdom have put only their institutional elements of their systems into legislation.*
- n. *The Danish approach to achieving a high degree of budget security for local authorities by giving them the option of opting for a guaranteed tax base and associated equalization amount, based on the most recently completed fiscal year is worthy of possible emulation in the Canadian context. Under this option, the central government assumes the risk, should the tax base declines but also reaps the benefits, should the tax base rise.*
- o. *A final conclusion relates to the importance of establishing an ongoing process or mechanisms for managing the fiscal relationship, given the inherent problem of dividing a fixed sum among a number of competing entities. The case studies point to two distinct models – the Australian approach of establishing a ‘neutral’, non-political agency to help the players manage the contentious issues or the Scandinavian approach, based more on a negotiating model. Both of these models have precedents in the Canadian federal-Aboriginal relationship.*