

**THE FIRST NATIONS GOVERNANCE ACT:
IMPLICATIONS OF RESEARCH FINDINGS
FROM THE UNITED STATES AND CANADA**

A Report to the
Office of the British Columbia Regional Vice-Chief
Assembly of First Nations

by

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Executive Summary

In the spring of 2002, the Office of the British Columbia Regional Vice-Chief of the Assembly of First Nations (AFN) asked the Native Nations Institute for Leadership, Management, and Policy at The University of Arizona to provide that office with an analysis of the First Nations Governance Act (Bill C-61). In particular, AFN asked us to evaluate the proposed legislation from the point of view of the research findings of the Harvard Project on American Indian Economic Development. From that viewpoint, what appear to be the strengths and weaknesses of the proposed legislation?

Harvard Project research indicates that sustainable economic development on indigenous lands depends on, among other things, three factors:

Practical sovereignty (genuine decision-making power over internal affairs, governance, resources, institutions, development strategies, etc.);

Capable governing institutions (governing institutions capable of exercising power effectively, responsibly, reliably);

Cultural match (a fit between the formal institutions of government and indigenous conceptions of how authority should be organized and exercised).

Also important to sustainable development are *strategic thinking* and *leadership*.

The First Nations Governance Act (FNGA) addresses a number of legitimate matters involving accountability, transparency, effectiveness, and other aspects of governance. However, with the above findings in mind, our review of the FNGA leads us to the following conclusions.

- Despite the stated concern with self-governance and with helping First Nations develop effective tools of self-governance, what is most striking to us is the degree to which matters of governance in the FNGA are *not* left to First Nations' discretion. The provisions of the FNGA make us question the extent of the federal government's commitment to indigenous *self*-governance.
- We also are concerned by the time frames set by this legislation. In effect, it asks a First Nation to produce a government in two years—a complex task for any society and one which involves not only the design of institutions but internal dialogue and the resolution of internal disputes. What impact will the timetable have on the quality and effectiveness of the resulting institutions and on the degree of support they win from indigenous communities?

- We believe the Canadian government is in danger of following a common but flawed approach to governmental decentralization: develop a template for government and then impose it on local communities. This process ignores diversity across local communities, ignores the fact that communities are more likely to support institutions that they help create, and often leads to governments local communities do not want and do not support.
- The Canadian government appears to have responded very favorably to Harvard Project findings on the need for good governance in indigenous communities but to have largely ignored Harvard Project findings on the need for indigenous communities to have real jurisdictional power. Unfortunately, good governance without sovereign powers is about as likely to be effective in improving the welfare of First Nations as sovereign powers are without good governance. Our research indicates that the two have to go together.
- The FNGA pays a great deal of attention to issues of accountability. However, decision-making and accountability are linked. If the federal government wants to hold indigenous nations accountable for what happens, then it has to vest those nations with genuine decision-making power. If, on the other hand, it wants to retain decision-making in its own hands, then it must bear primary responsibility for outcomes.
- We are concerned that the FNGA pays insufficient attention to diversity among First Nations. Research in the United States emphasizes that the legitimacy of governing institutions with their own peoples depends significantly on the fit between those institutions and indigenous political culture: that is, “cultural match.” But neither cultural match nor legitimacy receives significant attention in the FNGA. The legislation appears to believe that significant portions of First Nations government should be organized according to a single template, applied indiscriminately to all First Nations. Judging from the U.S. experience, this is not a successful recipe either for good governance or for effectively responding to “the particular needs and aspirations” of diverse indigenous peoples.

To summarize: We see three general reasons to doubt that the FNGA will achieve its stated objectives. First, it largely ignores jurisdictional issues. Second, in specifying details of government structure and practice and compelling First Nations to adopt those details, the legislation undermines the very idea of self-governance, which—in our view—includes the task of designing effective governing institutions that fit community ideals. Third, the one-size-fits-all approach that characterizes much of the legislation neglects diversity of cultures and circumstances and raises serious issues of legitimacy.

Despite the stated purposes of the FNGA, we find we are a little uncertain what the Canadian government’s objective really is. Does it wish simply to improve administrative and electoral practices among First Nations? Or does it wish to assist

those nations in moving out of dependency and poverty and creating viable, sustainable economies?

If the objective is the latter, then we believe two things are necessary. First, there will have to be a transfer of substantial constitutional authority and decision-making power to First Nations. Second, the government will have to invest in First Nations' own efforts to build capable governing institutions. This would mean providing First Nations with assistance in nation building, with useful (and diverse) models as sources of inspiration and ideas, and with the freedom—fully understanding what good governance means—to decide for themselves how to govern.

Effective governance is not simply a matter of establishing good government practices. It is a matter also of enlisting citizens as willing, active participants in the effort to build societies that work, empowering them to build those societies in their own ways, and making them feel that the future, to a significant degree, is in their hands.

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**THE FIRST NATIONS GOVERNANCE ACT:
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Stephen Cornell, Miriam Jorgensen, and Joseph P. Kalt¹

I. Background

In the spring of 2002, the Office of the British Columbia Regional Vice-Chief of the Assembly of First Nations (AFN) asked the Native Nations Institute for Leadership, Management, and Policy at The University of Arizona to provide that office with an analysis of the First Nations Governance Act (Bill C-61) under consideration by the Canadian parliament. In particular, AFN asked us to evaluate the proposed legislation from the point of view of the research findings of the Harvard Project on American Indian Economic Development.² Given that Project's extensive work on Native governance and development in the United States and its growing body of work in Canada, what appear to be the strengths and weaknesses of the proposed legislation?

In what follows, we first summarize the findings of the Harvard Project on American Indian Economic Development (the Harvard Project). We then briefly consider the differences between the situations of indigenous peoples in the U.S. and Canada and their implications for Harvard Project research results. In the bulk of the document, we then offer our view of the legislation in terms of Harvard Project research findings and the U.S. experience. We also offer a few thoughts about alternative approaches to fostering indigenous self-governance.

We should make one disclaimer before proceeding. Our work in both the U.S. and Canada is focused on economic development and governing institutions. We are not legal scholars and have no particular expertise in Canadian law as it applies to First Nations. This analysis does not directly address legal matters, and we do not attempt to evaluate the relationship between this legislation and other legislation, including the Indian Act and the Constitution Act of 1982, or between this legislation and the various treaties established between the Crown and Aboriginal peoples.

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² The Native Nations Institute (NNI) is substantially an outgrowth of the Harvard Project; the two organizations share fundamental objectives and some staff.

II. Harvard Project Research Findings

In 1986, two of us, then professors at Harvard University—Stephen Cornell, a sociologist now at The University of Arizona, and Joseph P. Kalt, an economist still at Harvard—organized a research project designed to answer a single question: Why are some American Indian nations more successful than others at building sustainable economies on Indian lands? Over the years, the Harvard Project on American Indian Economic Development has grown in scope and activity, becoming the most comprehensive effort ever undertaken to understand the dynamics of sustainable economic development on American Indian reservations. It also has led to the founding of a sister organization—the Native Nations Institute for Leadership, Management, and Policy (NNI)—at The University of Arizona. Research, executive education for indigenous leaders, and collaborative work with indigenous nations form the core activities of the Harvard Project and NNI, which continue to work closely together.

For sixteen years now, Harvard Project and NNI researchers have been engaged in systematic, comparative research on American Indian reservation economic development. More recently, we have been doing a growing amount of work on First Nations development and governance issues in Canada. Our research has included field-based case studies, statistical analysis of large data sets, policy-specific analytical work, and numerous on-the-ground collaborative projects with Indian nations. It also has led to a large number of publications, research reports, policy papers, and presentations that have been widely disseminated to policy makers at tribal and federal levels and to interested parties—including indigenous peoples and national governments—in other countries.³

At the core of this work lies a set of key research findings. It turns out that the best predictors of reservation economic success are not natural resource endowments, high levels of educational achievement, location near a major metropolis or transportation link, or other, classically “economic” factors. Such factors are helpful, but they are far more likely to pay off where a different set of elements is already in place. The first three of these are supported by extensive, systematic research across a diverse array of indigenous nations.

- ***Practical Sovereignty*** – The Indian nation has taken effective control of reservation affairs, resources, institutions, development strategies, and the like: in short, genuine decision-making power over matters of substance has moved into indigenous hands;
- ***Capable Governing Institutions*** – The Indian nation has backed up jurisdictional power with governing institutions capable of exercising that power effectively, responsibly, and reliably. This typically means, among other things, that it has developed a reliable and politically independent court system, has decoupled

³ A partial list: Cornell and Kalt (1992, 1995, 1997, 1998, 2000), Kalt (1996), Jorgensen (2000), Jorgensen and Taylor (2000), Begay et al. (forthcoming), Cornell et al. (1998), Cornell and Gil-Swedberg (1995), Cornell (2000), Harvard Project on American Indian Economic Development (1999, 2000).

- politics and business management, and has developed the ability to make and implement decisions in a timely fashion;
- ***Cultural Match*** – There is a fit between the formal institutions of government and indigenous conceptions of how authority should be organized and exercised, thus winning the support of the community for the institutions themselves.

Less systematic research and a large body of field evidence indicate that two additional factors also are important to indigenous nations' success.

- ***Strategic Orientation*** – The Indian nation has moved away from crisis-management and opportunistic, quick-fix responses to development dilemmas and toward long-term decision-making that incorporates community priorities, concerns, circumstances, and assets; and
- ***Leadership*** – There is some group or set of individuals who are willing to break with *status quo* practices in development and governance, can articulate a new vision of the nation's future, and can both understand and effectively encourage the foundational changes that such visions require.

The evidence is persuasive that where these five elements are in place, natural resources, education, location, financial capital, and other assets begin to pay off. Where they are absent, such assets are more often squandered, failing to deliver sustainable economic performance or lasting improvements in community welfare.

We refer to the process by which a community puts these elements in place and mobilizes them into the development effort as “nation building.” Nation building refers to enhancing the foundational capacity for effective self-rule and for self-determined, sustainable, economic and community development, and our research shows it to be as effective as it is necessary. Tribes as diverse as the Northern Cheyennes in Montana, the Navajo Nation in Arizona, the Winnebago Tribe of Nebraska, the Citizen Potawatomi Tribe in Oklahoma, and the Grand Traverse Band of Ottawa and Chippewa Indians in Michigan have taken practical, nation-building steps that today are producing concrete economic and social benefits for their peoples.

These findings can be captured in a “development pyramid” (see Figure 1, following page). The pyramid represents graphically a simple set of connections: indigenous economic success depends (in part) upon the implementation of thought-through policies that reflect strategic thinking backed up by capable, culturally appropriate governments that exercise real decision-making power.

III. Canada-U.S. Differences

It would be fair to ask at this point whether research findings drawn largely from the United States have any relevance in Canada. Admittedly, there are significant differences between the situations of Native peoples in these two countries. Some of these differences are directly addressed by Harvard Project research. For example, tribal jurisdiction, while under recurrent attack in the United States, is substantial there; for the

most part, American Indian nations are the primary decision-makers on American Indian lands. Canadian First Nations enjoy much less substantive power. Harvard Project research speaks directly to this issue, suggesting that expanding First Nations' jurisdictional power and reducing the ability of non-indigenous governments to control what First Nations do would raise the likelihood of sustainable economic development on reserves.

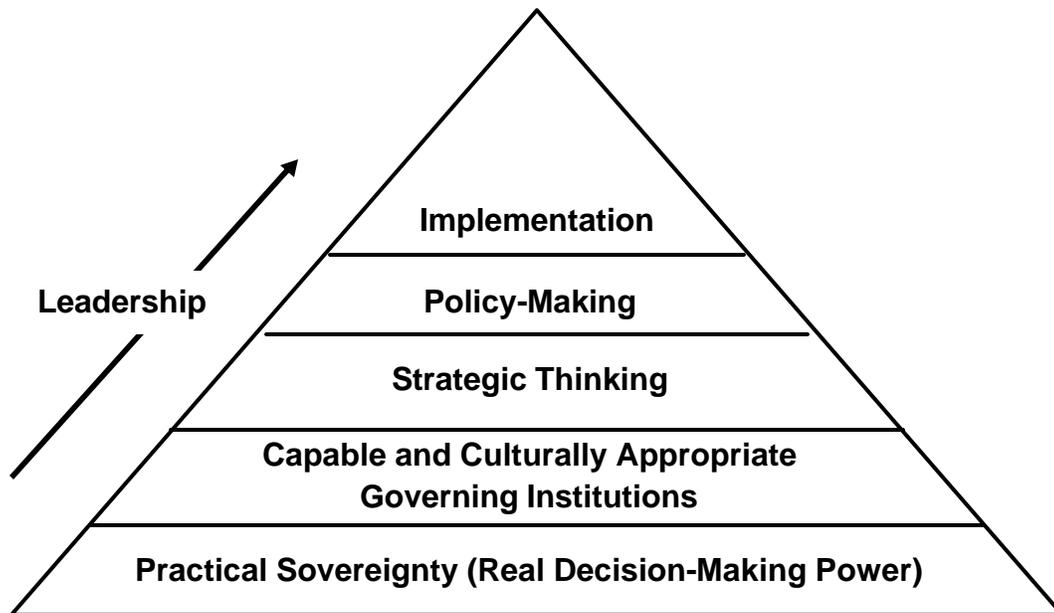


Figure 1. The Development Pyramid

Other differences also appear potentially important. Among them are the following:

- **Demographics** – While the United States has a number of Indian nations with very small populations, particularly in Alaska and California, U.S. Indian nations generally are larger than First Nations in Canada.
- **Land Base** – Similarly, many more Indian nations in the United States than in Canada have large land bases that can be used for development and other purposes.
- **Location** – More First Nations in Canada are isolated in areas far from markets and major transportation links. In this, the Canadian situation more closely resembles Alaska than the rest of the United States.

With some exceptions, our research has not as systematically addressed these issues; nonetheless, the work we have done is suggestive. There is substantial evidence, for example, that neither small land bases nor isolated locations necessarily shut down development. Cases of successful development from Alaska, Mississippi, Oklahoma, and parts of Canada, among others, illustrate the fact. Population size may be more important because of the limited human capital pool for government and other activities, and surely the combination of all three—small populations on small land bases in isolated areas—presents a particularly difficult development challenge. But we also see cases in which population size does not prevent indigenous nations from producing effective government and improving development outcomes. Institution-sharing within cultural or ecological boundaries, for example, is one solution to the problem of scale.

Furthermore, the cases we have looked at most closely in Canada, such as the Ktunaxa-Kinbasket Tribal Council and the Metlakatla, Gitga'at, and Mikisew Cree First Nations, support the core findings of our U.S. research. In Canada, as in the U.S., assertions of self-governing power, backed up by effective governing institutions that have the support of their peoples, are producing significant results.

IV. An Evaluation of the First Nations Governance Act

The First Nations Governance Act, by its own account, sets out to support indigenous self-governance. We find two items in the Preamble to the legislation particularly notable. First, it says that the Canadian government recognizes “the inherent right of self-government as an aboriginal right.” Second, it twice refers to “tools of governance.” It argues that effective tools of governance are required by First Nations and that they “have not been historically available under the *Indian Act*.” These statements appear to place the Canadian government on the side of indigenous self-rule while also making clear that First Nations’ governing capabilities are a matter of central federal concern.

The legislation goes on, under “Purposes” (Section 3), to establish three objectives. First, it is intended “to provide bands with more effective tools of governance on an interim basis pending the negotiation and implementation of the inherent right of self-government.” Second, it is intended “to enable bands to respond more effectively to their particular needs and aspirations.” Third, it is intended to assist bands in designing and implementing “their own” leadership selection, administrative, and financial management and accountability regimes, “while providing rules for those bands that do not choose to do so.” These statements reveal a further federal concern with *how* First Nations govern.

These strike us on the whole as admirable purposes. Certainly our research in the United States and Canada supports the focus on indigenous self-rule, showing that indigenous nations that operate largely under the control of outsiders such as the federal government are likely to remain impoverished. In short, self-rule is a key element in improving indigenous welfare.

The critical question—and the question we address in this report—is this: *Is the legislation as presented likely to achieve these goals?* Predicting outcomes is a risky business, but, for reasons laid out below, we are skeptical that it will do so.

What the FNGA Does and Does Not Do

What is most striking to us is the degree to which matters of governance in the FNGA are *not* left substantially to First Nations' discretion. For example, among other provisions, the legislation requires First Nations to develop and adopt certain kinds of codes, imposes its own codes on those who fail to do so within a specific time frame, specifies conditions for the adoption of codes, requires that a majority of council members be elected, specifies the style of balloting for elected councilors, makes the Minister the ultimate arbiter of election disputes, limits terms of office, prescribes how often public meetings must be held, requires publication of financial statements by a specific date, establishes limits on punishment for breaking band laws, specifies a grievance process that bands must adopt, indicates who can use that process, and specifies at least part of the relationship of non-member reserve residents to First Nations governments.

These are weighty matters. We also recognize that they are legitimate matters of interest not only to First Nations but to the Canadian government as well. Governments of any sort should think and worry about such things, and what they do in these areas will have significant impacts on them and their citizens. We also cannot claim to know, at this point, just what any particular government should do in such areas.

Taken together, however, these and other specifications in the FNGA make us question the extent of the federal government's commitment to indigenous *self*-governance—or, at the very least, make us wonder what “the right of self-government” means under these conditions. Does it mean that a First Nation will be allowed only to run a government that fits the federal template, but not—despite the words in Section 3(c)—to develop a government of its own design? That appears to be the case.

We also are concerned by the time frames set by this legislation. In effect, it asks First Nations to produce a government in two years. While it tells them a good deal about what that government should look like, they still face the tasks of doing the detailed work, resolving internal differences—as in any society, there are bound to be some—and producing a workable, effective model. They have to do all this with limited human capital and other resources. Of course some First Nations already have effective governments in place, but we assume that many will face significant revision of governmental institutions and practices or wholesale institution building from the ground up. These are complex tasks for any community—Native or non-Native. What impact will the timetable have on the quality and effectiveness of the resulting institutions and on the degree of support they win from indigenous communities?

In addition, we notice certain things the FNGA does not address. Certain functions, such as the making of laws, the making of policy, the resolution of disputes, and the implementation of governmental decisions, are critical for any government. The

FNGA addresses some of these. Perhaps the critical missing element is dispute resolution. The legislation does provide a grievance process for band members and non-member reserve residents with complaints against the band. Here, as throughout much of the legislation, the focus is on the accountability of band government. But it makes no mention of First Nations courts or other means of resolving internal disputes other than complaints against the band, of adjudicating constitutionality, of resolving policy conflicts or disputes between portions of band government, of interpreting the law, and so forth. We are not suggesting that the FNGA should specify how such functions should be carried out; such specifications are exactly the sorts of things in which we believe First Nations should be deeply involved. But the lack of attention to such topics encourages an impression of self-government as a rather truncated business, modest in its scope and ambitions. Will such issues be addressed in future legislation? What role will First Nations play in addressing them? Or are they not being considered part of First Nations self-government?

What Is Self-Government? Constitutional Authority and Jurisdictional Power

But there are some broader issues here that take us beyond the specific provisions of the Act. The problem of building capable government at the local level is a classically difficult one, in part because it is so often approached not as community-based process emerging from below but as an imposed process developed from above. In his study of local governance, Ronald Oakerson (1999, p. 120) points out that “decentralizers tend to see their task as one of creating a definitive set of regional and/or local governments. This requires them to choose a uniform plan of local-government organization, which is then imposed on local communities.”

This approach tends to ignore a crucial reality: there is enormous variety across communities—including First Nations communities—in circumstances, history, and culture, including people’s preferences about how they wish to govern and be governed. When communities are allowed to make their own decisions about institutional form, this rich variety tends to produce diverse governmental structures and practices. To the reformer, this often looks inefficient, but it is more rational than imposed uniformity because it takes citizen choices into account at the local level, which is where decentralized government has to perform. In fact, imposed uniformity is often the less efficient course to take because of its tendency to undermine—instead of facilitate—local governance. As Oakerson points out (p. 117), “uniform decentralization schemes undertaken in various parts of the world often result in local governments that locals do not want and in which they refuse to participate.”

This is what happened in the United States in the Indian Reorganization Act of 1934 which, while allowing Indian nations to establish local governing units, specified the form those units should take and the process by which they should be established. It began by assuming that the basic organizational structure of American democracy was ideal for everyone; it created a version of that structure designed by the federal government for Indian nations; and it organized an adoption process that, while paying

lip service to Native decision making, in effect imposed this structure on Native communities. The result was governing structures that for the most part ignored indigenous political culture and community organization. Many of these structures subsequently proved incapable of governing effectively, in part because they had no legitimacy with the people they were intended to govern.

But these structures faced another problem as well. They had very little power. The Indian governments created under the Indian Reorganization Act in the United States were not allowed to decide much of significance. Largely toothless, they became tribal arms of what remained, in effect, a federal administrative apparatus.

This was intentional. The designers of the legislation saw the fledgling tribal governments that they hoped to bring into being as vehicles not of self-rule but of assimilation, as mechanisms by which Indian communities could be transformed into only slightly different versions of other American communities, and Indian individuals could learn to participate in the larger American polity as anyone else would (Spicer 1962; Dobyns 1968; Collier 1954). The years from 1934, when the legislation was passed, until the 1960s were not years of tribal power but of tribal frustration with the continuing controls exerted by Washington, which was loath to put real power in the hands of Indian nations and continued to insist that it knew what was best for its “red brethren.”

In the 1960s, Indian nations finally began to shake off the federal leash and demand the power to run their own affairs. Under enormous pressure and after a decade of uproar in Indian Country, in 1975 the federal government passed the Indian Self-Determination and Education Assistance Act, allowing Indian nations to contract with the Bureau of Indian Affairs and other agencies to deliver services previously delivered by those agencies.

This was, in fact, a modest change, amounting to a shift in administrative function from Washington to tribal centers while the programs themselves were still designed in Washington and ultimately controlled by the federal government. But some Indian nations took the federal government at its word. They assumed that “self-determination” meant real decision-making power, and they acted accordingly, excluding federal administrators from tribal government meetings, taking over resource management, redesigning programs to fit their needs and circumstances, taking over their own court systems, passing their own laws, and asserting jurisdiction not only over lands but over expanded tribal policy domains.

What’s more, their assertiveness worked. Not everywhere: self-determination had to be backed up by capable, responsible governance if it was to improve tribal welfare, and some tribes were unable to deliver on this part of the deal. Tribal courts, for example, had to be made genuinely independent of tribal legislatures and executives if they were to yield developmental rewards; to this day, some Indian nations have been unwilling to implement such separations of powers. But it also turned out that without genuine decision-making power—without broad governing jurisdiction—simply

developing “good governance” institutions wouldn’t accomplish much. Good governance without sovereign powers was about as effective as sovereign powers without good governance: the two have to go together.

Where they did, the results were startling. After half a century of failed attempts to deal with persistent Indian poverty and reservation social problems, the federal government of the United States had inadvertently stumbled onto the core element in a long-term solution: let Indian nations call the shots. This had two crucial effects: it replaced the priorities of Washington bureaucrats with tribal priorities in decision-making, and it coupled decisions and their consequences. Prior to the move toward self-determination, Washington policymakers could impose their own priorities on Indian Country and, if their priorities and programs turned out to be inadequate, poorly designed, or simply wrong, escape the painful effects, which were visited instead on tribes. That changed. Federal decision-making without bearing the consequences (alternatively: decision-making for tribes without accountability to tribes) had finally been replaced. For the first time, the decision-makers would pay the price of wrong decisions and reap the rewards of good ones. This dramatically improved the quality of the decisions.⁴

While success has not been universal—the good governance imperative remains, and other factors also play a role—this increase in tribal constitutional and decision-making authority is the only federal policy in more than half a century that has had *any* sustained, positive effect on socioeconomic conditions in Indian Country. Self-determination—moving substantive jurisdiction and decision-making power into tribal hands—is *the only anti-poverty policy that has worked*.

Over the last five years or so, the Canadian government has shown considerable interest in the research results of the Harvard Project. Our impression, however, is that they have responded more to our findings on good governance than to our findings on practical sovereignty. The FNGA appears to confirm this. Urging First Nations to adopt specific good governance practices may appear to be less risky than transferring real constitutional authority to First Nations so that they can build governments of their own design. Fair enough: who knows what kinds of governments First Nations would build? But why not do both: transfer constitutional authority while at the same time identifying—not mandating—effective ways that key governance problems can be solved? Our concern arises from the demonstrable fact that, as Oakerson suggests in the quote we gave above, government practices legislated from outside are less likely to win support from communities they govern than those created from within. Without such support, they are unlikely to perform well.

We worry that, in stating its support for First Nations self-governance while at the same time imposing specific governmental forms on First Nations, the federal

⁴ It also underlines a key point: decision-making and accountability are linked. If the federal government wants to hold indigenous nations accountable for what happens, then it has to vest those nations with genuine decision-making power: i.e., practical sovereignty. If, on the other hand, it wants to retain decision-making in its own hands, then it must bear primary responsibility for outcomes.

government of Canada may be making the same mistake the United States did. In focusing so much on the details of First Nations' administrative and electoral practices—and specifying what those practices should be—is the FNGA missing an opportunity to assist First Nations in empowering themselves through creative and productive nation building?

Does One Size Fit All?

Governmental Form and Political Culture

Harvard Project research emphasizes the significance of the match between formal institutions of governance on one hand and indigenous political culture on the other. This “cultural match” appears to play a major role in the effectiveness of governing institutions. Where cultural match is high, governing institutions are more effective and communities fare better.

One of the reasons for this phenomenon is the effect of cultural match on the legitimacy of governing institutions among those they govern. Institutions that the community views as illegitimate—as representing not the community's beliefs, principles, and aspirations but someone else's—enjoy less community trust, have greater difficulty mobilizing community support for their actions, and are more likely to be abused by self-serving or corrupt leadership.

Neither cultural match nor legitimacy receives significant attention in the FNGA. The legislation pays a great deal of attention to accountability—a matter of concern in any government—but pays almost no attention to legitimacy. It seems to assume that as long as First Nations governments exhibit in their practices “broadly held Canadian values” such as the secret ballot, transparency, and accountability (see the FNGA Preamble), they'll do fine. But this ignores a major issue.

Accountability and legitimacy are not the same thing, and they have different effects on governance. Accountability is fundamentally a matter of responsiveness: are governing institutions and leaders responsive to constituents, funders, and the like, and can they be held accountable for what they do? Legitimacy is fundamentally a matter of values and belief: do constituents believe that these institutions are appropriate for them? In a democratic system, those who govern typically are held accountable through such formal institutions as rules of behavior and procedure and the vote. If you violate the rules that have been established, you get fired or go to jail. If you fail to be responsive to constituents' concerns, they vote you out of office. The FNGA pays significant attention to this sort of thing.

Of course one of the questions to be asked about accountability is “accountable to whom?” In the United States, many tribal governments are financially dependent on the federal government. This relationship carries accountability with it: Indian nations are held accountable, to one degree or another, for how they use federal funds. These same

governments also are accountable to their citizens. Around election time, this aspect of accountability becomes particularly important and apparent.⁵

Legitimacy is different. The political sociologist Seymour Martin Lipset, in one of the classic statements on the topic, argues that “groups regard a political system as legitimate or illegitimate according to the way in which its values fit with theirs” (1963, p. 64). Legitimacy, in other words, arises in part from cultural match, from the degree of fit between the formal organization of government and the community’s beliefs about how political things—such as exercising power, making decisions, and representing interests—should be done.⁶ Where formal organization departs significantly from community beliefs, legitimacy becomes a problem.

Of course legitimacy, as Lipset points out, “may be associated with many forms of political organization, including oppressive ones” (p. 64). As this suggests, legitimacy is by no means the only measure of the worth of a governing system—accountability is another—and legitimate systems are not necessarily good ones. But legitimacy should be a matter of concern to any system that hopes to gain the trust of the community and enlist the community in pursuit of common goals and the improvement of common welfare. Those institutions that resonate with community ideas about how power should be organized (who can do what) and exercised (how they do it) are likely to command significantly greater support within the community than those that don’t.⁷

This means that a government might be accountable to its constituents but at the same time lack legitimacy with them and, therefore, fail to govern well. An example from the United States is the government of the Oglala Sioux Tribe of the Pine Ridge Sioux Reservation in South Dakota. This is one of the poorest Indian nations in the United States. Its government is accountable to its people primarily via the vote. The citizens of Pine Ridge make ample use of their power to hold the government to account through elections every two years. Over and over again, they throw elected officials out of office for failure to perform well. In the last six decades, only one tribal president has been elected to successive terms of office. In this sense, accountability is high at Pine Ridge.

Legitimacy, on the other hand, is low. The governing institutions, largely imposed from outside, depart dramatically from indigenous, Lakota, political culture. Cynicism about tribal government is high, and few tribal members seem to believe these are the right institutions for them. Much of what happens at Pine Ridge proceeds through

⁵ Formal institutions are not the only basis of accountability. The incentive for those who govern to listen and respond may be based on a number of things other than formal rules or the vote. For example, it may be based on compensation (being better paid), coercion (the threat of force), or even cultural prescription (a shared understanding that the appropriate role of leaders is to serve the community and not themselves).

⁶ A complementary definition from the literature on organizations: “Organizational legitimacy refers to the degree of cultural support for an organization....” (Meyer and Scott 1992, p. 201).

⁷ For evidence on this point from American Indian cases, see, for example, Cornell and Kalt (1995, 1997) and Champagne (1989).

alternative mechanisms that more closely reflect the decentralized, dispersed power structures characteristic of the Lakota under conditions of freedom, a century and a half ago.

Here we have relatively high accountability—at least in formal terms—and low legitimacy. The result is a nation that, despite numerous rules and regulations imposed by the federal government and by the tribe, has great difficulty responding effectively to its “particular needs and aspirations.”

It also is possible to have the reverse: high legitimacy and low *formal* accountability. Again, we have an example from the United States in Cochiti Pueblo in New Mexico, one of the most successful of American Indian nations. Cochiti has no written constitution and no elections. It governs itself according to procedures that are directly descended from Cochiti government practices in place when the Spanish first arrived in the American Southwest. The chief administrators of the tribe are appointed each year by the *cacique*, the senior spiritual leader. The tribal council, known as the Council of *Principales*, comprises all those who have ever served in one of these senior administrative positions. To be appointed to one of those positions is to become a council member for life.

Does the lack of constitutional rules and elections—of formalized accountability—mean the leaders of the nation are not actually accountable to the people? No. Cochiti governing practices are deeply embedded in Cochiti culture, which is widely shared and still vitally alive within the community. The unwritten rules of behavior for both leaders and citizens are informally but powerfully specified by that culture; in a sense, the shared cultural understandings of the people *are* the constitution. Leaders are accountable to that set of understandings, and the yearly process of appointment by the spiritual leaders is a process of choosing those who will affirm and protect, in their actions, the ways of the people.

These governing institutions, while appearing to have relatively little formal accountability, enjoy enormous legitimacy with the community. What would happen at Cochiti if the Pueblo were forced to abandon this structure in favor of formal elections, written codes, and other, more obvious forms of accountability? Any answer is speculative, but it seems certain that such replacement institutions would have little legitimacy with the community, and it is difficult to believe, therefore, that they would perform anywhere near as well as the governing structures of Cochiti today.⁸

One might argue that if institutions are truly accountable to their peoples, they will have legitimacy. If they did not have legitimacy, the people would change them. But this assumes that the people in question are free to change their institutions so that they fit the people’s conceptions and preferences.

This is not what the FNGA offers. Instead, it specifies various aspects of indigenous governmental organization and procedure that First Nations must follow and

⁸ For more detailed discussions of Pine Ridge and Cochiti Pueblo, see Cornell and Kalt (1995, 1997).

retains outside control, ultimately, over much that happens (see, for example, sections 10 and 32). Nor does the legislation anywhere acknowledge that there might be very substantial differences in political culture among First Nations or between mainstream Canadian political culture and at least some First Nations' governmental preferences. Under these conditions, how many citizens of First Nations will view the resulting structures as truly their own? What legitimacy will these governing institutions have with those they govern? We cannot answer these questions, but we expect widespread legitimacy will not be easy to achieve.

Does this mean that we find the specific details of the codes and regimes laid out in the FNGA poorly chosen? Not necessarily. The legislation clearly is an attempt to specify certain "good governance" practices and mandate those practices among First Nations, and many of those practices make sense. What concerns us is the approach, which is a familiar one: again, it is what the United States historically has attempted to do not only with its own indigenous peoples but with nations around the world. It is characterized by two assumptions: (1) that there is a single model of good governance that can be successfully applied across societies, and (2) that the federal government knows what that model is. Judging from the U.S. experience, this is not a successful recipe for good governance or for effectively responding to "the particular needs and aspirations" of a people.

V. An Alternative Approach?

Perhaps the crucial question about the FNGA is this: what does the Canadian government hope to achieve? Is the objective simply to improve the administrative and electoral practices of First Nations? Or is the objective to assist those nations in moving out of dependency, poverty, and despair and in creating viable, sustainable economies?

If the latter is the objective, we believe two things at least are necessary: transfer significant constitutional authority and decision-making power to First Nations, and invest in First Nations' efforts to build capable governing institutions. It means providing First Nations with assistance in nation building, with useful (and diverse) models as sources of inspiration and ideas, and with the freedom—fully understanding what good governance means—to decide for themselves how to govern. It means examining the creative governance strategies that an assortment of First Nations across Canada—from the Mikisew Cree to the Ktunaxa people—either are developing or already have put in place, assembling the evidence of what works where, identifying those strategies that are particularly effective, and considering whether they offer usable models for others. It means investing in institutional capacity building, organized not as a single template but as the identification of key governance challenges and a search—with First Nations—for appropriate and effective solutions.

Will these steps guarantee success? Certainly not. Surely some communities will make mistakes, and some of those mistakes will be substantial in cost and effect. But many more nations will rise to the opportunity and challenge of true nation building.

In arguing for these steps, we do not mean to underestimate the problems involved. There are exceedingly difficult issues here that need to be addressed. What does effective government look like in very small communities? What are the possibilities of institution sharing, in which small communities that share culture, language, ecological setting, or other bonds join together to solve practical governance problems that may be almost insurmountable at very small scales? Who is the appropriate and effective “self” in self-governance? Where should political boundaries lie? In some cases, authority may be most appropriately and effectively vested in individual First Nations. In others, it may be more appropriately and effectively vested in tribes—or in some other association of First Nations. In some cases, perhaps, different governmental functions should be organized at different levels.

The mistake, we believe, is to formulate a single national answer to such questions. Among the key lessons from the U.S. experience is the simple fact that, in government, one size does not fit all. Governance challenges tend to be consistent across cases—and across the world. But the effective answers to those challenges vary richly. Surely the task at hand is to assist First Nations in developing answers of their own and to empower them so that they can put those answers effectively to work.

VI. Conclusion

To us, the key purpose of the FNGA, stated in Section 3(b), is “to enable bands to respond more effectively to their particular needs and aspirations.” Surely this is the heart of the matter: assisting First Nations in building societies that work and that are capable of realizing their own goals. Will the FNGA achieve this purpose and its other objectives?

We see two primary reasons for skepticism. First, in specifying details of government structure and practice and compelling First Nations to adopt those details, the legislation undermines the very idea of self-governance, which—in our view—includes the task of designing effective governing institutions that fit community ideals. We believe it would be better to identify the key, practical, governance problems that First Nations (and all societies) typically face; to explore, with First Nations, alternative means of solving those problems; and to invest, through education and other means, in expanding First Nations’ institutional capacities and governing expertise. Such steps would involve First Nations directly and more fully in the processes of nation building.

Second, the one-size-fits-all approach that characterizes much of the legislation neglects diversity of cultures and circumstances and raises serious issues of legitimacy. Will First Nations’ citizens *believe* in the institutions mandated by this legislation? We expect that some First Nations will find some provisions of the legislation congenial; others will not; and some will find the specific structures and practices congenial but the process of imposing them unacceptable. People support what they help create. They also support governing institutions that pay close attention to their own beliefs about the principles and the appropriate methods of governance.

These are critical issues. Effective governance is not simply a matter of establishing good government practices. It is a matter also of enlisting citizens as willing, active participants in the effort to build societies that work, empowering them to build those societies in their own ways, and making them feel that the future, to a significant degree, is in their own hands.

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