

# Implementing First Nations Self-Government in Yukon: Lessons for Canada

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Two decades have passed since the issue of self-government for Canada's First Nations<sup>1</sup> burst upon the national political scene. In that time, the debates among First Nations leaders, federal, provincial and territorial politicians and academics concerning the fundamental principles and the practical implications of self-government have commanded considerable national attention (Cairns, 2000; Franks, 2000; Morse, 1999; Canada, Royal Commission on Aboriginal Peoples, 1996; Russell, 2000).

Self-determination has gained such prominence because of the priority that the Assembly of First Nations (AFN) attaches to it (Assembly of First Nations, 2002). In the view of the AFN and others, including the Royal Commission on Aboriginal Peoples, the self-determination that First Nations seek rests on the constitutional basis of their inherent right of self-government.<sup>2</sup> The legal source of this right is "... the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied (historically)" (Royal Commission on Aboriginal Peoples, 1996, Vol. 2, Part 1: 166). The right both predates and is not contingent upon any act of the British Crown or, more recently, any policy of the Government of Canada. It follows that First Nations have the authority to design a diversity of forms for their governing institutions so that these institutions will reflect their diverse traditions, needs and preferences. In the view of the AFN, the Government of Canada has no role to play here. For its part, Canada recognized the inherent

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right in 1995, but intends to involve itself in a variety of issues relating to the creation of inherence-based First Nations governments (Canada, Minister of Indian Affairs and Northern Development, 1995).

The implementation of the inherent right will create First Nations governments that will operate outside the *Indian Act*, which has prescribed the form of First Nations government since 1876. Governments, First Nations and observers all agree that the regime established by the *Indian Act* is a badly outdated formula which rests on colonial assumptions about the First Nations-Crown relationship and limits the ability of First Nations to develop politically, socially and economically (Royal Commission on Aboriginal Peoples Vol. 1, 1996: 255-322, Cairns 2000: 91). While all sides condemn the *Indian Act*, it has not proven possible to repeal it, for lack of agreement on what would replace it. As a result, the Government of Canada has attempted to modify or replace individual sections of the Act or to administer it in ways different from its former practice. So, for example, in 2002 the *First Nations Governance Act* was tabled in Parliament. This Act would have altered the form of band council elections, clarified the legal status of First Nations, developed codes of conduct for First Nations politicians and administrators, and improved their accountability to their citizens. Also, the federal government has pursued a very active policy of devolving to First Nations the design and delivery of programs that it formerly administered (Abele, Graham and Maslove, 1999: 274, 282-83). This has put in First Nations' hands a great deal of authority and money to address the needs of their people. Still, these powers are exercised under the *Indian Act*, which decrees that the Minister of Indian and Northern Affairs (INAC) can veto decisions of band councils, alter their form, suspend their operations or terminate them. Moreover, because *Indian Act* band councils do not rest on the premise of inherent right, First Nations reject their underlying principle and want to replace them. Ottawa's 1995 recognition of the inherent right has encouraged them to pursue this goal.

First Nations want self-government outside the *Indian Act*, ideally on the basis of the inherent right. However, important questions and objections have arisen concerning the implications, indeed, the feasibility of such systems of governance (Cairns, 2000, Flanagan, 2000). The questions include the following:

- (1) Is it possible for First Nations to create institutions that can both perform the functions expected of contemporary governments and embody traditional values and knowledge?
- (2) Will First Nations governments assume more responsibilities than they can effectively handle?
- (3) In view of issues of accountability that have arisen in the context of band government under the *Indian Act*, what are the prospects for enhanced accountability in governments established outside the Act?

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**Abstract:** The experience of implementing self-government in the Yukon offers important insights into the future of self-government nationally. Yukon First Nations have created institutions that reflect their traditional values, that achieve creditable levels of accountability and that have limited their responsibilities to what their staff resources can handle. Yukon First Nations have assumed relatively few jurisdictional responsibilities because they reject the financial terms presented by the federal and territorial governments. This pattern is likely to weaken inheritance-based governments as they appear elsewhere in Canada. This prospect raises the question of how First Nations should divide their energy and resources between pursuing inheritance and strengthening the capacity of their existing institutions.

**Résumé.** La mise en oeuvre d'un gouvernement autonome au Yukon offre d'importants aperçus sur l'avenir de l'autonomie sur le plan national. Les autochtones du Yukon ont créé des institutions qui reflètent leurs valeurs traditionnelles, atteignent des niveaux estimables de responsabilité et ont limité leurs engagements en fonction de leurs ressources en personnel. Les autochtones du Yukon ont assumé relativement peu de responsabilités juridictionnelles parce qu'ils rejettent les conditions financières présentées par le gouvernement fédéral et le gouvernement territorial. Ce dilemme va vraisemblablement affaiblir les gouvernements inhérents qui verront le jour ailleurs au Canada. La question se pose dès lors de savoir comment les autochtones devraient diviser leur énergie et leurs ressources entre la poursuite de l'inhérence et le renforcement de la capacité de leurs institutions existantes.

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- (4) How feasible can these governments be when they deliver to relatively small populations complex programs and services with substantial diseconomies of small scale?
- (5) First Nations governments created outside the *Indian Act* will have the authority to legislate and to deliver services in some of the same policy areas that the provincial and territorial governments occupy. What factors will shape the relationships among these governments in these policy areas? To what extent and in what ways might these factors encourage the development of separate Aboriginal and public government regimes of policy development and delivery? What is the logic that could promote a convergence of decision making and policy delivery? What is the likely outcome of these factors?
- (6) How will the federal government, the provincial and territorial governments and First Nations share control over the process of creating new First Nations governments? Where will the ultimate power lie and how much real First Nations empowerment will it permit?
- (7) What is the appropriate time frame for judging the process of creating new First Nations governments?

These questions can be answered in theory. However, such answers, being necessarily speculative, are unlikely to satisfy skeptics. Lessons drawn from experience will be more persuasive. They should also be more useful in informing the design of institutions of First Nations governance. Unfortunately, Canada has very little experience of First Nations self-government on which to base answers to these questions. The most informative instances are those in Yukon. This is the case because,

although a number of First Nations are currently negotiating with Ottawa regarding their future governance institutions, the only other extant examples of self-government outside of the *Indian Act* are the Sechelt and the Nisga'a First Nations, both of British Columbia. The Sechelt case may have lessons to teach, particularly in terms of policy integration between a First Nation and a provincial government. However, the range of powers it exercises is so narrow that it has been described as resembling more closely a municipal government than the type of broadly empowered government to which most First Nations aspire. The evolution of Nisga'a governance will be very instructive over the years. However, it is in such an early phase of development that it is difficult to draw lessons from its brief existence. Other cases, such as Nunavut and Nunavik, are instances of public government, hence different in their constitutional basis than is Aboriginal self-government, even though the large majorities of their citizens are Aboriginal. In contrast, while Yukon First Nations governments are still new and evolving, enough experience has been gained of their implementation to shed light on the above questions. Moreover, the fact that a number of Yukon First Nations have been engaged in this process for some time enables observers to appreciate the diversity of forms that First Nations governments can assume. It also adds to the confidence with which lessons can be drawn from this experience.

The purpose of this paper is to consider these lessons.<sup>3</sup> The paper will begin by setting out the social circumstances and legal framework within which First Nations self-government is evolving in Yukon. It will then apply this experience to some general questions about self-government in Canada. It will conclude by arguing that the Yukon experience diminishes for the foreseeable future the promise of powerful and meaningfully self-determining governance that First Nations see in the principle of inherence. They therefore confront profoundly difficult questions as they contemplate the future directions that the pursuit of self-government should take.

### **The Context of Self-Government in Yukon**

Although Yukon is a territory, its political process closely resembles those found in the provinces (McCormick, 2001). Unlike the other two northern territories, it has a full Westminster model of government. Since the 2003 devolution of federal authority over lands and resources to the Yukon government, it now enjoys virtually all of the powers of the provinces. In these important senses, the territorial government is a miniature replica of the provincial governments. Its interest in and concerns about First Nations self-government resemble theirs.

As of the 2001 census, the population of Yukon numbered 28,675, of whom 6545 identified themselves as Aboriginal persons (Canada, Statistics Canada, 2001). They belong to one of 14 First Nations that range in size from approximately 100 to 1100 citizens. It is important to note that this population number is higher than the number of status Indians—those registered under the *Indian Act*—because the Act's narrow rules for identifying who is a status Indian exclude a significant number of people whom Yukon First Nations accept as citizens. It is also important to note that a considerable proportion of First Nations citizens do not live on "settlement lands", the 41,595 square kilometres of Yukon that the claims settlements confirmed as belonging to Yukon First Nations. The small populations of Yukon First Nations create serious administrative and financial problems for their governments. The relatively large proportion of First Nations citizens living off their settlement lands augments these problems and complicates the process of implementing self-government. Indeed, these problems may be so severe as to limit the number of areas in which First Nations will want to legislate and deliver programs.

The proportion of the Aboriginal population to the whole is important politically for several reasons. The first, obviously, is that the higher the proportion, the more attentive to Aboriginal concerns will Yukon political parties and the Yukon government tend to be. Second, the larger the Aboriginal population, the greater will be the reduction in the proportion of the Yukon population the territorial government will serve as functions are transferred from it to First Nations governments. This may undercut the stature of the government as well as exacerbate the fiscal problems that will be discussed below.

First Nations self-government in Yukon is an offshoot of the settlement of First Nations land claims in the territory. The Umbrella Final Agreement signed in 1993 by the governments of Canada and Yukon and by the Council for Yukon Indians<sup>4</sup> provided that each of the First Nations would conclude a final land claim agreement with the two governments.<sup>5</sup> An element of each final agreement was a set of provisions providing for the establishment of a form of self-government for the First Nation through a self-government agreement. These self-government agreements contain a set of general principles that are common for all of the First Nations. First, while the Aboriginal claims settlements involve "aboriginal and treaty rights" that are recognized and protected by Section 35 of the *Constitution Act, 1982*, the provisions relating to Yukon First Nations governments explicitly do not enjoy this constitutional entrenchment. Second, the agreements identify the following three broad types of powers that Yukon First Nations governments can exercise when they wish to do so: administration of the government's internal affairs; a very broad range of social, educational, health and cultural policies and

programs for their citizens wherever they might live in the Yukon; and management of their own settlement lands.<sup>6</sup> Third, while national laws of general application supersede laws passed by First Nations, First Nation laws render “inoperative” any “Yukon Law of General Application” to the extent that the two laws overlap.<sup>7</sup> Given the similarity between the legislative powers of the governments of Yukon and of the First Nations, the primacy of First Nations laws confers potentially enormous power upon First Nations, depending, of course, on the span of jurisdiction they decide to assume.

Fourth, issues of intergovernmental finance lie at the heart of the self-government agreements. The agreements establish that the core of each First Nation government’s finances is the Financial Transfer Agreement that it negotiates every five years with the federal government. The standard for deciding the amount of money to be transferred is that it should be sufficient to enable the First Nation “... to provide public services at levels reasonably comparable to those generally prevailing in Yukon, at reasonably comparable levels of taxation.”<sup>8</sup>

Fifth, the agreements anticipate that First Nations will not want to exercise all of their potential jurisdiction immediately. The agreements provide that the territorial government will continue to deliver to all Yukoners programs and services for which First Nations have not assumed responsibility. They also establish a process by which a First Nation can request and receive responsibility for a power that it is eligible to exercise. This process involves the negotiation of the financial and administrative terms of a Programs and Services Transfer Agreement (PSTA).

Section 18 of self-government agreements provides that the Government of Yukon will fund a PSTA with the amount of money that it will save when a program or service it formerly provided is transferred to a First Nation, hence freeing the territorial government from any costs involved in delivering the program to the First Nations’ citizens. When PSTAs are negotiated, the funding that they provide can, in subsequent years, become part of the block funding provided by the First Nation’s FTA.

Sixth, a Yukon First Nation can tax its citizens and their property. Also, after negotiations with Ottawa, it can tax non-First Nations citizens resident on settlement lands, and their holdings. The Yukon government will reduce the property taxes it levies to avoid double taxation.

In summary, the self-government agreements create the potential for broadly empowered First Nation governments. The realization of this potential is subject to negotiation. This process makes the acquisition of self-government powers by Yukon First Nations contingent on approval by the federal and territorial governments, an arrangement clearly at odds with the First Nations’ insistence on inherence-based self-government. However, the federal government’s policy on inherence also requires

implementation negotiations on such fundamental questions as the range of powers of First Nations governments, mechanisms to ensure their accountability to their members, and financial relations between them and the federal government (Canada, 1995: 4-16). This suggests that the Yukon process is relevant as a basis for anticipating the unfolding of negotiations aimed at creating inheritance-based First Nations governments.

### **Implementing Self-Government**

The nine First Nations that have signed self-government agreements have established governments under the terms of these agreements. The diversity of their forms shows that it is possible under these agreements to create governments that embody traditional political practices. Over half of the First Nations involve the traditional clans in the selection of members of their council. For example, the councillors of the Selkirk First Nation at Pelly Crossing are selected by their respective clans, the wolf and the crow. The Teslin Tlingit First Nation Council is composed of the leaders of its five clans. The Little Salmon/Carmacks First Nation has an elders' council and a youth council, each of which names one individual to serve on the First Nation council. Several of the First Nations have hereditary chiefs. These arrangements demonstrate that Yukon First Nations retain and can put into practice values that diverge from the one person one vote, plurality system of electing office holders that prevails in non-Aboriginal Canadian politics. Indeed, the relevance of political tradition is emphasized by the decision of the Teslin Tlingit to ratify their final claims agreement not by a referendum, but rather through a collective decision of the clan leaders. It is too early to tell how well these institutions will fare in handling issues that bring contemporary and traditional values into conflict. However, the cultural authenticity that underlies them should assist in the resolution of such issues.

Among these traditional values is the weight given to the principle of accountability of leaders to their First Nation citizens. This is an important concern in that the *Indian Act*-based band council system has not always been effective nationally in ensuring accountability. Yukon First Nation administrators interviewed for this study reported that their citizens impose upon their leaders a considerable degree of accountability. They noted that most Yukon First Nations feature a General Assembly to which their chief and council report at least annually. At these assemblies, their citizens question their leaders closely on financial and policy issues. The administrators also emphasized that the General Assemblies of at least some of the First Nations make policy decisions on the understanding that they are the legislative body for the First Nation. The role

of their chief and council is to act as an executive, applying decisions taken by the General Assembly. This is not to deny the power that the chief and council will have in view of the relative infrequency of General Assembly meetings. However, the emphasis on accountability and the locating of authority in the body of Yukon First Nation citizens are clear. Moreover, on an informal basis, the small size of Yukon First Nations gives their citizens many opportunities to challenge their chiefs and councillors on a daily basis, opportunities that they frequently and often vigorously take advantage of.<sup>9</sup>

The creation of new Yukon First Nation governments led to a considerable growth in the number of staff employed by the First Nations. At least two basic factors explain this growth. The first is that the change required the creation of new systems of financial management as First Nations developed systems that enabled them to track revenues and expenditures in ways that suited their program and planning needs. These tend to require more information than did the formats stipulated by Indian and Northern Affairs Canada under the old relationship, which focused more on auditing spending than on planning programming. The second reason is that the First Nations have taken on responsibility for managing their lands and resources. Accordingly, they have created lands and resources departments and staffed them with the number of administrators needed to properly administer this complex and diverse policy area, or are in the process of doing so.

The question of staffing First Nations governments raises a critical factor limiting their ability to assume more jurisdiction. This factor is human capacity. First Nations no longer merely deliver a limited array of programs. Their responsibilities have grown and they want to assume additional areas of jurisdiction. Moreover, they want to redesign the programs that they formerly delivered, but that were defined by Indian and Northern Affairs. These changes represent more self-determination. However, they also require staff with the expertise and skills needed to enable them to succeed. Most obviously, the skills required are technical, ranging from financial management to geology and social work. Equally important, chiefs and councils need new skills to enable them to work with other governments on the basis of equality rather than *Indian Act*-style dependence, and to use their technical experts to full advantage.<sup>10</sup>

The small number of Yukon First Nations people and their relatively low level of educational attainment<sup>11</sup> place limits on the availability of individuals with the expertise necessary to fill the administrative needs that the arrival of self-government has created. Adding to the problem is the pattern of First Nations governments hiring and training First Nations staff only to find that a number of them leave to take up positions with the Government of Yukon, the federal government or private-sector employers. Other Yukon First Nations citizens do not seek

employment with their governments, preferring positions with other employers. These positions tend not only to be better paid but also to be unencumbered with the frequent drawbacks of employment with First Nations. These drawbacks can include short-term contracts, other sources of employment insecurity, and the stresses of trying to meet high expectations with limited resources. What is notable is that, in response to the resulting staffing shortages, the First Nations have avoided the temptation to take on responsibility for more programs than they have the staff to effectively manage. The effect of this scruple is to further delay program transfers. In this regard, the full commitment of their staff capacity to developing the systems to deliver the powers they have already received reinforces the delaying impact of the deadlocked financial negotiations discussed below. It can also delay the implementation of program responsibilities. For example, First Nations are supposed to establish a central Yukon registry of their constitutions and laws.<sup>12</sup> Largely because staff are preoccupied with other responsibilities, this registry has not yet come into existence. Also, when First Nations do pursue the transfer of particular powers, staff capacity constraints can limit their ability to represent themselves at negotiations for these new program transfers. While these outcomes dismay proponents of robust First Nations governments, the basic pattern—the triumph of the concern for good government over the ideology of empowerment regardless of consequences—should comfort those who have expressed concerns about the feasibility and self-discipline of new First Nations governments.

Despite these challenges, nine Yukon First Nations have negotiated Financial Transfer Agreements with Canada. These agreements have proven controversial. For its part, the federal government takes a historical approach to deciding how much money it will transfer to each First Nation. This approach assumes that programs and services for Yukon First Nations were adequately funded to meet their needs when they were under the *Indian Act*. It follows, Canada holds, that they should receive the amount of money they received then, adjusted for inflation and population change. This approach meets the government's need for a funding rationale that will ensure reasonable predictability and constraint for the future costs of funding Yukon First Nations governments. In doing so, this formula avoids the risk of the unsustainable burden that could be created if the Yukon pattern came to be seen as a precedent for application to future new First Nations governments outside the *Indian Act*, elsewhere in Canada. Thus, INAC will not allow the transfer of programs and services to be an occasion for what it terms "program enrichment" (Canada, Minister of Indian Affairs and Northern Development, 1995:16). Moreover, it is unlikely that the federal government will change this approach to funding transfers in the foreseeable future.<sup>13</sup>

The First Nations take a contrasting approach, arguing that the appropriate level of funding is the amount necessary to achieve reasonable goals in each program and service area, and that historical levels of funding do not provide for this. Moreover, they observe that under the *Indian Act* the money that Canada spent on First Nations programs and services only funded their provision to “registered Indians.” However, as noted above, First Nations count among their citizens many people who are not registered Indians in terms of the particular criteria that Canada requires individuals to satisfy in order for them to be recognized as belonging to this category. The First Nations view these non-registered people as citizens by virtue of family relationship or cultural affinity. The problem that arises from the First Nations’ new control over defining their membership is that Canada has not given them additional funds to cover the extra cost they bear in delivering programs and services to a larger number of people than before. Canada has not increased its funding levels in the face of these arguments. It simply will not accept an open-ended approach to First Nations citizenship, or increase funding until Yukon First Nations have attained particular targets in terms of social well-being. To commit to these approaches would be to sign a blank cheque whose ultimate cost would be unpredictable and possibly unsustainable. However, INAC’s regional staff do acknowledge the First Nations’ critique of Canada’s funding policies as a substantial and ongoing issue.

The First Nations have also negotiated three programs and services transfer agreements. The first involves responsibilities that Indian and Northern Affairs Canada carried out before the creation of the new First Nations governments, that is, under the *Indian Act*. These are core funding for the operation of the First Nation government, most social assistance programs, capital spending including housing, and whatever community services—such as sewers, water systems and fire protection—the First Nation delivered under the *Indian Act*. This agreement, referred to as “PSTA One,” also provides a modest amount of money for school counselors and some school supplies. However, the bulk of educational spending is undertaken by the territorial government, which provides education from kindergarten to grade 12. PSTA Two involves relatively modest expenditures relating to the transfer of Health Canada services already delivered by First Nations. The most important of these is the funding of community health representatives. These individuals are not nurses, but do provide health education and counseling on topics such as diet, drug and alcohol problems and prenatal health. In contrast, PSTA Three transfers the very important Northern Affairs Program of INAC, as it relates to the management of First Nations land and resources. Its transfer, in addition to contributing to the growth of First Nations administrations, enables First Nations for the first time to use their natural resources as important parts of their economic development strategies. Several Yukon

First Nations have passed legislation governing their activities in this policy area.

Several features of the negotiations leading up to these PSTAs deserve mention. The first is that exactly the same disagreements about the appropriate levels of program funding that characterize FTA negotiations recurred in the negotiation of the three PSTAs. Indeed, the experience of the PSTAs has led First Nations to fear that Canada will continue to provide what is in their view inadequate funding for future PSTAs. This fear is one factor delaying the negotiation of further PSTAs.

A second feature reported by several respondents was that the internal organization and culture of the Government of Canada impeded progress at the negotiating table and now impede the implementation of the programs and services transfers. Indian and Northern Affairs Canada is the lead federal agency negotiating PSTAs on behalf of Canada. However, it lacks the authority to compel other departments of the government to accept agreements it has negotiated with Yukon First Nations. For example, INAC, the territorial government and First Nations have negotiated mining regulations for federally designated Special Management Areas. However, Environment Canada is reluctant to allow these regulations to supersede its own regulatory regime. Also, obligations negotiated as part of PSTAs may create costs for the federal government. These can lead to protracted disagreements as to which department should pay these costs. For example, should the federal Department of Justice or INAC pay the cost of developing the system that would enable the Teslin Tlingit First Nation to administer justice? The failure to date to answer this question has held up the implementation of this transfer agreement, even though all parties have signed it. Another problem is that INAC may not be able to persuade other departments to complete their support tasks as quickly as the negotiating and implementation timetables require. All of these issues reflect the fact that these line departments are less well informed about the claims and self-government processes than is INAC, and hence feel less urgency about them. They also have other, national, priorities that form their core missions and lead them to invest less attention and fewer resources in dealing with issues that are regional.

Another problem worth noting is that the federal government prefers to transfer existing programs rather than program areas or functions. As a result, the transfer of programs is piecemeal and reflects the history of program planning (and financial decisions) under the *Indian Act* rather than the desire of First Nations to develop holistic solutions to their policy needs. For example, First Nations may want to address the problem of welfare dependence with programs of employment counseling and skills training. However, if they can only negotiate the transfer of the authority to deliver social assistance payments, they are ill equipped to deal with the problem in the comprehensive manner that they feel is needed.

It is noteworthy that the three PSTAs that have been finalized all involve federal government powers and funding. No agreements have been negotiated that transfer responsibilities from the Government of Yukon to First Nations governments. As a result, although ten years have passed since the ratification of the first self-government agreements, First Nations citizens have not experienced much change in the way they receive government services, with the exception of the administration of lands and resources. The major explanation for the failure to transfer territorial government power lies in Section 18 of the self-government agreements. This section requires the Government of Yukon to contribute to the funding of each PSTA the amount of money it will save by not having to deliver to First Nations people the programs and services covered by the PSTA. In some instances, such as providing social assistance money to First Nations individuals, it is relatively easy to quantify this saving. However, it is much more difficult to do so for responsibilities that involve fixed costs, such as maintaining a lands registry that requires the same regulatory regime and costly information technology infrastructure regardless of whether or not it covers First Nations lands. The determination of the actual amount of money that will be saved by a program transfer depends on the assumptions that are made concerning the fixed and variable costs of delivering the service. So far, Yukon and Canada have disagreed on this question. Yukon sees considerably fewer savings than does Canada. It is determined to limit its contributions to PSTAs on the grounds that it ought not to have to subsidize a federal government responsibility. Undoubtedly it is particularly reluctant to pay to subsidize the loss of powers it currently exercises. Several of the officials interviewed for this paper (both federal and territorial) expressed the opinion that the process of negotiating PSTAs has reached an impasse over the financial contribution issue. Interestingly, the impasse is more between the two public governments than it is between them and the First Nations. Thus, a conflict to which they are not a direct party is holding hostage the issue of further empowerment for the First Nations.

### **PSTAs or Convergence?**

This impasse has made some of the officials involved in the negotiation of PSTAs and the implementation of self-government skeptical about the PSTA approach and, in fact, about the basic logic of the self-government agreements. These officials suggest that the fiscal problems that are delaying or even denying the separate institutions that embody the First Nations' governance rights provide an opportunity to rethink First Nations governance options. For example, the public management principle of subsidiarity—that services should be designed and

delivered at the most local unit of government that can do so effectively—might validate the PSTA approach of gradually empowering Yukon First Nations governments. However, the very small size of the populations that these governments will serve makes them decidedly cost-ineffective. They are poor candidates for the application of the subsidiarity principle, especially as they face major capacity problems. These factors suggest that the principle of “disaggregating” program and service delivery—the term used by one government official to describe the pattern prescribed by the self-government agreements of dispersing program authority among numerous First Nations governments—ought not to be the sole vehicle for seeking greater self-determination for First Nations. Thus, in addition to the PSTA process, it might make sense to experiment with a “convergent” system. This would be a system that would allocate policy making and service delivery between the territorial government and First Nations governments on a basis that best balances efficiency and effectiveness with respect for the various governments’ authority and for the spirit of the agreements. Indeed, the full range of options discussed in the literatures on new public management and alternative service delivery may enable Yukon First Nations to work with the territorial government to achieve responsive, cost-effective program delivery, despite their small size.

Neither side will welcome such arrangements in principle. In general, they are or will quickly become aware of the enormous challenges that alternative service delivery poses in terms of cost-effectiveness, responsiveness and accountability (Rosen, 1993: 230-35, Salamon, 2002: 312-13, 329-32). More specifically, the territorial government will not want to share powers or alter standing policies to which its members are deeply committed. After all, these policies reflect their efforts over the years to best serve the people of the territory. They may be reluctant to trade the control they possess over their current policy processes for a set of negotiations that resembles the intergovernmental processes of Canadian federalism. This change will be all the more unsettling because any new arrangement will have to strike a difficult and unprecedented balance among incommensurable factors. These include the considerably larger number of non-Aboriginal than Aboriginal Yukoners; the constitutionally guaranteed rights that First Nations governments will pursue in joint policy making; and the threat posed by the fact that First Nations laws will supersede territorial laws if First Nations decide to leave a convergent process and pass their own legislation. What form of joint policy relationship properly reflects the conjunction of these and other considerations?

For their part, the First Nations will not want to surrender or share powers for which they fought so hard and which they have not yet begun to exercise. In any case, such a convergence will only evolve if it is con-

structed as a pursuit of solutions by fifteen governments, rather than as the imposition of the will and practice of the public government upon the others. It is far too early to judge the willingness of the First Nations to share their newly gained and still largely potential authority with the territorial government. However, the material and logical pressure for them to do so is already becoming apparent. For example, the dispersal of First Nations citizens off their settlement lands makes it difficult for the First Nations to provide services to their own people. This would require, for example, the staffing of 14 First Nations social assistance offices in Whitehorse, in addition to one for non-First Nations clients. Currently negotiations are under way to consolidate the provision of social assistance in a single office. This will require the development of some common policies in order to avoid administrative chaos. Similarly, situations will arise in which a citizen of one First Nation may seek services from another First Nation—for example, if the citizen has taken up residence on the settlement lands of a First Nation other than his or her own.

The effective response to this contingency should be to integrate the administrative systems of the First Nations and, for that matter, of the territorial government. The government that delivers the services should be reimbursed by the First Nation to which the citizen-client belongs. These arrangements will be simplified and a great deal of confusion avoided if it is possible to negotiate relatively similar levels of service among the various governments of Yukon. This would avoid situations where, for example, members of the same family who, for whatever reason, seek similar services from different governments receive different levels of benefits because the different governments have different eligibility criteria or service standards. Such a situation can both undercut the legitimacy of the government that offers the less ample benefits, and lead to “program shopping,” by which means people seek to access the more generous programs. To the extent that such shoppers are successful, there can be serious cost implications for the governments offering the programs. The policy harmonization that would reduce these problems makes sense, but only if it is a collegial process that respects the equal status of all of the governments involved.

The foundation for a convergent policy process and program delivery is already in place. The financial transfer agreements provide for a senior financial arrangements committee composed of federal and First Nations’ representatives, with provision for invited attendance by Yukon officials. The purpose of this committee is to review issues arising out of the FTA and generally to manage its implementation. The agreements also provide for such a body on the territorial level (Canada, Minister of Indian Affairs and Northern Development and Vuntut Gwichin, 2000: 9). Similarly, the PSTAs provide for First Nation/federal/territorial consultative and co-ordinating mechanisms. These try to promote efficient deliv-

ery and common standards for services and programs delivered by the various governments to their respective clients and regarding their respective lands (Canada and Vuntut Gwichin, 1999: 6). In the summer of 2002, the federal minister of Indian Affairs and Northern Development, the premier of Yukon and the chiefs of the Yukon First Nations agreed to meet on a regular basis. The Intergovernmental Forum they created will pursue shared understandings about the future pattern of governance in Yukon.

It is too early in the process to predict how far convergence may proceed. All that can be noted is an impasse on fiscal issues that a measure of convergence, based on new approaches to governance, power-sharing and service delivery, might help overcome.

### **Lessons for Canada**

It is also too early to make predictions about the larger question of the outcome of efforts to implement self-government in Yukon. Still, Yukon has had enough experience with the implementation process that it can offer several lessons that relate to the questions and critiques of First Nations government identified at the start of this paper. Concerns about cultural authenticity, staffing shortages and accountability have been addressed earlier in this paper.

Another prominent concern is the feasibility of First Nations governments delivering a wide range of programs to populations, many of which face significant social problems and which tend to be very small—most often, as in Yukon, within a range of between 100 and 1100 citizens. In one sense, Yukon's First Nations cannot offer much insight into this question because they have not taken on a broad range of powers. However, acknowledging a number of disappointments and setbacks concerning management issues and the delivery of some programs in some First Nations, developments among them suggest a growing will and capacity to address these problems. In the first years after the signing of the self-government agreements, the First Nations tended to pursue independent paths. This reflected their wish to safeguard their new-won autonomy. Also, they wanted to maximize the program money that each could obtain in order to subsidize the cost of their basic administration and operations, which they felt their financial transfer agreements had underfunded. More recently, they are beginning to coalesce and pursue joint undertakings in order to gain the efficiencies of scale that they must achieve if they are to govern effectively. For example, regional and cultural clusters of First Nations—the northern Tutchone, the southern Tutchone and First Nations along the British Columbia border—are forming tribal councils to pursue common goals. In addition, the Yukon First Nations have been

willing to use a single negotiating table to achieve understandings about PSTAs and other matters with the federal and territorial governments. This practice imposes a uniform set of arrangements on all of them, but avoids the financial costs and staff capacity problems that 14 different tables would cause. Finally, they have established a self-government secretariat to share information and best practices. In the future, it would be economical for this secretariat to provide some shared services, such as legal and technical assistance, to First Nations.

The record in Yukon does not prove that First Nations elsewhere in Canada, a highly diverse set of peoples, will make the same decisions as have the Yukon First Nations, or experience the same outcomes. However, Yukon does show that these largely favourable outcomes are plausible.

The most salient lessons that Canada and its First Nations can draw from the Yukon experience of implementing self-government are those that link the fifth and sixth questions posed early in this paper. These concern intergovernmental finance and First Nations enjoyment of their right of self-government. The lessons are discouraging for First Nations. In terms of the sixth question, the Yukon experience suggests that funding issues will enable the federal, provincial and territorial governments to control the process of creating and empowering First Nations governments. It also suggests that self-government will fall short of the promise that the principle of inherence seems to hold out. This outcome will result from the insistence of the Government of Canada that the creation of any First Nation government based on the inherent right will require financial negotiations that closely resemble those used in Yukon (Canada, 1995: 14–15). Given that Ottawa's fiscal priorities are unlikely to change in favour of First Nations, these negotiations are almost certain to be as financially constrained as the Yukon negotiations have been. Moreover, Ottawa's policy is to not provide new money for transitional and implementation costs. On this question, the *Federal Policy Guide: Aboriginal Self-Government* is very clear: "All federal costs associated with the implementation of self-government agreements will have to be accommodated within existing federal expenditures" (1995: 16).

The provinces are not likely to be any more comfortable with the idea of substantially funding First Nations programs and services than Yukon has been.<sup>14</sup> It is true that these transfers would involve smaller proportions of their budgets than would program transfers in Yukon, where First Nations citizens comprise a larger proportion of the population than in the provinces. Still, they would experience these transfers as losses that would enjoy less support around their cabinet tables because their governments are less dependent upon First Nations voters for their re-election than is the Government of Yukon. Moreover, provincial governments are accustomed to think of First Nations reserves as falling exclusively within federal jurisdiction. As inherence-based governments

are likeliest to develop on reserves, provincial governments can be expected to be particularly unwilling to help fund them.

These financial considerations indicate that program and services transfers to inherence-based First Nations governments will tend to be offered on terms that are not viable for the First Nations. First Nations officials interviewed for this study emphasized that they would not assume responsibilities if underfunding was an issue. As a result, inherence-based governments are likely to exercise a relatively narrow range of powers, most likely those centrally related to culture as well as to the internal operation of their governments and the management of their lands. Here is yet another instance of the control exercised by "he who pays the piper." The problems surrounding the financing of self-government mean that, even though the right is inherent, Ottawa controls the pace and the direction that the empowerment of First Nations inherence-based governments will take. So too do the provinces, to the extent that they resist transferring to First Nations governments cost savings they gain when the First Nations start to deliver to their citizens programs and services that the provincial governments formerly delivered and funded. This observation may cause First Nations to considerably lower their expectations about how much real self-determination a switch from the *Indian Act* to inherence-based government would provide.<sup>15</sup>

There might, of course, be some exceptions to this generalization. These are the few wealthy First Nations. They may be able to augment federal funding with enough revenue from their own sources, including taxing their people, that they could deliver programs of an acceptable standard. The federal government is committed to the principle that First Nations should develop their own revenue sources so they can contribute to the costs of their governments. The prospect that these governments are going to have to contribute some of the revenues they generate if they want to receive program transfers certainly promotes this federal government policy goal. However, there are very few wealthy First Nations. Of particular interest to scholars of northern public policy is the possibility that resource revenue sharing related to oil, gas and diamonds could enable several First Nations in the Northwest Territories to enter this category, and could provide significant sums to help them fund their own broadly empowered inherence-based governments. Another possibility is that the dependence of the territorial government on federal funding and the potential losses it might suffer if it had to help fund program transfers might motivate it to pursue the kind of program convergence that is being considered in Yukon. However, its past reluctance to share power with Aboriginal groups in the NWT suggests that this is an unlikely outcome (Dacks and Devine, 1999).

More generally, the Yukon experience emphasizes the fundamental link between the economic and political aspects of self-determination.

The federal government and most territorial and provincial governments recognize the inherent right of Aboriginal self-government. However, First Nations will enjoy this right only to the extent that it can be funded. The limits that the federal and Yukon governments have set on their funding for self-government and that the other territorial and provincial governments can be expected to impose give First Nations an additional compelling reason to emphasize economic development. As well as improving social conditions, economic development may well be the only source of the new dollars needed to fund the program transfers that will make the promise of the inherent right a reality. It is becoming increasingly clear that the fiscal capacity of First Nations governments, which is directly related to their tax base, will become a very important determinant of the level of self-determination they enjoy.

Stalled PSTA negotiations and the financial stringency that underlies them are encouraging Yukon First Nations and the federal and territorial governments to contemplate some measure of convergence of their responsibilities and activities. It is easier for them to do so than it would otherwise be because the self-government agreements are not constitutional documents. As a result, if the governments decide to pursue convergence, they will negotiate in an atmosphere relatively free of the inflexible positions and attitudes that reference to constitutional rights tends to foster. This example of unforeseen developments and of institutional learning from experience suggests a reconsideration of the assumption that it is best to constitutionally entrench self-government arrangements. These arrangements carry a risk. Guarantees provide protection, but they may produce rigidity when experience reveals that new directions are needed. This risk is particularly significant at present because the process of creating new forms of First Nations government outside of the *Indian Act* is at such an early stage that mistakes are likely to occur. In this context, the fact that Section 35 of the *Constitution Act, 1982* does not entrench self-government arrangements provides valuable flexibility for all parties in responding to an unpredictable future.

What does the Yukon experience reveal concerning the time frame for implementing self-government and for judging its performance? Clearly, implementation is a very long-term project, whose strengths and weaknesses will only be fully apparent many years from now. Indeed, the appropriate time frame may well be a generation of leaders, or at least the length of time that cultural change takes to work its way fully through institutions. In formal and financial terms, it will take many years to transfer programs and services to First Nations and for them to develop the staff and experience to deliver them successfully. More fundamental are questions of political culture. The end of the *Indian Act* in Yukon will change its First Nations leadership. Over time, a new generation of leaders will appear who will be socialized to roles shaped by the self-

government agreements. These will be leaders who see themselves as more accountable to their people and less dependent upon the federal government than they are now. They are likely to place more emphasis on performing the functions of government and less on asserting the autonomy of their First Nations because the question of the formal status of their governments and their offices has been resolved. This could foster collaborative undertakings with other First Nations, enhancing successes already gained in the development of tribal council and similar bodies.

It should also facilitate more constructive relations with provincial, territorial and federal governments. However, improved relations will require cultural change within non-Aboriginal governments. For example, several respondents for this study noted that thinking within the Government of Canada needs to change. These respondents reported that head office employees of INAC retain a tendency to think of Yukon First Nations governments as if they were still band councils under the *Indian Act*, that is, weak and dependent rather than autonomous partners in governance. Other federal departments vary considerably in their willingness to modify their policies or make funding available in order to support the implementation of self-government. Similarly, Yukon public servants and politicians vary in their ability to see Yukon First Nations governments as partners whose status is equivalent with theirs, justifying negotiating new relationships on a basis of intergovernmental equality. The success of self-government will depend on how fully the passage of time changes the cultures of non-First Nations governments toward a comfort with and commitment to self-government. Institutional change may also be needed. For example, the interdepartmental problems within the federal government that impede the implementation of self-government may require the kind of solution recommended by the Royal Commission on Aboriginal Peoples—a new federal agency at the most senior administrative level that would have the authority to compel line departments to work toward implementing self-government agreements as a top priority (Canada, Royal Commission on Aboriginal Peoples, 1996, Vol. 2, Part 1: 361–74). All of this change—jurisdictional, financial, cultural and institutional—will take time. There is no quick fix. Those who expect quick returns on self-government will have to be patient. Those who would judge it can form provisional opinions, but they should recognize that final judgments will have to wait.

## **Conclusion**

The lessons from the Yukon experience are mixed. It does respond to the skeptics by demonstrating that First Nations and their leaders are not ideologically driven. They will not accept program transfers where underfund-

ing, diseconomies of small scale and insufficient staff capacity will lower standards. Moreover, while it is too soon to tell, the small steps that Yukon First Nations are taking toward collaboration suggest some capacity for gaining the kinds of economies that the Royal Commission advocated in urging a coalescence of Canada's 600-plus First Nations into a considerably smaller number. The new First Nations governments in Yukon are more culturally authentic and their policies promise to be more sensitive to their traditional values than was the case with their *Indian Act*-based predecessors. There is no guarantee that this pattern will repeat itself in the provinces. However, that it has occurred in Yukon gives weight to the arguments of those who predict that inherence-based governance will reflect traditional values, provide more and better jobs to First Nations people, and result in more responsive, accountable government than did the band councils they will replace.

However, there is much in the Yukon experience of implementing self-government to trouble First Nations and those who advocate their fuller self-determination. It is almost certain that the financial constraints that have stalled the process of negotiating further PSTAs in Yukon are likely to limit the span of First Nations governance there and throughout Canada. To say this is not to condemn the concept of the inherent right or to contest its implementation. To the contrary, the inherent right represents a constructive and mutually respectful basis for conceptualizing the relationship between Canada and its First Nations. Moreover, inherence-based government is likely to be no weaker than any other form of First Nation government, and to be more culturally authentic. The practical problem is not the legal and conceptual basis on which different governmental forms may rest, but rather their dependence on funding transfers from another government. This dependence creates the gap between the optimistic assumption that the inherent right will produce meaningful self-determination and the reality that First Nations' enjoyment of that self-determination is likely to be limited.

One implication of this reality is to emphasize the importance of economic development for First Nations. Clearly, they themselves will have to produce the additional resources required for their further empowerment. A second implication of the probable future weakness of inherence-based government is that it complicates the already difficult question for First Nations leaders of how to apportion their scarce political resources. Of course, at present, they both pursue inherence-based governance and work vigorously to develop First Nations' institutional capacity and program delivery under the existing *Indian Act* regime. However, the negotiations to resolve the fundamental differences between their views on implementing inherence-based self-government and the positions of the federal, provincial and territorial governments are going to take a long time. Given that the result will be relatively weakly empowered govern-

ments, as revealed by the Yukon experience, First Nations leaders may have to reconsider how much a focus on inherence should divert resources away from the immediate task of developing their non-inherence-based institutions. A focus on existing governments is unpalatable, to say the least, because they are based on the discredited *Indian Act*. However, such a focus may prove to be the best choice if inherence-based governments are unlikely to be more powerful than current First Nations governments. After all, their leaders need to focus on a daunting set of tasks. In addition to fleshing out their own governmental structures, they need to build staff capacity, and develop relevant programs and services to address often grave social problems. They must enhance their legitimacy in the face of expectations on the part of their citizens that may be quite unrealistic, particularly in view of the limited funding the leadership has available to meet their citizens' needs. Also, to the extent that it is relevant in their situations, they need to negotiate power-sharing and other co-operative relations with other First Nations, public governments and private sector agencies that may enable them to capture the efficiencies that new public management concepts promise. This agenda will take a long time to accomplish. To delay it in favour of emphasizing inherence will affirm and honour the fundamental self-definitions of First Nations and serve as an empowering experience for them. However, the Yukon case demonstrates the cost associated with this option: a delay in developing the institutional strength needed to address the pressing economic and social challenges facing First Nations people today. In this way, the Yukon experience with implementing self-government presents even more starkly the difficult choice that First Nations already face between inherence and institution-building, and between birthright and pragmatism.

## Notes

- 1 This paper will focus on First Nations for several reasons. The first is that the First Nations of Yukon encompass all of the Aboriginal people of the territory; there are no groups seeking institutions of self-government for Metis in Yukon and there are no more than a handful of Inuit persons. The second is that the bulk of energy being devoted to institutions of Aboriginal governance in Canada in general focuses on First Nations. Metis efforts to achieve self-government are at an extremely early stage (Chartier, 1999) and the creation of Nunavut, while in effect enabling its predominantly Inuit population to govern itself, created a public government, not an Aboriginal government based on Aboriginal rights.
- 2 The importance of the inherent right to First Nations can be appreciated in terms of their view that "it flows from the Creator to each generation". (Assembly of First Nations, 2002: 8).
- 3 A total of eight individuals were interviewed in September of 2002 for this paper. This included two officials of the Council of Yukon First Nations, three officials associated with individual First Nations, two Government of Yukon public servants and one official in the Yukon regional office of Indian and Northern Affairs Canada.

- 4 In 1995, this organization changed its name to the Council of Yukon First Nations. Its function has been to serve Yukon First Nations, to foster collaboration among them, and in particular to represent their shared interests through interactions with the governments of Canada and Yukon.
- 5 Four First Nations—the Vuntut Gwitchin, the Champagne and Aishihik First Nations, the Teslin Tlingit Council and the First Nation of Nacho Nyak Dun—signed their agreements in 1993. These agreements were legislated into operation in 1995. Since then the Selkirk First Nation and the Little Salmon/Carmacks First Nations completed their agreements in 1997, the Tr’ondek Hwechin First Nation in 1998, the Ta’an Kwach’an Council in 2002 and the Kluane First Nation in 2004.
- 6 These powers are enumerated in Section 24 of the various self-government agreements. The agreements are available at [www.ainc-inac.gc.ca/pr/agr/index\\_e.html#Self-Government%20Agreements](http://www.ainc-inac.gc.ca/pr/agr/index_e.html#Self-Government%20Agreements); site last accessed April 28, 2004.
- 7 See for example, Section 13.5.3 of the Teslin Tlingit Council Self-Government Agreement.
- 8 See Section 16.1 of the Teslin Tlingit Council Self-Government Agreement.
- 9 My thanks to one of the *Journal’s* reviewers for reminding me of this important form of accountability.
- 10 I am indebted to one of the First Nations administrators with whom I spoke for this idea.
- 11 The 2001 census reported that 66.5 per cent of the Aboriginal population of Yukon over the age of 25 has a high school graduation certificate or higher level of education, compared to 83.4 per cent of the non-Aboriginal population. University degrees had been obtained by 180 Aboriginal persons in Yukon. For these statistics, please refer to [http://www12.statcan.ca/english/Profile01ab/Details/details1edu.cfm?SEARCH=BEGINS&PSGC=60&SGC=6001&A=&LANG=E&Province=All&PlaceName=Yukon&CSDNAME=Yukon&CMA=&SEARCH=BEGINS&DataType=1&Type>NameE=Census%20Division&ID=283;\\_site](http://www12.statcan.ca/english/Profile01ab/Details/details1edu.cfm?SEARCH=BEGINS&PSGC=60&SGC=6001&A=&LANG=E&Province=All&PlaceName=Yukon&CSDNAME=Yukon&CMA=&SEARCH=BEGINS&DataType=1&Type>NameE=Census%20Division&ID=283;_site) last accessed January 26, 2004.
- 12 Section 21.2, self-government agreements.
- 13 This prediction rests on the fact that Prime Minister Martin was the finance minister who led the process of expenditure reduction in the federal government during the 1990s. His first months in office demonstrate his intention to continue to constrain government spending.
- 14 See, for example, *Strengthening Relationships: The Government of Alberta’s Aboriginal Policy Framework*. This statement makes clear that Alberta believes that the federal government should be pressed to carry out its special responsibility for funding spending related to Aboriginal peoples (19).
- 15 To the financial problems of implementing inherence-based governments must be added two more fundamental problems. The first is that the *Canadian Charter of Rights and Freedoms* will apply to these governments and limit their ability to create institutions and policies that reflect their traditions and values. (Canada, 1995: 4). The second is that “federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws” (Canada, 1995: 11).

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