



Policy Brief

Aggregation and First Nation Governance

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Introduction

Among the set of important issues underlying the policy debate over Aboriginal governance reform in Canada is the following: How can the highly disparate and often very small First Nations communities across Canada manage their wide ranging and complex set of government functions in an effective and legitimate manner? The possibility of *aggregation* of some of the responsibilities of First Nations communities to a regional or provincial level of Aboriginal government appears to provide some answers, despite a number of potential pitfalls.¹

Critical to any informed reflection on First Nation aggregation is this point: no country in the world has developed local governments like those in Canadian First Nations communities today, that on the one hand serve so few citizens, and on the other have such a wide range of responsibilities.² Indeed, in the rest of Canada and elsewhere in the western world, governments serving on average 600 or so people have responsibilities limited to recreation, sidewalks and streets, and perhaps water and sewers.³ No countries assign such small communities responsibilities in the ‘big three’ areas of education, health, and social assistance, let alone in other complex areas such as policing, natural resource management, economic development, environmental management, and so on. Moreover, there is empirical evidence to suggest that the highest costs for providing local services are found

¹ More details of the ongoing IOG research on this topic are available at www.iog.ca, in particular the following reports: “Governance Models to Achieve Higher Levels of Aggregation: Literature Review”; “Aggregation Among First Nations: A Handbook for Self-Government Negotiators”; “Mi’kmaw Kina’matnewey: A Case Study in Aggregation”; “Regional District Governance in British Columbia: A Case Study in Aggregation”.

² The only close parallel are tribal governments in the United States, which tend to be larger on average and have fewer responsibilities.

³ See for example, George Boyne, “Local Governance Structure and Performance: Lessons From America?” *Public Administration* (Autumn, 1992) and Harry Kitchen and Enid Slack, Trent University, “Providing Public Services in Remote Areas”, publication forthcoming

in governments serving very small and very large populations.

This brief re-evaluates the standard arguments for the various models of aggregation in light of international and local experience, and provides new rationales for aggregation based on ‘good governance’ criteria. The purpose is to draw out the chief policy implications for First Nation governance both in the short and long term.

Whose issue is it?

Aggregation among Aboriginal communities is hardly new: indeed, there is evidence of Aboriginal peoples collaborating to provide better services, protection, and representation to their members throughout history. For example, the Anishinabek Nation can trace its roots to the Confederacy of the Three Fires, which existed long before Europeans arrived in North America.

Is it not fair to conclude, therefore, that aggregation is an internal concern for First Nations communities and their leadership? There are at least four responses to this important question. The first is costs. The federal and in some instances provincial governments will be footing much of the bill in the foreseeable future for self-government and so cannot be indifferent to an issue which has profound funding implications.

Second, aggregation involves not just the provision of services but also a range of other government functions such as regulation. This brings the matter squarely into the domain of health and safety. Should anything go wrong – for example another Walkerton, this time in a First Nation self-governing community – the political ramifications would be significant. Furthermore, and this leads to the third point, the federal government might be open to legal action if it did not show due diligence in the configuration of First Nation governments in agreements to which it was a party.

But more is at stake than just financial, political, and legal considerations. We are in the midst of ‘re-confederating Canada’, of creating a third order of government with constitutional protection. So it is imperative that we collectively get the

configuration of First Nation governments right. For all of these reasons, First Nation aggregation is the business of all Canadians.

Models of Aggregation

From various international and domestic examples, we can discern five major models of aggregation, outlined below with a few examples:

<u>Aggregation Model</u>	<u>Key Characteristics</u>
1. Single tier <i>e.g. RCAP proposal, amalgamated municipalities</i>	Merging of local governments, sharing of governance functions, requires legislative change.
2 (a) Two-tier, delegated powers <i>e.g. United Anishnaabeg Councils</i>	Some functions of two or more local governments transferred to a regional body, opt out possible.
2 (b) Two-tier, not delegated <i>e.g. Nisga'a, Two-tier municipal (Canada), Aboriginal Province (Courchene and Powell proposal)</i>	Like 2 (a) but powers of regional government are fixed. Requires legislative change.
3. Power-sharing treaties <i>e.g. European Union</i>	Autonomous nations agree, through an international treaty, to establish an organization to exercise law-making powers over delegated areas of responsibility within their respective jurisdictions.
4. Special purpose bodies – no specific legislated powers <i>e.g. Tribal Councils, First Nations Lands Advisory Board</i>	Two or more governments agree to establish an organization to provide specialized services to the governments. Requires no legislative change.
5. Special purpose bodies – specific legislated powers <i>e.g. Cree School Board, FN Policing, FN Child & Family Services, Municipal Finance Authority of BC</i>	Two or more governments agree to establish an organization to exercise power over delegated areas of responsibility within their respective jurisdictions. May require legislative change.

Of course the model of aggregation depends on the number and size of the First Nations involved, the provincial and regional context, and the government services or functions in question. And each arrangement implies trade-offs in terms of the degree of accountability to citizens, the simplicity of the governance structure, the costs of transition and operation, the stability or flexibility of the arrangement, the level of competition between service providers, service quality, and the level of local control. But there are common pluses as well.

Rationales for Aggregation

There are at least six reasons, listed below, to support forms of aggregation in the First Nations context. The first two of these are broadly cited, common arguments; the other four are more nuanced issues concerning the promotion of ‘good governance’:

Standard Rationales:

1. Effecting better advocacy through collective voice;
2. Achieving savings or improved service through ‘economies of scale’;

‘Good Governance’ Rationales:

3. Developing effective regulatory systems that separate the regulator from operations and managing other provincial-like responsibilities such as certain kinds of redress, revenue equalization, administration of the courts, property tax assessment, intergovernmental relations, and so on;
4. Managing with integrity funding programs directed at families or individuals;
5. Ensuring sustainable and effective ‘core’ governance capabilities such as political and senior administrative leadership;
6. Making the federation work effectively.

We look at each of these rationales in turn and relate them to the five models of aggregation canvassed in this brief.

1. Advocacy

Increased ‘clout’ is a long standing reason why Aboriginal groups have collaborated in the past.

Indeed, Tribal Councils in some parts of the country existed long before the federal government provided Tribal Council funding beginning in the mid 1980s. The AFN, Provincial/Territorial organizations (PTOs) and special purpose bodies like the Indian Taxation Advisory Board and the Lands Advisory Board are examples of this type of aggregation. Special purpose bodies without specific legislated powers (they are incorporated bodies under federal or provincial ‘not for profit’ legislation) are the form most of these organizations take on.

A key issue is how these organizations are funded. With advocacy funding coming primarily from the federal government, accountability relationships become tangled as these organizations, whose *raison d’être* is to serve their members, must also meet federal funding conditions. Further, there is a major issue around independence. How critical can an organization be of its principal funding source? In the non-Aboriginal world, for these and other reasons, federal funding of advocacy organizations has switched from ‘core’ to project-related.

The long term direction for this type of aggregation appears to be clear: it should be voluntary and funded by the participating FN entities. How to get there, however, will present significant challenges – political and economic.

2. Economies of Scale

This argument for aggregation may be the one most commonly heard. The assumption is that most First Nations are too small to carry out many of their service-related functions in a cost-effective manner. Collaboration among First Nations, therefore, will either save money (do more with less) or at a minimum get a bigger bang out of existing funds. All five forms of aggregation canvassed in this brief could presumably accomplish this objective.

Surprisingly, the evidence at least in the non-Aboriginal world suggests some skepticism is warranted with regard to these claims. Consider the following points:

- There are a wide variety of ways that local governments can deal with small size without adopting an aggregation option: some of these

include contracting with the private sector, developing service agreements with neighbouring municipalities, contracting with provincial or federal Crown agencies.

- The empirical evidence suggests that there is no ‘ideal’ size for local government. There is little uniformity in what drives costs across the range of local responsibilities and these cost drivers can change significantly over time.
- Implementation costs of aggregation are consistently underestimated and there are some important ‘drivers’ for long term cost increases among newly aggregated governments (having service standards rise to the highest level among former governments and adjusting wages to meet the level of the most generously paid employees are two examples)
- Aggregation can reduce local competition that helps stimulate innovation
- When collaboration is voluntary such as in the Regional Districts of BC, then participating governments tend to break down functions and services into component parts and look for innovative solutions around these smaller elements (for example, they will collaborate on building an arena but run their own recreation programs for children)
- There is strong evidence to suggest that citizens prefer smaller governmental units so as to preserve local control and choice.

That said, it is important to be cognizant of certain features of current First Nation governments that will tend to dampen voluntary collaboration. The first and most critical is that First Nation citizens do not pay taxes to their government and as such will not be nearly as demanding as their non-Aboriginal counterparts for efficient, high quality services. Pressures from citizens who are concerned about tax levels move politicians to look for cost savings that might be realized through collaborative solutions. Second, given that the public sector is the biggest employer in most First Nation communities, there is strong motivation to create local jobs instead of realizing cost savings. With these disincentives in mind it might be wise to employ countervailing incentives such as the ability to redirect cost savings to other areas as is the case with AFA type agreements.

From the above analysis, it is clear on what to avoid – for example, the establishment and funding of aggregated service agencies by the federal government, agencies that provide free services to a group of First Nations all in the name of economies of scale. Tribal Council funding for the five advisory services is good examples of this tendency.

Further, to rest the case for aggregation principally on the achievement of economies of scale appears shaky at best. Stronger, more cogent arguments lie elsewhere and it is to these that we now turn.

3. Separating Municipal-like from Provincial-like Responsibilities

Past self-government agreements, whether of a comprehensive or sectoral nature, have involved the creation of First Nation governments with law-making authority in areas that, in the non-Aboriginal world, are associated with municipal, provincial and even federal levels of government. Some examples include:

Municipal-like responsibilities

- Provision of basic public works – e.g. water, sewage treatment, roads
- Delivery of education, social assistance, some public health services

Provincial-like responsibilities

- administration of justice
- broad taxation powers
- broad regulatory powers – public works, environmental protection, natural resource management
- certain redress mechanisms
- property tax assessment
- land registry systems
- revenue equalization among municipalities

Federal-like responsibilities

- administration of certain federal acts
- co-management arrangements

In the non-Aboriginal world, there are some ‘good governance’ reasons for why provinces carry out

certain functions and municipalities others. Take regulation, for example. The provision of potable water and the collection and treatment of sewage are done to exacting standards established in a regulatory regime. Provinces are the regulators, municipalities the operators. If the standards are not being met, provinces have the power to order municipalities to take corrective action, including the shutting down of a facility. Thus it is not clear how the combining of these regulatory and operating responsibilities in a single tier Aboriginal government would work.⁴ How can a government, especially a small one, regulate itself? And public works is not the only jurisdictional area where this problem might arise – other examples are child and family services, the management of natural resources, environmental protection and policing.

Similar rationales could be developed for why other provincial-like (and federal-like) responsibilities are not found in local governments. For example, in property tax assessment, the principle is to separate this power from the property tax power so as to avoid a potential conflict of interest (the taxing power has a built-in interest to see assessment values rise). Another example is the tendency of some provinces to have redress mechanisms for local decision-making at the provincial level (the Ontario Municipal Board is one example) to ensure that parochial interests at the local level do not trump the broader public interest.

Thus, the need to keep separate certain provincial-like powers from local governments provides a powerful rationale for aggregation in a First Nation context. What is needed to realize effective self-government is the creation of two tiered, First Nation government – a provincial-like tier with provincial-like powers and a local tier consisting of a number of governments dedicated to providing local services to their communities. Moreover, two other important ramifications follow:

- the provincial-like tier should not be based on delegated powers from individual First Nations – this would render it too unstable and put

⁴ It would be possible, of course, in a self-government agreement to assign the regulatory responsibility to the province, assuming the concurrence of both the Aboriginal party and the province to the agreement.

important health and safety concerns at risk, should the delegation be withdrawn

- the political leaders at the provincial-like tier should be different from those at the local tier to avoid conflicts of interest, among other things

It is important to clarify that the provincial-like tier need not encompass all of the First Nations in an entire province. Rather, First Nation compatibility should be the primary (but not sole) factor in determining the make-up of these governments.

4-6. Other ‘Good Governance’ Reasons for Aggregation

There are three other ‘good governance’ rationales for supporting a case for aggregation in a First Nation context. One major reason, as the Royal Commission and numerous others have pointed out, concerns the provision of certain services by governments in small communities where family connections are a major fact of life and where discretionary powers of officials and political leaders can exacerbate tensions within the community based on family lines. Examples of such programs include social assistance, economic development funding, post secondary education, housing and any program with coercive powers such as policing, child and family services and leasing and permitting systems. The Royal Commission pointed to this problem and used it as a basis for arguing for larger First Nation governments based on nation groupings. And many others have pointed to similar problems.

A second ‘good governance’ rationale has to do with core capabilities of a government – political leadership, senior administrative competence - capabilities which can’t be obtained by contracting out or making servicing arrangements with other levels of government. Once again the RCAP used this rationale for arguing for large, Nation-level governments.

Finally, aggregation can also be justified by arguing that, in creating a third level of government, we need to think carefully about how the Canada as a whole will function. With only 10 provinces and three territories, a vast array of collaborative

structures and processes can be fashioned that provide the glue for making the country work better. It is no accident that the United States as a federation with some 52 states has evolved in a much more centralized manner than has been the case in Canada. The classic pattern in the US is for the federal government to develop a legal framework for a functional area (potable water is a good example) leaving the states to do most of the implementation. So the number of governments matter. A federation with say 600 Aboriginal governments is going to work much differently (and likely less co-operatively) from, say, a federation with 60 Aboriginal governments.

These last three arguments for aggregation, while compelling, are not as helpful as the good governance argument around separating provincial-like and local type responsibilities in pointing to a specific set of directions for how aggregation might occur. Moreover, one can point to exceptions to some of these arguments – for example, small communities with highly competent leaders or small communities that manage family relationships well.

Common Design Principles for Structuring First Nation Self-Government

From our analysis of the main rationales for aggregation, we can pick out a few critical points to consider in creating effective governance arrangements:

- the principal arguments for aggregation in a First Nation context should be based on ‘good governance’ principles and not the realization of savings or better service through economies of scale
- First Nations’ taxing their citizens is likely the best, long term incentive for prompting innovative solutions to economies of scale issues
- the combination of provincial-like and local law-making responsibilities strongly points to the need for a two tier system of First Nation government.
- Among other things the provincial-like tier would be responsible for regulatory matters, major tax powers, revenue equalization among

lower tier governments, certain redress functions, intergovernmental affairs, the administration of justice and provincial-like functions relating to health, education, social programs and economic development.

- The local tier, made up of a number of First Nations, would have a range of law-making powers dealing with service delivery responsibilities and other local matters such as zoning etc.
- There could be a number of special purpose bodies (e.g. school boards, policing commissions, child and family service agencies, economic development corporations) responsible to the provincial-like tier.
- The provincial-like tier would not have delegated powers but would have separate ‘constitutional’ standing; further it would not need to encompass all First Nations in a single province but could be regional in nature
- Political leaders in the two tiers would be different.

Policy Implications

If the above design principles have validity, then a number of shorter term implications follow:

- The government and First Nations should phase out ‘forced’ attempts at achieving economies of scale such as the Tribal Council funding program for advisory services; rather attention should be focused on using existing incentives (AFA funding agreements) or developing new ones for encouraging innovative and voluntary solutions to economies of scale problems
- Future initiatives using the same Tribal Council rationale for realizing economies of scale - that is, the federal government funding some central service agency which provides free services to First Nations - should be avoided.
- Combining regulatory and operational responsibilities in a single tier, self-governing entity should be avoided unless the First Nation participants are willing to be subject to existing provincial regulatory regimes where no federal regime exists
- The federal government and the First Nation signatories to the First Nation Land Management Initiative should make significant

efforts to devise an approach that separates regulatory responsibilities from operations in such areas as potable water, sewage treatment, solid waste management and environmental protection

- For those negotiating sectoral self-government agreements, there should be efforts among the parties to make the proposed regime compatible with an eventual move to the two tier government structure described above.
- For those self-government agreements where there are delegatory powers from participating First Nations to a regional government, the federal government and First Nations should identify provincial-like and local powers, ensure the regional government is assigned the provincial-like powers and provide strong disincentives for First Nations to opt out of the regional government.⁵

Summary Remarks

Our conclusions have built on important insights from several sources – the Royal Commission on Aboriginal Peoples; Tom Courchene and Lisa Powell’s controversial work on the idea of an Aboriginal province; the experience of various Canadian municipalities, the European Union, and innovative local government structures in Scandinavian countries; and of course from the experience of the First Nations with whom we have been privileged to work on self-government issues.

Ultimately, however, we take full responsibility for our proposals relating to aggregation in the context of First Nation governance and look forward to the debate they may engender.

⁵ The requirements to approve a withdrawal from an aggregation arrangement could include several options: a mediation process prior to any final decision to withdraw; a citizen referendum with a high ‘bar’ of, say, 75% in favour; the support of a majority of the other members of the aggregated government; or a requirement that the First Nation distribute information to its citizens on how it proposes to ensure the health and safety of its citizens in a manner comparable to surrounding communities, specifically for drinking water, treatment of sewage and the other Public Works and environmental protection functions.