



THE
WEALTH



OF
FIRST



NATIONS

TOM FLANAGAN

The Wealth of First Nations

Tom Flanagan

Fraser Institute

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Preface

The Liberal government of Justin Trudeau elected in 2015 is attempting massive policy innovations in Indigenous affairs. Major changes include large increases in federal spending on Indigenous peoples, division of the former department of Indigenous and Northern Affairs into a department of Indigenous Services and another department of Crown-Indigenous Relations, reconsideration of the *Indian Act*, and adoption of the United Nations' *Declaration of the Rights of Indigenous Peoples*. Less sweeping but still important changes include allowing more people with Indigenous ancestry to become Registered Indians, addressing the land claims of some Métis organizations, revising the specific-claims process, and negotiating further settlements for past injustices (residential schools in Newfoundland & Labrador, the "Sixties Scoop," Indian hospitals). Beyond these particular changes, a whole new framework for Crown-Indigenous relations has been promised before the 2019 election (TEAL, SINGH, BURSEY, AND CURPEN, 2018).

I do not propose to enter into the debate over First Nations at this level. Whatever differences exist with respect to constitutional, legal, and political arrangements, I think everyone would like to see First Nations enjoy a higher standard of living, or *well-being*, as it is often called today. When the Constitution is being reinterpreted, laws passed, bureaucracies re-organized, and large amounts of money spent, we need to know what the impact on First Nations may be, because more spending and greater official attention does not necessarily translate into improved well-being.

The book title, *The Wealth of First Nations*, is borrowed from my American friend Terry Anderson, who has used the phrase "the wealth of Indian nations" in several publications. The word "Indian" is still widely used in the United States, but "First Nations" is now preferred in Canada. Although like Terry I use the word "wealth," I am writing not just about material accumulation but about well-being more generally, in which material prosperity is an important factor. Of course, behind both of our titles looms the incomparable work of Adam Smith, *The Wealth of Nations*. The explicit reference to Smith shows my conviction that the principles of political economy apply to all peoples. Applications may vary in particular circumstances, but the laws of supply and demand cannot be repealed, suspended, or evaded.

The Wealth of First Nations

Making and Taking

Prior to the nineteenth century, the large majority of human beings lived in what today would be considered poverty. In all complex societies, an elite stratum used its control of political and economic institutions to enjoy a varied diet, clean water, formal education, and relief from long hours of manual labour, but such luxuries were not for ordinary people. For causes that are still debated, things came together in the nineteenth century to make possible a gradual extension of these luxuries to the broad mass of the population (CLARK, 2007). A new society emerged characterized by universal education, the harnessing of science to engineering, the division of labour and mass production, multiplication of energy through use of hydrocarbon fuels, the extension of private property rights and free markets, and inclusive political institutions based on constitutionalism, representative government, and a widely distributed franchise.

After its obvious success in Western Europe and North America, there have been many attempts to export this form of society to the rest of the world, with great success in countries such as Japan, South Korea, Taiwan, and Singapore. The experience of the Soviet Union and its satellites, as well as Mao Tse-tung's China, showed that a high general standard of living could not be achieved without private property and free markets. China is now conducting an experiment using many elements of the new society (with the notable exception of free political institutions), with remarkable economic progress so far but with questions remaining about the longer term.

Canada has thrived under the new form of social organization, achieving rank among the world's leaders in political freedom and stability, material standard of living, longevity, advanced education, relative equality between the sexes, and many other economic and social benefits. Immigrants from all over the world have been able to benefit from Canada's achievements by participating as individuals in the society—becoming citizens and voting in elections, earning income from employment and investment, attending educational institutions, and raising children who

can progress even farther. Members of some groups also work hard at retaining a distinctive religious or cultural identity, but that does not compromise their prosperity as long as they also take part as individuals and families in Canada's wider social and economic life.

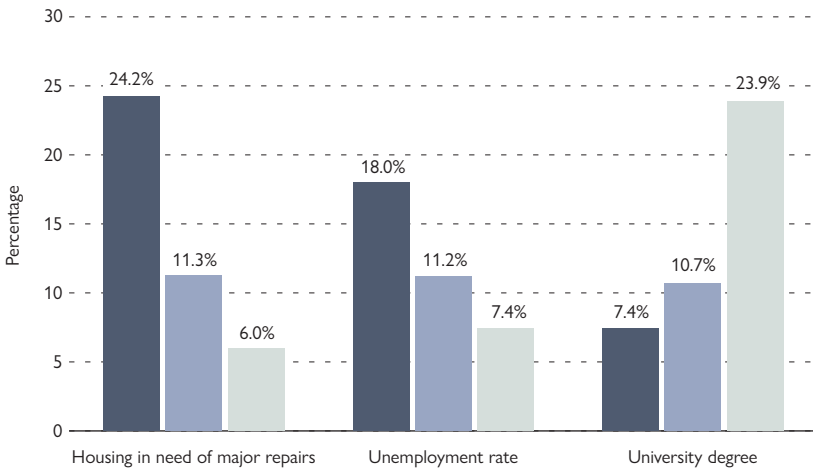
There is, however, a serious problem of prosperity for Indigenous people, who did not voluntarily choose to join Canadians in seeking the benefits of the modern form of social organization. Rather, that model was imposed upon them by colonialism, often with harshly coercive methods such as the prohibition of their inherited languages and religious practices, so they are naturally in conflict about it. Some have reacted rather like immigrants, pursuing employment, education, and social participation while also often trying to preserve a distinctive cultural inheritance. Others remain outside the wider society and are largely shut off from the economic and social benefits that most Canadians enjoy. Let's look at some numbers.

In the 2016 census, 1,673,785 of Canada's 34.5 million people labelled themselves as having an Aboriginal identity. (The Liberal government elected in 2015 is in the process of switching official terminology from "Aboriginal" to "Indigenous," but the term used in the 2016 census was "Aboriginal." The denotation of the two words is the same, even if the connotations may be slightly different.) Of those identifying as Aboriginal, 977,230 called themselves First Nations, Registered, or treaty Indians, while 587,540 called themselves Métis, that is, being of mixed Aboriginal and other ancestry.

A comparison between Métis and First Nations highlights the focus of this book. The Métis were designated as an Aboriginal people in the *Constitution Act*, 1982, but they have never been separated from Canadian society in the same way as Indians. Except for the eight small Métis settlements in Alberta, there are no Métis reserves, no *Métis Act*, no history of separate legal and political status. So how have they done in Canadian society?

FIGURE 1.1 compares some important social and economic indicators for First Nations, Métis, and non-Aboriginal Canadians drawn from the 2016 census data tables (STATISTICS CANADA, 2017B). Other indicators would show the same pattern: the Métis occupy an intermediate position between First Nations and non-Aboriginal Canadians, often closer to the latter than the former. The pattern has been the same as long as data have been available (THOMAS, 2015; FLANAGAN, 2017B). The disparity between Métis and First Nations would be even larger if we looked at the approximately half of First Nations people who live on Indian reserves. Unfortunately, detailed data from the 2016 census on the characteristics of reserve populations were not yet available at the time of writing. However, data from previous census years have always shown that First Nations people living on reserve were less well off than Métis or indeed than First Nations people living off reserve.

Figure 1.1: Selected indicators for First Nations ■, Métis ■, and non-Aboriginal Canadians ■, 2016



SOURCE: STATISTICS CANADA, 2017B.

So the most serious concern, and the focus of this book, is not about the prosperity of Indigenous people as such but about First Nations people living in reserve communities. The question is: is it possible for people living in these circumstances, which make it difficult to participate fully in Canadian society as individuals, to participate communally in such a way as to achieve a standard of living similar to that of other Canadians? One answer, going back to the first *Indian Act* of 1876, is no: First Nations people must be enfranchised as individuals after a period of proper education required to learn the arts of civilization. But First Nations communities have rejected this full-scale assimilation, as illustrated in the vehement reaction to the federal government's 1969 White Paper (CHRÉTIEN, 1969). Those in remote locations have also usually rejected the less sweeping but still drastic option of relocation to a site near a town or city where economic opportunities are more abundant. Joseph Quesnel (2018) has recently proposed federal subsidies to encourage relocation, but I doubt that it will happen on any significant scale. Hence arises the question of how First Nations' prosperity can be achieved through collective rather than individual participation in Canadian society.

Making and taking

The economist André Le Dressay, president of the Fiscal Realities consulting firm, provides one approach to answering these questions. He has suggested that there are two main strategies for helping First Nations overcome the barriers they face:

One is developing the institutional framework to reduce the high costs of doing business. The second is to improve their competitive advantages by expanding First Nation rights and title over their original territories. The strategies are different and each addresses a different barrier facing First Nations. The institutional strategy supports First Nations with existing competitive advantages on their existing lands, and the rights and title strategy provides competitive advantages to First Nations that may not have them (LE DRESSAY, 2016: 265).

For purposes of this book, I want to use Le Dressay's insight while adding to it slightly. Let me introduce a distinction between what I call "making" and "taking."

As I am using the concept of "making" here, it also includes the notion of "trading." Thus augmented, "making" means the creation of wealth by offering for sale or lease something owned by the makers. This could be the makers' time, as in contracts of employment. It could be objects that the makers have fabricated, books they have written, manufacturing processes they have patented. It could be land, buildings, or natural resources they own. In all cases, makers enter the economic marketplace through exchanges for mutual benefit in voluntary transactions. Makers have things that other people want, and they are willing to exchange some or all of these things for different things that will make them better off.

"Taking," on the other hand, is involuntary. It means using the power of the state to appropriate the wealth that others have generated through voluntary transactions. It is part of what Acemoglu and Robinson call, in their well-known book *Why Nations Fail* (2012), "extractive institutions." Taxation for purposes of income redistribution is an obvious example. Less obvious but sometimes even more rewarding is what modern economists call rent-seeking (SIMMONS, 2011: 187–198)—using political power to change the rules surrounding ownership and exchange, to steer the benefits toward a selected group. A classic Canadian example of rent-seeking is the supply management of dairy products, which has created a set of rules that apply nowhere else in the Canadian economy: administered prices, production quotas, and high protective tariffs to reduce the effect of foreign competition.

For First Nations today, "making" means earning money by engaging in what I call "community capitalism." A First Nation can make money and create jobs for its members by organizing or investing in businesses, selling goods and services to consumers, leasing land for residential or business purposes, and licensing the extraction of natural resources. This is the general way of creating wealth in a free-market society, except that First Nations are doing it as communities rather than as individuals. As Le Dressay emphasizes, success usually requires improvements in both institutional and physical infrastructure in their communities.

First Nations engage in “taking” when they lobby for more extensive government services financed by general tax revenues, litigate to create potentially profitable rights such as the duty of consultation, seek compensation for past grievances, and demand a share of resource revenues generated by others. In these instances, they are using the power of government, including both the political and the judicial processes, to acquire more money, land, and property rights.

The distinction between making and taking, however, is not entirely clear-cut. The acquisition of new rights may arguably replace old rights of which claimants were wrongfully dispossessed; such is the stated logic of the specific claims process, which is based on arguments that legal rights embodied in treaties and the *Indian Act* have been violated. Even broader claims of still-existent Aboriginal rights and title underlie the judicial creation of the right to be consulted. I have argued in the past that Britain and Canada often misinterpreted and even ignored the pre-existing property rights of Indigenous peoples (FLANAGAN, ALCANTARA, AND LE DRESSAY, 2010: 30–41). Whether and to what extent such primordial rights can be restored is an enormous question beyond the scope of this work. Here I want to focus on how First Nations can and do improve their well-being within the existing constitutional and legal framework.

Money, land, and resources acquired through the exercise of political power can also be invested for new rounds of wealth generation, although the process is not inevitable; some First Nations may prefer to leave land and property rights economically unused, and to distribute money to their members as individuals rather than invest it in community capitalism. And for some First Nations, the important issues may not be economic at all; they may be much more interested in preserving traditional languages, customs, and spirituality. While I respect those choices, my research is directed to what I believe is the larger number of First Nation reserve communities that aspire to attain a higher level of prosperity and material well-being.

Even if making and taking are not watertight compartments, it is a useful common-sense distinction. Hence this book is divided into two parts corresponding to these two main strategies of acquiring wealth. As I go along, I will try to point out ways in which they may reinforce or work at cross purposes with each other. The first part looks at how First Nations have increased their well-being by engaging in the Canadian economy through community capitalism; the second part examines the results of their attempts to secure more control over resources through politics and legal action.

The second part does not include campaigns for compensation for historical injustices to individuals, such as residential schools, the adoption of children outside of First Nations, and poor care in Indian hospitals. Those campaigns can lead to large monetary transfers, but those go to individual persons, not to collective First

Nations. The recipients may not live in First Nation communities (Indian reserves) and may not even be Registered Indians, that is, those who are listed on the federal government's Indian Register and thus receive the benefits of official Indian status (INAC, 2018B).¹

The need for evidence

I agree with the historian of science Alice Dreger that “the pursuit of evidence is probably the most pressing moral imperative of our time” (DREGER, 2015: 52), particularly in the highly politicized field of Indigenous studies. The purpose of the book is to provide empirical evidence about the well-being of First Nations. Which factors are associated with prosperity, and which with poverty? The emphasis is on laws, policies, and strategies that are under the control of governments—federal, provincial, and, most importantly, First Nations themselves. The findings in the book are meant to be of practical assistance to political leaders at all levels, suggesting what is likely to contribute to elevating the well-being of First Nations.

The evidence offered here combines statistical analysis of general trends with particular case studies. These are standard methods in the social sciences where experimental evidence is not available. Granted, the evidence is observational in character, resulting in findings of correlation rather causation, but one cannot run controlled experiments on human communities. The best researchers can do is to identify differences between more and less prosperous communities, using statistical tests and controls to get a sense of their importance.

Will all of this improve the well-being of First Nations? The evidence presented here suggests that improvement will only happen if the changes allow First Nations to become more self-determining, more able to take advantage of the economic opportunities around them, and more agile in using their own governments to promote the well-being of their people. This book contains many detailed findings about laws, programs, policies, and strategies, which all cohere around one major conclusion: whatever the wrongs and calamities of the past, the future prosperity of First Nations will depend mainly upon their own initiatives, their own efforts, their own choices. Those—not government transfer payments and administrative reorganization—will build a genuine “Wealth of First Nations.”

1. Much of the money is probably spent on short-term consumer goods; but even if it goes to long-term investments such as housing and education, we have no way to link those individual benefits to collective statistics about the well-being of First Nation reserve communities.

Making

Part One of this book examines the ways in which First Nations are using the land and resources currently set aside on their behalf to create wealth and raise their own standard of living. They do not own this land outright; the federal Crown is the legal owner, but the First Nations are the beneficiaries. Their main resource south of the 60th parallel is 3,000 land reserves totalling about 3.8 million hectares (BRINKHURST & KESSLER, 2013: 2) with associated mineral rights.² The challenge for First Nations community capitalism is to use this land base in productive ways that will make their people better off.

2. This book focuses on First Nations communities in the ten provinces who live on Indian reserves. I do not attempt to deal with the First Nations in the Yukon and the Northwest Territories who have a variety of rights over much larger tracts of land as a result of modern agreements.

The Community Well-Being Index

The main tool used here for measuring the progress made by First Nations in attaining a higher standard of living is the Community Well-Being Index (CWB), a measure of standard of living and quality of life for all Canadian communities, including First Nations (INAC, 2016C; O’SULLIVAN & MCHARDY, 2007). It is calculated by researchers in Indigenous and Northern Affairs Canada, based on Statistics Canada’s census data. The time series extends back to the 1981 census, with updates every five years except for the 1986 census. In earlier versions, it was calculated from the Census of Population; for 2011 it was based on the voluntary National Household Survey, which was sent to every household in First Nations communities. The First Nations’ response rate in 2011 was 82%, higher than for other Canadian households, so the changeover to a voluntary survey in 2011 is not a major problem in this context. That responses were gathered by First Nation interviewers going door to door helps to explain the high participation rate. Results from the 2016 census were not yet available at the time of writing.

The Community Well-being Index is a summation of four equally weighted aspects of on-reserve life as measured by Statistics Canada data: per-capita income, education, housing, and workforce participation.

1. PER CAPITA INCOME is logarithmically transformed, so that the impact of income on well-being is not overestimated, and the presence of one or two millionaires in a small First Nation cannot have an undue effect.
2. EDUCATION is measured in two ways:
 1. percentage of the community aged 15 and over that has completed at least grade 9 (weighted $\frac{2}{3}$ of the education component);
 2. percentage of the community aged 20 and over that has at least finished secondary school (weighted $\frac{1}{3}$).

3. HOUSING is also measured in two ways, emphasizing both quantity and quality:
 1. quantity—percentage of the population living in housing with no more than one person per room, that is, not crowded;
 2. quality: percentage of the population living in dwellings that do not need major repairs, that is, in good shape.
4. LABOUR FORCE PARTICIPATION is measured in two ways as well:
 1. percentage of the population aged 20 and over who are involved in the labour force, which means seeking work even if not now employed;
 2. percentage aged 15 and over actually employed.

These four aspects of community life are standardized into percentages, weighted as described above, and then added together to give the final CWB, which can range from 0 to 100. Note that the logarithmic transformation of per-capita income renders the CWB less purely economic in character. It is not just about purchasing power; it encompasses other values such as security (housing), intellectual achievement (education), and personal fulfilment (labour force participation).

In recent census years, the CWB has been calculated for about 85% of First Nations, omitting very small ones (of population less than 100) and others where there are issues of data quality or where the band government will not grant access to census takers. Unfortunately, this latter category includes large and important Iroquois communities in Ontario and Quebec. The CWB is also calculated for over 4,000 Canadian communities, thus facilitating comparison of aboriginal standards of living with those of other Canadians.

While the CWB appears to be the best available measure and has been used in other research, it is not without problems. It shares two difficulties associated with all aggregated indexes: the weighting—25% each for income, education, housing, and labour force participation—is arbitrary; and the CWB as an aggregated variable has no natural interpretation. It is not clear what an increase of, say, 10 points means. In contrast, each of the four components has a natural interpretation; an increase means more dollars, or years of education, or more spacious housing in better repair, or more people with jobs.

The CWB measures the well-being of reserve communities but says nothing about the condition of First Nations people who live off reserve—50.7% of the Registered Indian population according to the 2011 census and 55.8% in 2016 (STATISTICS CANADA, 2017A; STATISTICS CANADA, 2018). Moreover, the CWB is not available for all First Nations; and when it is available, there are potential problems with the composition of the on-reserve population. Some reserves include non-Indian residents whose socio-economic characteristics may be different from the norms for Registered

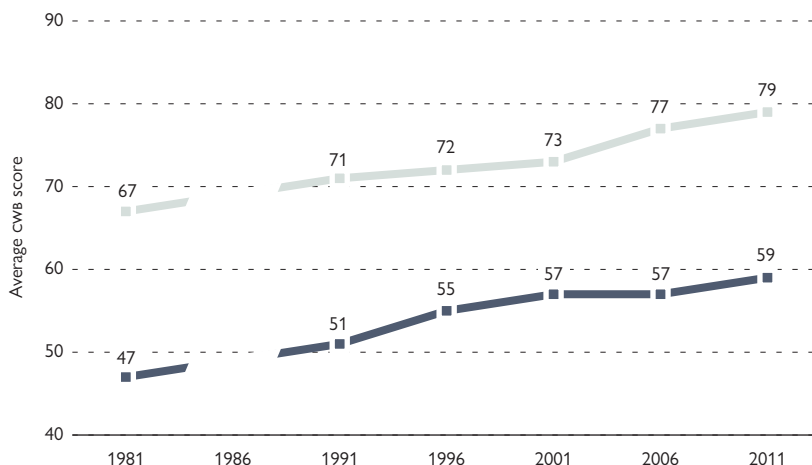
Indians. Also populations on many reserves are quite mobile, with many band members moving back and forth from neighbouring cities. Depending on who is coming and who is going, reserve populations may be demographically different in different census years. But all indexes are problematic in one way or another, and the possibility of problems with the CWB do not prevent its usage in research.

Other indicators can, of course, also be used. Sharpe and Lapointe (2011) used average earnings and GDP per capita as indicators of economic outcomes on Canadian Indian reserves. There are at least two reasons, however, to believe that a broader indicator of well-being is more appropriate in measuring on-reserve outcomes. First Nations people, especially those living on reserves, often receive substantial in-kind income, such as subsidized housing, supplementary medical benefits, and financial assistance in attending institutions of higher education. Moreover, reserve populations are often very small, so that the presence of a few millionaires can drive average income statistics much higher without reflecting much improvement in well-being for most band members. The broader base of the CWB index helps to reduce such problems.

Admittedly, the CWB is not the last word about well-being. It does not incorporate measures of crime, health, language retention, cultural practice, environmental integrity, religious faith, subjective happiness, or many other things that might contribute to quality of life (AUDITOR GENERAL OF CANADA, 2018). But it is hard to argue against the importance of income, jobs, education, and housing. First Nation leaders frequently state that their people desire these four things and need more of them. So, even if the CWB is not the last word about well-being, it represents a good baseline or common denominator of what people, including First Nations, hope to enjoy in a modern society. Even if a better indicator is eventually developed, the CWB will remain indispensable for study of the 35-year period from 1981 to 2016.

Based on data from the 2011 census, the CWB calculated for 452 First Nations ranged from 37 to 90, with a mean of 59, compared to a mean of 79 for other Canadian communities. This difference in means of 20 points has persisted with minor variations ever since the CWB was first computed on the basis of 1981 census data (FIGURE 1.1). The good news for First Nations is that their average CWB has been steadily increasing over the last three decades. The less good news is that the gap between First Nations and other Canadian communities, after seeming to narrow a little in the 1990s, has widened again and was as great in 2011 as it was in 1981. This temporary improvement in relative position followed by regression to the longer-term trend line has not been explained by researchers. Over the whole 30 years, the best-attested generalization is that First Nations as a group have been lifted by the rising tide of the Canadian economy but not catching up in relative terms.

Figure 1.1: Average scores on the Community Well-Being Index, First Nations ■ and non-Aboriginal communities □, 1981–2011



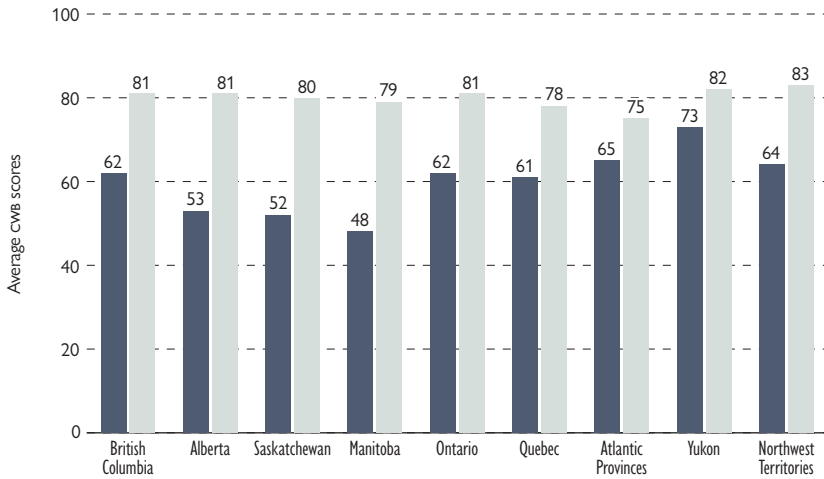
SOURCE: INAC, 2016C.

Looking at a time series of mean CWB scores is just the start of interpretation. The range for First Nations of 37 to 90 in 2011 is much greater than the range of variation for other Canadian communities, and this variance is structured in systematic ways. As shown in FIGURE 1.2, the difference between the lowest 2011 CWB mean for First Nations (Manitoba) and the highest (Yukon) is 25 points, which is as great as the gap between the overall First Nations mean and the average of other Canadian communities.

That hundreds of First Nations have such a wide range of measured outcomes creates an opportunity for empirical research to see which variables are correlated positively or negatively with CWB scores. That research, in turn, can generate practical insights about policy for senior governments and development strategies for First Nations. Essentially, the goal is to seek best practices in aboriginal governance associated with higher CWB scores, practices that can be adopted by First Nations leaders and encouraged by governmental policy-makers to help Indigenous people achieve the same standard of living as other Canadians.

Following the lead of Nobel-Prize-winner Douglass North, contemporary economics and political science emphasize the importance of legal and governmental institutions in explaining economic progress and associated advances in well-being. The Fraser Institute's annual survey, *Economic Freedom of the World*, first published in 1996, is an important part of this literature. It produces an aggregate score for sovereign states based on measures of size of government, legal system and property rights, sound money, freedom to trade internationally, and regulation.

Figure 1.2: Average scores on the Community Well-Being Index (CWB) by region for First Nations and non-Aboriginal communities, 2011



SOURCE: INAC, 2015C: FIG. 14.

The 2012 edition highlighted positive correlations between economic freedom and per-capita income, economic growth, life expectancy, and related indicators of well-being (GWARTNEY, LAWSON, & HALL, 2012: 23–24). Similar results have emerged in the Fraser Institute’s *Economic Freedom of North America* series, which compares American states and Canadian provinces. Those sub-national units that score higher on the index for economic freedom also tend to score higher on measures such as GDP per capita and annual growth rates (BUENO, ASHBY, & MCMAHON, 2012: 12–14).

In a broad review of international and comparative studies, Francis Fukuyama found that individual property rights and the rule of law were consistently correlated with economic growth and prosperity (FUKUYAMA, 2011: 468–475). Deron Acemoglu and James Robinson, in a magisterial historical survey, argued that prosperity is based on inclusive economic institutions—open markets and widely dispersed property rights—as well as inclusive political institutions—the rule of law and widely held political rights (ACEMOGLU & ROBINSON, 2012).

In many publications, the Harvard Project on American Indian Economic Development has also argued that governance is crucial to economic development for native peoples: “When Native nations back up sovereignty with stable, fair, effective, and reliable governing institutions, they create an environment that is favourable to sustained economic development. In doing so, they increase their chances of improving community well-being” (JORGENSEN, 2007: 24). Other scholars in the United States and Canada espouse similar views (ANDERSON, BENSON, & FLANAGAN, 2006; ANDERSON, 2016). John Graham has argued that the major barrier

to the progress of Canadian First Nations is “dysfunctional governance” (GRAHAM, 2012). But, in spite of the general consensus around this point, much of the evidence that has been adduced is anecdotal rather than systematic.

I will try to approach the issue systematically, using statistical methods to identify governmental, legal, and economic strategies associated with higher CWB scores. We need to go beyond ideological debates about sovereignty versus assimilation to discover what institutions and practices are actually associated with improvements in the lives of First Nations people. This book pulls together the results of several specialized studies that I have carried out with the aid of younger scholars more adept than I in the use of spreadsheets and computer software. These studies led to a series of technical papers published by the Frontier Centre for Public Policy and by the Fraser Institute. Part One of this book integrates those studies together with the findings of other researchers in an attempt to make the results more accessible to the general reader.

These specialized studies have been carried out at three levels. Several papers used statistical techniques to arrive at generalizations about all First Nations for which data were available (FLANAGAN & BEAUREGARD, 2013; FLANAGAN & JOHNSON, 2015A, 2015B; FLANAGAN & HARDING, 2016B; FLANAGAN, 2018B). These general studies were then complemented by a more detailed focus on the 20 First Nations that had the highest reported CWB scores (the Top 20 actually became the Top 21 because of a tie) (FLANAGAN & HARDING, 2016A). Finally, I carried out a case study of the highly successful Fort MacKay First Nation (FLANAGAN, 2018A). The survey of the Top 21 and the case study of Fort McKay add human texture to abstract statistical generalizations.

The great advantage of focussing on institutions is that they are human contrivances created by legislation and administrative action. Within a certain range of autonomy, First Nations can alter their institutions to achieve better results. Of course, that autonomy is limited by the *Indian Act* and other legislation, so that in many instances the cooperation of the federal government and Parliament is also required. Nonetheless, the general point remains valid: formal institutions are consciously made by human beings and can be changed by human decision. Their effectiveness can be judged by observation, experience, and research; and their structure can be altered accordingly. Part One will show that the choice of institutions explains a good deal of the variation in CWB scores among First Nations. Success is not random; the more successful First Nations are doing things differently. They have discovered practices that others can study, adopt, and adapt to their own situation. Research on institutions, therefore, has practical implications. It can highlight what the more successful First Nations are doing and give hope to the less successful that they can take action to improve their standard of living.

Nonetheless, not everything is under conscious control. American economist Thomas Sowell (2015) points out that culture is also important. Cultural traditions that value hard work, thrift, and respect for learning promote success in many settings, as the Ashkenazi Jews and the overseas Chinese and Koreans, some of Sowell's favourite examples, have shown. Yet culture cannot overcome all institutional obstacles. Koreans, Chinese, and Russian Jews lived in extreme poverty in their homelands until they could leave regimes that at the time were politically oppressive and economically static.

Economic historian Gregory Clark has raised even more fundamental questions in *A Farewell to Alms* (2007). Why has the conventional advice of economists and political scientists about institutional reform been adopted in some countries but not others, and why has it not always worked well even when it has been adopted? And why did the transition to a modern, highly productive, economy—the so-called Industrial Revolution—take place first in Great Britain, even though China, India, and the Middle East had arguably attained higher levels of productivity only a few centuries previously? Clark argues that a complex interplay of cultural and demographic factors creates conditions propitious for adoption of the institutions that facilitate economic progress.

If Clark is right, some First Nations may find it harder than others to adopt the best practices of governmental, legal, and economic strategy. Thus Part One ends with reflections on intractable factors of location and culture that may pose obstacles for some First Nations.

Governance

Government can use political power to transfer wealth from some people to others (“taking”), but it is also indispensable to the creation of wealth and mutually beneficial transactions in the marketplace (“making”). I am looking at First Nations governments in the latter sense here, inquiring whether some governmental institutions are better than others at enabling prosperity.

Form of government

The *Indian Act* contains a simple template for band government, prescribing biennial election of a single chief plus two to twelve councillors, depending on the size of the First Nation. This structure is open to criticism on multiple grounds. Holding elections every two years can foster an atmosphere of politicization and permanent campaign. The schema does not include any counterweights or separation of powers, leaving small elected bodies in control of annual budgets that may be in the tens or even hundreds of millions of dollars. It represents an individualistic conception of democracy that does not make room for traditional authorities such as elders, clan mothers, or hereditary chiefs. It may thus be a poor cultural fit for some First Nations.

However, only a minority of First Nations follow the *Indian Act* model. It was never imposed on all bands, and in recent decades it has become legally possible for First Nations to write their own constitutions departing from the *Indian Act*. In 2015, the overall distribution was as follows (INAC, 2015B):

- ♦ 234 (38%) *Indian Act* model
- ♦ 344 (56%) custom governance
- ♦ 38 (6%) legislated self-government agreement
- ♦ 2 (0.3%) *First Nations Election Act*, an updated version of the *Indian Act* model with longer terms of office.

There is an undeniable trend toward adoption of alternatives to the *Indian Act* model, although substantial numbers of First Nations also seem willing to retain it.

The question here is whether custom governance is associated with a higher standard of living and community well-being than the *Indian Act* model. So far, the answer is no. Quesnel and Ishkanian (2017: 9–10) found that the average 2011 CWB index for bands using a form of custom governance was actually two points lower than for *Indian Act* bands. My own research has tested the association between this governance variable and CWB in bivariate and multiple regressions using both 2006 and 2011 data and found no statistically significant relationship. In a more focussed study of 21 First Nations with very high 2011 CWB scores, eleven were found to follow the *Indian Act* model and ten had some form of custom governance (FLANAGAN & HARDING, 2016A: 15). There may be many good reasons for First Nations to design their own constitutions, but there is thus far no evidence that doing so will lead to a higher standard of living as measured by the CWB index.

This is, however, not the last word on this important subject. In an American study, Cornell and Kalt (2000) found that differing structures of tribal government were significantly related to rates of income growth and workforce participation. The Canadian category of custom bands is highly diverse, including governance by hereditary chiefs, self-selecting oligarchies, and democracies incorporating various degrees of separation of powers, such as independent tribunals, elders' councils, and other traditional authorities. Some custom governments may in fact lead to improvements in CWB scores, while others may not. A definitive study would require collecting data on hundreds of band constitutions, recording when changes were made, and testing for subsequent changes in CWB performance—a worthwhile project for some energetic Ph.D. candidate! But in our present state of knowledge, it seems that First Nations interested in improving their standard of living will get the biggest payoff, not by writing new constitutions, but by focussing on political, legal, and economic factors more closely connected to economic development.

Another topic deserving mention is self-government agreements. As of 2015, there were 22 self-government agreements involving 36 First Nation communities in Canada, plus many more in various stages of negotiation (INAC, 2015A). These are negotiated agreements backed up by legislation once they are completed. Self-government allows a First Nation to leave the constraints of the *Indian Act*; it is the ultimate in flexibility available while remaining part of Canada. When tested against 2011 CWB data, the presence of a self-government agreement showed a modest positive and statistically significant correlation of 0.18 (FLANAGAN & JOHNSON, 2015: 11–12). However, a full analysis of self-government could not be done with our data because self-governing First Nations are not subject to the *First Nations Financial Transparency Act*, leading to a lot of missing data. From everything else

we have learned, self-government should be seen as a step in the right direction. As time goes on, it would be highly desirable to do a systematic comparison of the economic effects of self-government with those of the First Nations Land Management Regime and other forms of autonomy that exist in special cases.

Leadership and stability

In the late stages of the research, when reviewing the performance of the “Top 21” First Nations (those with the highest CWB scores), I was struck by the importance of leadership and stability in their governance. Some of the Top 21’s leaders are nationally known public figures. The transformative impact that Chief Clarence Louie has had upon the Osoyoos Indian Band is almost legendary (MACDONALD, 2014). Also well known is the role that Bernd Christmas, the first Mi’kmaq to graduate from law school, played—along with Chief Terry Paul—in bringing prosperity to the Membertou First Nation (SCOTT, 2006). Having this kind of effect requires time. Clarence Louie has been the Osoyoos chief since 1991. Bernd Christmas took ten years away from his law career, starting in 1995, to run the Membertou development corporation.

Other Top 21 leaders may not have the public profile of Louie, Christmas, and Paul but have spent years and even decades as chiefs pushing the development of their First Nations. In at least 13 of these 21 First Nations, the same chief had been in office for ten years or more as of 2016 (FLANAGAN & HARDING, 2016A). A few examples: Ernest Campbell, Musqueam Indian Band, 2000–2014; Joanna Bernard, Madawaska Maliseet First Nation, 2003–2013; Sharon Henry, Chippewas of Rama First Nation, 2000–2014. A few had even been in power for decades. For example, John Thunder, and before him his father, had led the Buffalo Point First Nation for more than 40 years. Jim Boucher had been chief of the Fort McKay First Nation for 27 of the last 32 years.

Tabulating years spent as chief does not do full justice to the continuity of leadership observed in the Top 21. Long-serving chiefs were frequently councillors before assuming the top job. They also often serve as executive director of the First Nation’s government and/or CEO or chairman of the band’s development corporation before, during, or after their tenure as chief. For example, Jim Boucher, chief of the remarkably successful Fort McKay First Nation, also chairs the boards of directors of the wholly owned Fort McKay Group of Companies and Fort McKay Landing, a holding company for Fort McKay’s share in joint ventures (FLANAGAN, 2018). This kind of double-duty would be considered conflict of interest in the larger Canadian society but is probably unavoidable in the small world of First Nations. A community of a few hundred people is lucky to find even one talented, hard-driving leader in its midst.

This topic would repay further quantitative research. Does the importance of leadership and stability observed in this sample of 21 cases extend to First Nations in general? It's an important question but difficult to answer because there is no database of historical information about First Nations office-holders. Some current information could be assembled from First Nations' websites and the community profiles posted by INAC, but compiling historical information for 618 First Nations would be a daunting task. As with many other topics, systematic research on this issue is hindered by the large number of First Nations and the absence of a centralized, publicly available repository of information. Most of the information is probably stored somewhere in INAC files, but extracting it would not be easy.

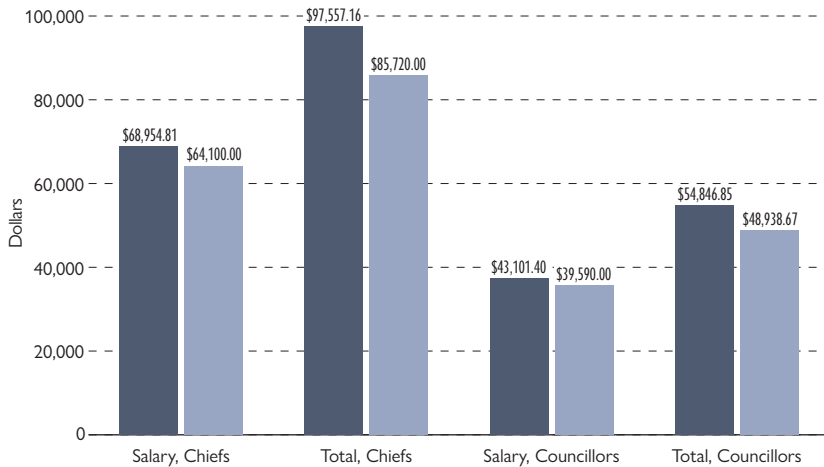
Qualitative research would also be useful. What characterizes the transformative First Nations chiefs such as Clarence Louie and Jim Boucher, who have managed to lead their people to great improvements in their standard of living? How have they maintained their political support despite having to make decisions that were not always popular, at least initially? Are some communities more receptive to leadership than others? Intuitively, it seems that leadership is probably the single most important practical factor in increasing "the wealth of First Nations." If I had achieved that insight at the beginning rather than the end of my last five years of research, I would have incorporated it into the research design of my various projects, and I might have more to say about it today.

Compensation of First Nation leaders

The pay of First Nation chiefs and councillors has long been a topic of discussion in Canada. Typically, debate has broken out in the media after the appearance of reports about chiefs or councillors who were making what some observers thought were excessive salaries. Discussion based on anecdotal reports was often animated but was limited by the absence of systematic evidence. Hard data are now available as a result of the passage in 2013 of the *First Nations Financial Transparency Act* (FNFTA), which requires annual public disclosure from First Nations of compensation paid to chiefs and councillors.

FIGURE 2.1 summarizes compensation totals for fiscal 2013/14; expense accounts are included as well as salary because in the past there have been many complaints about travel and other expenses serving as concealed compensation for First Nations politicians. These values may seem remarkably high, considering that most First Nations are comparable to villages or small towns if measured in terms of population. However, it must be kept in mind that the chief and council of a typical First Nation must grapple with a much wider range of issues than the mayor and council of a typical village.

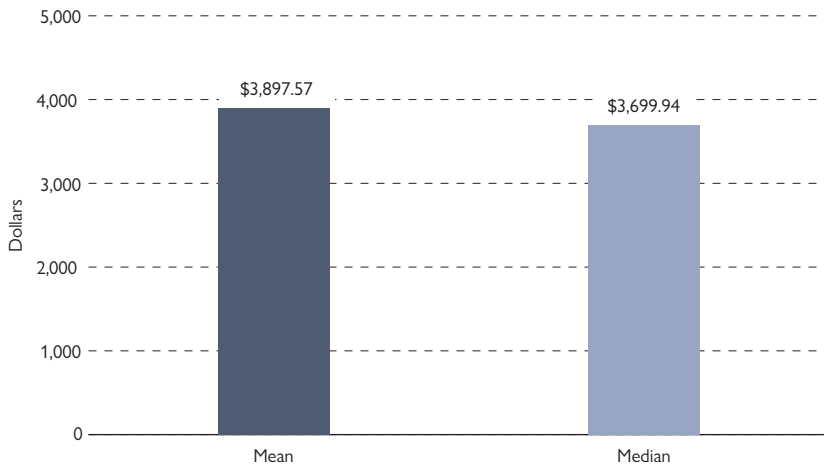
Figure 2.1: Compensation for First Nations' chiefs and councillors, national mean and national median, fiscal 2013/14



SOURCE: FLANAGAN AND JOHNSON, 2015A.

For comparison, FIGURE 2.2 shows honoraria (not including travel) for local government councillors in southern Alberta villages in 2014. The Alberta data are from a survey of 18 villages in southern Alberta. With populations of just a few hundred, these villages would be comparable in size to the lower half of the First Nations distribution. Average salaries for First Nations' councillors are about ten times as high as for the councillors of these Alberta municipalities.

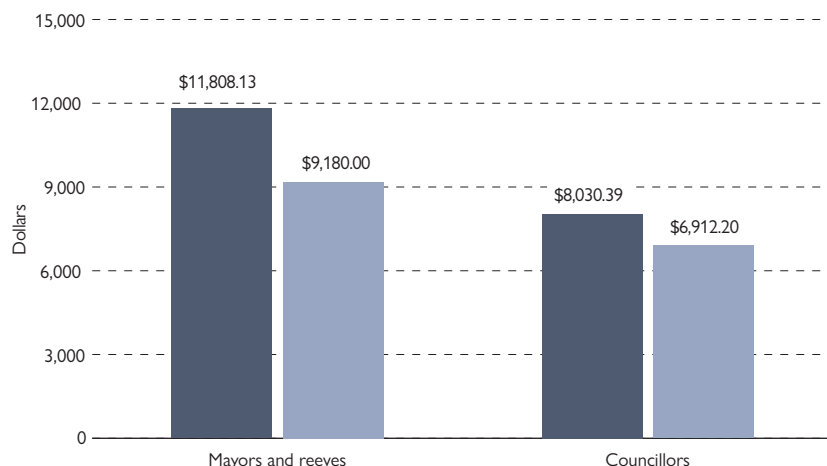
Figure 2.2: Compensation for councillors in Alberta villages, mean and median, 2014



SOURCE: PARSONS, 2014.

FIGURE 2.3 presents data for Manitoba. In comparison to the data for Alberta, note that the Manitoba data include all towns except Winnipeg, not just small rural villages. Brandon, the largest city in Manitoba other than Winnipeg, with 41,511 people in the 2006 census, paid its mayor \$73,692 and councillors \$18,957 in 2009. Average pay for Manitoba councillors was about a fifth of what First Nations pay their councillors.

Figure 2.3: Salaries for mayors, reeves, and councillors in Manitoba, mean ■ and median ■, 2009

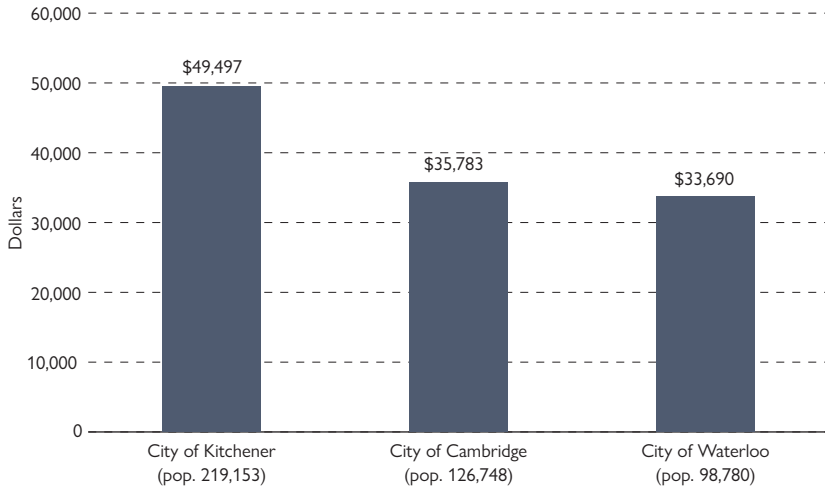


SOURCE: CRAIG, 2010.

First Nations in essence give their elected representatives pay packages comparable to those found in much larger cities. FIGURE 2.4 shows three examples from Ontario. These cities, with populations in the range of 100,000 or 200,000, paid their elected councillors in the same range as First Nations with an average on-reserve population of fewer than 1,000. Directing the affairs of a First Nation with a few hundred members is compensated like a full-time job managing a city of 100,000 residents or more.

Even more unusual than the level of First Nations' compensation packages is their degree of variation. Chiefs' salaries ranged from \$0 to \$914,219, and total remuneration, including travel, from \$13,816 to \$930,793 in 2013/14. Councillors' salaries ranged from \$0 to \$297,539, and total remuneration from \$0 to \$389,620 (FLANAGAN & JOHNSON, 2015A: 11-12).

At the high end, First Nations' payments to their political leaders go well beyond anything that can be found in the rest of Canada, not only for municipalities but even for provinces or the federal government. A similar or even larger

Figure 2.4: Compensation for councillors in three cities in Ontario, 2012

NOTE: "A calculation is applied to estimate city salaries that are partly tax-free ... Amount is base pay only."
 SOURCE: OUTHIT, 2013.

range of variation can be found in the worlds of sport, entertainment, and business, where individual performance can be crucial to success, but is unheard of in the world of government. Modern governments set salary scales on the basis of qualifications and seniority and typically pay close attention to what other governments are doing, so that similar jobs are similarly rewarded across jurisdictions. There is some variability, but nothing like what is encountered in the payment of First Nations' leaders. Also, section 87 of the *Indian Act*, as it has been interpreted by the courts, exempts Registered Indians from paying federal and provincial income tax on income earned on reserve. Thus the purchasing power of the First Nations politicians who are at the high end of the range is well above that of other politicians in Canada, or indeed of politicians in other liberal democracies.

Multiple regression analysis identified three factors associated with higher compensation for both chief and council: larger on-reserve population, higher annual budget, and being located in Alberta. The first two make intuitive sense: running a larger operation in terms of people and dollars seems to deserve higher pay. The Alberta effect is probably due to the overall boom conditions prevailing in Alberta when the analysis was done. Things cost more and people were better paid in the province at that time.

However, high compensation for councillors does not seem to be associated with better outcomes. Multiple-regression analysis showed that pay levels for councillors (but not chiefs) were *negatively* correlated with First Nations' scores on the

Community Well-being (CWB) index, even after controlling for several other factors (FLANAGAN & JOHNSON 2015B: 12). In the returns for 2013/14 filed under the FNFTA, the Top 21 spent an average of \$4,309 per on-reserve resident in compensating chief and council, compared to an average of \$5,371 for the entire database (FLANAGAN & HARDING, 2016A: 16). Possibly, extraordinary payments for councillors tend to politicize governance by focusing attention on competition for office; this, however, is a speculation that would need to be tested against empirical evidence. The negative effect of high salaries seems to apply mainly to councillors, probably because chiefs often have important executive functions that deserve higher compensation; there was no negative correlation when chiefs' compensation was used in the equation.

As with all generalizations in the field of public affairs, there can be exceptions. In the Fort McKay First Nation (FMFN), the chief and councillors are compensated like the president and vice-presidents of a fair-sized corporation, which in some respects they are. In fiscal 2016/17, Chief Jim Boucher received a salary of \$632,785, while two councillors received \$466,275 and the other two, \$326,393. This is at the very high end of compensation for First Nation elected officials in Canada, even compared to others with sizable business activities (FLANAGAN, 2018A; FLANAGAN & JOHNSON, 2015A). FMFN explains this level of payment by pointing out that chief and council carry out business executive functions, the figures are disclosed to the membership, and the money comes from business earnings, not government grants (GEDDES, 2014). There are also some other factors to consider. Earnings are high in the oil sands, so that skilled workers pull down six-figure wages. Also, executives in publicly traded corporations often take part of their compensation in stock-option plans, but this is impossible in FMFN, given the legal structure of community capitalism. If the chief and councillors of FMFN are to be well compensated, it must be through salary. The salaries come from the business earnings of FMFN, and the members could bring about change by electing different leaders, if they were so inclined.

Like all other political systems, First Nations have to find the right balance between making and taking. Compensation of chief and council has to be high enough to encourage constructive leadership that promotes community well-being, yet not degenerate into wealth enrichment for a local elite at the expense of the general membership. The data suggest that there is no universally applicable formula, that the right balance will depend on local circumstances, and that executive functions dictate higher compensation for the chief than for councillors.

Financial management

The ability to run a balanced budget is a hallmark of prudent administration, although senior governments in Canada and elsewhere can evade this requirement for long periods of time because of their sovereign taxing power. Essentially,

they can borrow money based on a promise to raise revenue by forcing their citizens to pay future taxes. But First Nations governments have no tax base except for the ones that have instituted property taxation for leaseholds, and even there the amount of money is modest. Thus, First Nations have not generally assumed debt through entering financial markets,³ but they may often get into deficit situations by defaulting on payments to employees or suppliers, or failing to make scheduled repayments on advances from governments.

To manage (not solve) this problem, INAC has a Default Prevention and Management Policy, with three levels of intervention. The lowest level is the Recipient Managed Management Action Plan (MAP), in which First Nations having trouble balancing their budgets are required to develop a plan for stabilizing their finances. The second level is the Recipient-Appointed Adviser, in which the First Nation is required to find an external accountant to act as co-manager. The third and most interventionist level is Third-Party Funding Agreement Management, in which INAC appoints a financial manager for the band. As of April 2017, there were 74 First Nations in the first category, 61 in the second, and eight in the third, for a total of 143 (INAC, 2017B).

When in 2011 I first tried to use default management as a variable in research, the names of First Nations in distress were not published, but I was able to get a semi-official list from INAC because the information was appearing anyway in a news story. Since 2013, First Nations under default management have been listed on the INAC website, so research has become easier. A test of the semi-official list against 2006 CWB data showed an association in the predicted direction. First Nations not under any level of default management had a mean CWB of 60.6, compared to a mean of 47.2 for those under the highest level of intervention. The association also held up in a multiple regression with half a dozen other variables acting as controls (FLANAGAN & BEAUREGARD, 2013: 15, 18). The findings were similar in a later analysis using a 2013 list of First Nations under default management and 2011 CWB scores (FLANAGAN & JOHNSON, 2015B: 11–12). And only one of the Top 21 First Nations was under any level of default management at the time of that research (FLANAGAN & HARDING, 2016A: 16).

The evidence is overwhelming that prudent financial management is a robust predictor of CWB, but the direction of causality is less clear. First Nations afflicted with financial trouble are disproportionately located in Manitoba and Saskatchewan (68 of 143), the two provinces where average CWB scores have always been the

3. A few are now issuing bonds through the First Nations Financial Authority <<https://fnfa.ca/en/>>. Fort McKay First Nation is financing purchase of a share of Suncor's East Tank Farm by issuing bonds, using contracted bitumen shipments as security (FLANAGAN, 2018A).

lowest in the country. Good financial management may be a predictor of high CWB, but the causal arrow may also point in the opposite direction: First Nations with low CWB scores may get into financial trouble more frequently because they are so poor.

Yet default management remains a statistically significant explanation of CWB even when control variables such as percentage of own-source revenue, existence of a property-tax system, and remote location are added into the equation. This accords with the common-sense view that a First Nation wishing to improve its situation through promoting economic growth must be able to manage its own financial affairs prudently. If the band administration cannot pay its bills on time, it will not be able to find and retain partners for economic development and job-creating enterprises on the reserve. An early step for both the Osoyoos Indian Band and the Membertou First Nation in climbing out of poverty was to exit from default management (FLANAGAN & HARDING, 2016A: 18). Balancing the band government's budget will not immediately bring improvement on the CWB index, but it will be an essential part of a long-term growth strategy.

Property

Certificates of Possession

Prior to the colonial era, First Nations in what is now Canada had a variety of property institutions, ranging from collectively controlled hunting grounds to family owned farms, fishing stations, and trap lines (FLANAGAN, ALCANTARA & LE DRESSAY, 2010: 30-41). One of the tragedies of Canadian history is that these rights were largely ignored while Indians were sent to live on land reserves that they did not and still do not own.

According to section 91(24) of the *Constitution Act, 1867*, Parliament has jurisdiction over “Indians, and Lands reserved for the Indians.” The *Indian Act* further specifies: “Subject to this *Act*, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this *Act* and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band (s. 18 (1)).” The *Indian Act* regime has never allowed for individual fee-simple ownership of reserve land, but it does provide for individual property rights that are less robust than fee simple.

Apart from a few First Nations in British Columbia, such as the Nisga’a, that have negotiated modern treaties allowing for fee simple ownership, the highest form of individual property on reserve land is the Certificate of Possession (CP), which is provided for by s. 20 (1) of the *Indian Act*. The CP is a permanent title to a piece of reserve land, approved by the band council and then issued by the Minister. It can be enforced in court, so in that respect it is similar to ownership in fee simple, but it is not as strong as fee simple for two main reasons. First, transactions require the approval of the Minister, which often introduces uncertainty and bureaucratic delay. Second, a CP can only be transferred to another member of the same First Nation, or to the band government. Given the small population of most First Nations, this means there are few potential buyers and hence almost no real estate market for CPs. Also, where CPs have been in existence for many years,

ownership may become subdivided through inheritance to the point where managerial decision-making for the land becomes gridlocked. Some CPS on the Iroquois reserves in Ontario now have hundreds of owners.⁴

According to Aragon and Kessler (2017: 7), at the end of 2011 about half of First Nations had one or more CPS on their reserve land, and about 4% of all band land was “certificated.” The Indian Land Registry in Ottawa had at that time a record of almost 44,000 CPS and was able to give Katrine Beauregard and me the total number of such holdings on each reserve.⁵ By dividing that total by the on-reserve population of the First Nation, we constructed a variable representing the density of certification for each First Nation. We interpreted that as an index of the usage of private property, because the CP is the closest equivalent to private property that First Nations people can possess on their own lands.

Because of the well-known importance of property rights in a market economy, our hypothesis was that density of CPS should be positively associated with CWB scores. FIGURE 3.1 is the scatterplot of the linear regression of the 2006 CWB scores upon the density of certification on reserve land, that is, the number of CPS per reserve inhabitant. The correlation coefficient is 0.33, indicating a modest but still statistically significant relationship in the predicted direction ($n = 463$, $p < .01$). The regression equation (FLANAGAN & BEAUREGARD, 2013: 13) is:

$$\text{CWB} = 56.5 + 16.2 \times \text{density of certification}$$

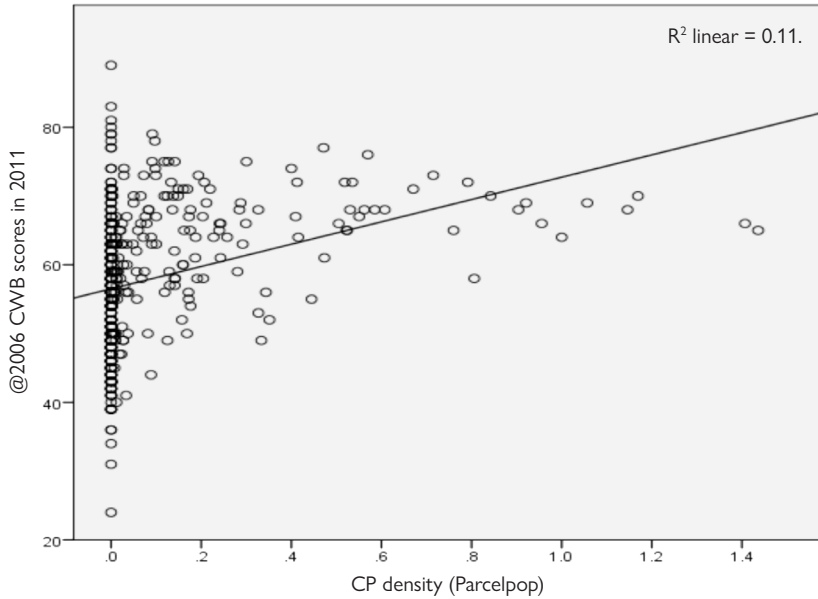
Interpreted in words, when *Density of Certification* is 0, that is, there are no CPS at all on the reserve, the average CWB Index is 56.5; and if the *Density of Certification* were increased to 1.0, that is, one CP per inhabitant, the predicted CWB would be $56.5 + 16.2 = 72.7$. That is a big difference in practical terms, representing a move from depressing poverty to a situation not far from the average Canadian community. However, the scatterplot also shows that CPS are not a magic wand.

This scatterplot looks more like a cloud than a straight line, which means there is a lot of variation, and the presence of more CPS does not always translate into higher well-being. Reliance on CPS explains only 11% of the variance in community well-being. For a dramatic illustration of this fact, concentrate on the extreme left side of the graph, where the CP variable is valued at zero (i.e., no CPS on the First

4. Randy Jenkins, Department of Aboriginal and Northern Affairs, e-mail to Tom Flanagan (January 2, 2013).

5. Randy Jenkins, Department of Aboriginal and Northern Affairs, e-mail to Tom Flanagan (November 18, 2011). The Registry list is actually of landholdings for which there is “Evidence of Title,” a category including, for example, veterans’ grants, which are legally similar to CPS. In any case, CPS make up most of the list.

Figure 3.1: Regression of 2006 CWB index upon density of certificates of possession (CP)



SOURCE: FLANAGAN AND BEAUREGARD, 2013.

Nation's land). The CWB in this situation ranges from barely over 20 (very low) to well over 80 (very high). With such a range of well-being for reserves that have no CPs, it is obvious that CPs are only part of the story of well-being, and other factors must be involved. Reliance on CPs is not magic wand that changes everything, but it appears to be one among many factors related to community well-being for First Nations.

This relationship held up well under multivariate analysis. In a multiple regression equation using six plausible factors leading to higher CWB scores, the CP variable had the highest coefficient and beta weight, and the most significant *p* value. We were concerned that the effect might be spurious because First Nations in the province of British Columbia have a higher average CWB than in most other provinces, and British Columbia also has more reserves where CPs are used. It is also true that CPs are more likely to be used by First Nations located nearer to cities, where land markets are more vibrant, and reserves near cities tend to have higher CWB scores (BRINKENHURST & KESSLER, 2013). So we put controls both for remoteness and for being located in British Columbia into the equation, and yet the association between CPs and CWB remained strong (FLANAGAN & BEAUREGARD, 2013: 18).

I obtained similar results in my later work with Laura Johnson, using the same CP variable and 2011 CWB data. The bivariate correlation between the two was 0.34, and the

association remained strong in a multiple regression using six plausible factors related to CWB (FLANAGAN & JOHNSON, 2015B: 11-12). It is also noteworthy that 17 of the Top 21 make some use of CPS, and the overall incidence of CPS in the Top 21 is about two and a half times that among First Nations in general (FLANAGAN & HARDING, 2016A: 15).

Other researchers are now starting to study CPS, using more powerful statistical tools and more elaborate data sets. Aragon and Kessler (2017) reported a positive association between use of CPS and housing quality, but not between CPS and household income and employment prospects for band members. Ballantyne and Ballantyne (2016: 345) also found a relationship in this direction, though the small size of their sample of British Columbian First Nations caused the effect to lack statistical significance. Using some of the same data as Aragon and Kessler, but with a different regression model, Victoria Talbot (2017) found a positive association between use of CPS and housing quality, but not with income or employment. Indeed, that is similar to what Beauregard and I found (2013: 19). When we regressed the four components of CWB separately upon CP density, we found that the association with housing quality was strengthened, while the association with income, employment, and education fell below the threshold of statistical significance.

Given this convergence of results among multiple researchers using different datasets and statistical methodologies, it seems safe to conclude that greater reliance on CPS would improve housing quality for First Nations people. Families and individuals would have greater security of tenure and thus would be led to take better care of the property and to invest more in improvements. In this area, the causal interpretation seems straightforward. A Certificate of Possession is a means to obtain better housing, not a result of receiving better housing from some other source.

Less optimistically, Aragon and Kessler also found that increased reliance on CPS was neutrally or even negatively associated with improvements in household income and employment for band members, though in some specifications there were positive effects for non-band members living on the reserve (2013: 16). The authors were unable to offer a cogent explanation for these findings, which deserve further investigation. Given that reserves differ so greatly in their location, number of CPS, and the use made of those CPS, a number of factors may be involved with effects working in cross-cutting or even conflicting directions.

First Nations Land Management Regime

The *First Nations Land Management Act*, passed in 1999, allows First Nations to opt out of 32 provisions of the *Indian Act* relating to the administration of Indian reserve land. To do so, the First Nation must first develop its own land management code with the assistance of the Lands Advisory Board and Resource Centre. After a band referendum, and once the Minister has granted approval, the First Nation

takes over control of its own lands, which includes the right to enter into leasehold agreements without recurring to INAC for further approval. As chiefs sometimes put it, “Now we can move at the speed of business, not the speed of government.” From an economic point of view, this can reduce transaction costs by expediting the negotiation and approval process, thus making business deals easier to conclude. As of January 2016, 95 First Nations had either been fully approved to enter the First Nations Land Management Regime (FNLMR) or were in the process of developing their own land code and seeking approval (INAC, 2016A).

There is, it must be noted, a lot of variation in these land codes (LAVOIE & LAVOIE, 2017). Some are almost as restrictive as the *Indian Act*, except that the locus of decision-making is transferred from INAC to the First Nation. Some require approval by community referendum for new leases of band land, and approval of the band council for transfer of existing leases or Certificates of Possession. Others leave approval of new leases up to the council, and allow transfers of leases and CPS at the initiative of those who hold them, thus treating them more like private property. It would take careful study of each code to determine the extent to which it actually reduces transaction costs as compared to the *Indian Act*.

In every statistical analysis I have undertaken, participation in the FNLMR is associated with a higher CWB score. In 2013, using 2006 CWB data, participating First Nations had an average CWB index of 64.8 compared to 57.4 for non-participants. The relationship remained positive and statistically significant even after five other variables were added in a multiple regression equation (FLANAGAN & BEAUREGARD, 2013: 15, 18). Similar results were achieved in 2015 using 2011 CWB data in both a bivariate and multivariate regression analysis (FLANAGAN & JOHNSON 2015B: 11–12). And when the Top 21 were reviewed in 2016, nine of this select group were already in the FNLMR and seven were working towards approval (FLANAGAN & HARDING, 2016A: 15).

Although there is little doubt about the statistical association between the CWB and participation in the FNLMR, causality is less clear. The FNLMR is so recent that a statistical correlation between participation and CWB relies partly upon earlier CWB data, thus reversing the causal interpretation. Even if entering the FNLMR is something that higher-scoring First Nations are more likely to do, does it actually lead to further improvement in their CWB index? A different research design allowing for sufficient passage of time will be necessary to answer this question. Different types of FNLMR land codes should also be tested for their impact on CWB.

For a First Nation to develop its own land code and receive approval requires a well-organized band government that can analyze the law, find the right legal and economic consultants, hold productive hearings, write a land code, and steer it through the complex approval process. All of this requires not only technical expertise but political skill to retain the support of the community amid inevitable fears

about the disposition of land, which is such a sensitive topic within First Nations. These characteristics—competent government and community support—would be useful in many endeavours that would lead to a higher CWB. Thus participation in the FNLMR, even if it has not yet had a chance to increase CWB directly, might be an indirect indicator of the ability to achieve success.

Property tax

Dating back to the first *Indian Act* of 1876, Indian land reserves as well as Indian people living on those reserves were immune from all taxation. There was no income tax for anyone at that time; government revenue came mainly from property taxes (local governments) and customs and excise duties (senior governments). Since Indian reserves were federal property, it was logical to exempt them from local property taxes. It also was a safeguard to prevent Indian reserves from being confiscated by local governments for non-payment of property taxes. But it left reserve governments without any revenue source except federal transfers or sale of produce from reserve lands.

In response to a movement led by Manny Jules of the Kamloops Indian Band, Parliament in 1988 passed the so-called “Kamloops Amendment” to the *Indian Act*, allowing band governments to tax real property on their reserves. Taxing authority was further expanded in 2005 by the *First Nations Fiscal Management Act*. Today 146 First Nations have instituted a property tax (FIRST NATIONS TAX COMMISSION, 2017), while smaller numbers have created various forms of sales tax, income tax, and provincial-type levies such as drilling taxes (INAC, 2014A).

Property taxation is a form of government taking but, if properly administered, it produces revenue to fund legal and material infrastructure necessary to the creation of wealth. In the case of First Nations, it also closes loopholes that arose as unintended consequences of the original exemption of Indian reserves from taxation. Railways, pipelines, and utility companies pay property tax to local governments when they cross their land. Merchants, homeowners, and renters also pay property tax, directly or indirectly, when they use leased land. Why should it be any different when business or individuals lease parcels of land that have been set aside for First Nations?

At the beginning of my research, I decided to investigate property tax as an explanatory variable for CWB, for several reasons:

- ♦ there was an authoritative, up-to-date list of participating First Nations on the website of the First Nations Tax Commission;
- ♦ property taxes yielded a modest but still useful amount of annual revenue that First Nations governments could use to provide better services to their residents—about \$70 million in 2012/13 (INAC, 2014a);

- ◆ like entry into the First Nations Land Management Regime, creation of a property tax showed governmental competence backed by community cohesion;
- ◆ the existence of a property tax could be seen as a proxy for the importance of leaseholds on the reserve—land rented to outside farmers and ranchers, utility and natural resource companies, commercial business developers, and vacation and residential homeowners. Property taxes on Indian reserves are directed almost entirely at leaseholds, so First Nations with little or no land rented out would not find it worthwhile to establish a property tax. At the time, I could not obtain overall statistics on leaseholds on reserves, so using property tax as a variable was an indirect way bringing this important form of property right into the analysis.

Tested against 2006 data, First Nations with property tax had a mean CWB of 60.4, compared to 56.4 for those without. The relationship remained positive but fell below statistical significance in a multivariate analysis (FLANAGAN & BEAUREGARD, 2013: 14, 18). Tested against 2011 CWB data, property tax had a bivariate correlation of 0.28 and retained a statistically significant relationship in a multiple regression equation, though weaker than that of other explanatory factors (FLANAGAN & JOHNSON, 2015B: 11–12). Fifteen of the Top 21 have their own local taxes (FLANAGAN & HARDING, 2016: 15).

A safe conclusion from these various statistical results is that adoption of a property tax system is indeed associated with higher CWB scores, but that the association is interwoven with numerous other factors. As with most other statistical associations that we have looked at, causality remains an open question and probably runs both ways. Better-off First Nations are more able to afford the expense of developing and administering a tax system, while the revenue derived from taxation helps provide better services to the people and perhaps contributes to a higher CWB, depending on how it is used.

Related evidence comes from the work of Aragon and Kessler, who were able to obtain data on the various forms of leased land on Indian reserves, about 3.5% of total land in 2011 (2017: 7). They found that a greater percentage of leased land, but not of CPS, was positively correlated with higher per-capita band spending, higher remuneration of chiefs, and higher quality drinking water (2017: 21). They did not include the existence of property tax as a variable in their model. Nonetheless, their work provides evidence for the positive impact of treating reserve land as a marketable commodity and leasing it out to earn revenue. Creating a property-tax system (“taking”) thus becomes part of the rational use of land to create wealth and raise living standards (“making”).

Economics

In this chapter we enter the realm of direct wealth creation (“making”). How have some First Nations managed to increase their community well-being by engaging in the Canadian marketplace?

Own-source revenue

Regardless of the rhetoric of nationhood, First Nations bear many resemblances to local governments supported and supervised by the departments of Indigenous Services and of Crown-Indigenous Relations rather than by a provincial department of municipalities. Canadian municipalities, school boards, and other local government agencies receive financial transfers from their provincial governments, but they also pay part of their own operating costs through levying property taxes and collecting user fees. Many First Nations, though still a minority, are now levying property taxes of their own and collecting other payments for the use of their lands and resources.

Several authors have criticized the tax-free status of reserves, arguing that taxation would not only raise much-needed revenue but also lead to better government (GRAHAM & BRUHN, 2009; FLANAGAN, 2008: 102–106). However, except in the case of self-government agreements, Parliament has shown no interest in repealing s. 87 of the *Indian Act*, which confers tax-free status on Indian reserves. Indeed, that tax-free status can help turn Indian reserves into something like the low-tax enterprise zones that many nations use to foster business development. Money that would otherwise be paid in corporate income tax can promote a unique form of community capitalism in which First Nations create band-owned agencies and corporations to engage in business activity, leveraging their location, resource rights, and other assets to generate revenue. Their property taxes are part of the mix, but much of the revenue comes from the entrepreneurial lease of location and resource rights or management of businesses. The resulting cash flow is known as “own-source revenue” (OSR), including tax receipts, interest on trust funds, impact benefit agreements, rents from leasing reserve lands, and all business revenue.

INAC does not publish data on OSR, but the *First Nations Financial Transparency Act* (FNFTA), passed in 2013, has made it possible for researchers to collect information. The *Act* requires First Nations to file annual audited budgetary reports, which are then posted in the First Nations Profiles section of INAC’s website (INAC, 2018A). Bains and Ishkanian (2016) collected data on OSR from 539 First Nations’ reports that were available at that time. Their chief finding was that OSR, or “band-generated revenue” as they also called it, amounted to about \$3.3 billion in 2013/14, or almost 40% of the total amount of money received by First Nations that year, the remainder consisting of transfers from various levels of government (BAINS & ISHKANIAN, 2016: 13).

Taylor Jackson and I updated the OSR analysis to include fiscal 2015/16, based on INAC’s First Nations profiles. There were, however, problems of comparability with the data from 2013/14 because reporting by First Nations is somewhat sporadic. The FNFTA was controversial, and some First Nations from the beginning refused to report and went to court to challenge the constitutionality of the *Act* (FLANAGAN & JOHNSON, 2015A: 8–10). Reporting went down a further notch after the newly elected Liberal government announced in 2015 that it would not exact financial penalties for non-compliance and would engage in consultations aimed at replacing the FNFTA with more “respectful” legislation (CANADIAN PRESS, 2015B). Thus only 516 reports were available for 2015/16. Jackson and I used the data from the 500 First Nations that reported in both 2013/14 and 2015/16, about 80% of the 618 First Nations in Canada. TABLE 4.1 below gives a summary comparison of OSR for 2013/14 and 2015/16.

Table 4.1: Comparison of own-source revenue (OSR) generation (2015 \$), 2013/14, 2015/16

	Total revenue	Government revenue total	OSR + resource revenue	OSR total	Natural resource revenue total
Totals 2013/14	\$7,961,264,851	\$4,849,143,802	\$3,112,121,049	\$2,784,296,554	\$327,824,495
Totals 2015/16	\$8,311,394,177	\$5,349,902,511	\$2,961,491,666	\$2,639,920,362	\$321,571,304
Difference	\$350,628,094	\$500,758,709	−\$150,629,383	−\$144,376,192	−\$6,253,191

SOURCE: FLANAGAN AND JACKSON, 2017: 12.

Note that total OSR, including natural resource revenues, was about 5% less in constant dollars in 2015/16 than in 2013/14 for these 500 First Nations. Two hundred seventy-one (54%) First Nations experienced a decrease, compared to 229 (46%) who saw some increase. Both natural-resource revenues and other OSR declined. What caused these decreases is not known for certain, though they obviously occurred in a period when natural resource commodity prices had declined.

For the 500 First Nations in our sample, OSR totalled more than half of government transfers, or almost 36% of all funds available. In the aggregate, First Nations now seem to contribute a substantial share of the costs of running their own communities. However, OSR is highly variable among First Nations. In fiscal 2015/16, the OSR reported by our sample of 500 ranged from \$97,020,544 (the oil-rich Samson Cree Nation in Alberta) to –\$287,676 (Beecher Bay First Nation in Sooke, BC, who took a loss on a real estate development), the only negative OSR that year.⁶ The average OSR for our sample of 500 was about \$5.9 million, and the median was about \$3.0 million (i.e., 250 First Nations had more OSR than that, and 250 had less).

The ten First Nations with the highest OSR amounts in 2015/16 are listed below in TABLE 4.2. Together, these ten (2% of the total sample) generated \$531.5 million in OSR, or 18% of the total earned by all 500 First Nations. The top five First Nations, the highest 1% of the sample, had \$329.2 million in OSR, about 11.1% of the total. By way of comparison, the top 1% of tax filers in Canada in 2013 earned 10.3% of all reported income (KOHUT, 2015). OSR is about as unequally distributed as income in the larger Canadian society.

Table 4.2: Top ten OSR-generating First Nations, 2015/16

	Total revenue	Government revenue total	OSR + resource revenue	OSR total	Natural resource revenue total
Samson (AB)	\$129,185,686	\$32,165,142	\$97,020,544	\$37,226,585	\$59,793,959
Chiniki (AB)	\$136,686,693	\$61,411,994	\$75,274,699	\$62,600,875	\$12,673,824
Squamish (BC)	\$78,381,602	\$16,914,959	\$61,466,643	\$57,332,600	\$4,134,043
Saint Mary's (NB)	\$64,604,477	\$16,195,375	\$48,409,102	\$47,619,908	\$789,194
Nisichawayasihk Cree Nation (MB)	\$82,657,108	\$35,569,347	\$47,087,761	\$46,030,190	\$1,057,571
Chippewas of Rama First Nation (ON)	\$57,168,694	\$10,862,519	\$46,306,175	\$46,306,175	
Membertou (NS)	\$56,038,238	\$14,855,177	\$41,183,061	\$38,139,962	\$3,043,099
Norway House Cree Nation (MB)	\$109,932,112	\$68,784,440	\$41,147,672	\$32,902,903	\$8,244,769
Wikwemikong (ON)	\$58,505,641	\$21,272,850	\$37,232,791	\$37,232,791	
Blood (AB)	\$146,732,257	\$110,328,982	\$36,403,275	\$35,358,823	\$1,044,452

SOURCE: FLANAGAN AND JACKSON, 2017: 14.

6. The Samson Cree Nation actually produces little oil now, but it built up a trust fund of over \$450 million during the years when production was high. That trust fund produces a high level of OSR, which is augmented by other investments.

Laura Johnson and I demonstrated a statistically significant positive correlation between OSR as a percentage of the band budget and the Community Well-Being Index. The correlation persisted even after controlling for several other variables (FLANAGAN & JOHNSON, 2015B: 11–12). Particularly interesting was that there was no positive correlation between the size of financial assets per capita and CWB score. Financial assets can become very large through the receipt of mineral royalties or settlement of land claims, but it appears that money in the bank does not in itself lead to a higher standard of living for First Nation communities. The money has to be put to work to create opportunities for earned income, better housing, and higher levels of education in order to raise the CWB.

Business strategy

The findings reported here in TABLE 4.3 come from a study of the 21 First Nations that had the highest scores on the 2011 CWB index. CWB scores for the First Nations examined in this study ranged from 73 to 83. The sample was drawn from a database compiled for earlier research that includes a number of variables relevant to governmental and economic performance, variables that are central to this analysis (FLANAGAN & JOHNSON, 2015B). Some high-scoring First Nations were not in that database because we could not obtain information on all relevant variables. There are also some well-off First Nations that do not participate in the census and therefore do not have CWB scores. Thus, this group may not be literally the “Top 21,” but it is certainly a set of First Nations who have been successful in raising their standard of living and whose performance is worthy of close study.

The economic development of the Top 21 has brought with it not only more revenue for those First Nations but greater independence. They have financial assets (mostly in federally managed trust accounts but some in conventional financial instruments): an average of \$8.49 million for the Top 21 in 2013/14, compared to a mean of \$4.2 million for the entire database. They are generating more own-source revenue from property taxes and business operations: an average of 39% of their annual budgets, compared to 28% for all the First Nations in the database.

Business success has turned these First Nation governments into serious economic players, with money in the bank, reliable credit histories, and substantial cash flows coming primarily from government but bolstered by their own-source revenues. The benefits also show up in CWB scores, which measure not the wealth of the First Nation government but the standard of living of the whole community, including personal income, labour force participation, education, and housing. What exactly are they doing to earn this additional revenue and enhance their standard of living? Although there is no single business strategy, certain themes frequently appear.

Table 4.3: List of “Top 21” First Nations by score on Community Well-Being Index, 2011

	CWB score	Province / Territory	Located in or near
Musqueam Indian Band	83	British Columbia	Vancouver
Buffalo Point First Nation	82	Manitoba	Lake of the Woods
Liidlii Kue First Nation	78	NWT	Fort Simpson
Shuswap Indian Band	78	British Columbia	Invermere
Madawaska Maliseet First Nation	76	New Brunswick	Edmundston
Fort MacKay First Nation	76	Alberta	Fort McMurray
Tsou'ke First Nation	75	British Columbia	Sooke
Tsawout First Nation	75	British Columbia	Victoria
Alderville First Nation	74	Ontario	Rice Lake
Tzeachten First Nation	74	British Columbia	Chilliwack
We Wai Kai (Cape Mudge)	74	British Columbia	Campbell River
Whitefish River First Nation	73	Ontario	Georgian Bay
Matatchewan First Nation	73	Ontario	Temiskaming
Chippewas of Rama First Nation	73	Ontario	Orrillia
Membertou First Nation	73	Nova Scotia	Sydney
Miawpukek First Nation	73	Newfoundland	Conne River
Skowkale First Nation	73	British Columbia	Chilliwack
Simpcw First Nation	73	British Columbia	Barriere
Osoyoos Indian Band	73	British Columbia	Osoyoos
Leq'amel First Nation	73	British Columbia	Mission
Campbell River Indian Band	73	British Columbia	Campbell River

SOURCE: FLANAGAN AND HARDING, 2016A: 20.

First and foremost is the use of land as an economic asset. At least half a dozen of these First Nations have marketed residential developments, which can be either seasonal recreational dwellings or permanent homes. This brings in money up front in the form of pre-paid leases as well as an annual income flow through property taxes and service fees. Beyond this, almost all of the Top 21 are in the commercial real-estate market, leasing land for small retail stores as well as large shopping centres. Perhaps the most unusual leasing project is the contract by the Osoyoos Indian Band to provide land for a British Columbia provincial prison (JUNG, 2015).

A great deal of the economic activity falls into the interrelated categories of hospitality and recreation. These First Nations have numerous hotels, conference

centres, restaurants, golf courses, marinas, and campgrounds. There are four major casinos plus smaller establishments such as bingo halls. Some deliberately invite tourism by holding cultural events and promoting native arts and crafts. All these activities involve using land as an economic resource (sometimes leased to outside operators), but they also involve members of the First Nation as workers and entrepreneurs. When band members are earning income, not just receiving rents or government transfers, there are positive effects on education and housing.

Some First Nations also generate income from their reserve lands or traditionally used lands and waters by exploiting natural resources. The Lidlíi Kue, Matatchewan, and Simpcw First Nations are involved in hard-rock mining by furnishing workers as well as investing in projects. The Fort McKay First Nation is known for participating in the oil sands through local service and labour contracting agreements. We Wai Kai pursues fish farming in Pacific waters, while the Membertou First Nation has a commercial fishing enterprise in the Atlantic (SCOTT, 2006: 248). The Osoyoos Indian Band is famous for its production of grapes and wine—a specific form of agriculture.

It is noteworthy that Fort McKay is the only one of the Top 21 to base its business strategy on the petroleum industry, and it has done so without producing a drop of oil or earning a dollar in royalties. Rather, it has prospered by establishing a suite of companies to sell services to oil sands producers. Dozens of First Nations in western Canada have been earning royalties from oil and gas for decades. Sometimes the amounts have been very large and have led to major business developments, such as the creation of Peace Hills Trust by the Samson Cree Nation. Yet oil-rich bands have not generally achieved high scores on the CWB index. This phenomenon is worthy of further investigation, but Indian Oil and Gas Canada, which manages oil and gas resources on behalf of First Nations, puts little information in the public domain.⁷ One hypothesis worth pursuing is that the paternalistic approach taken by Canada in this area (management of resources by a government agency) has not stimulated entrepreneurship and workforce participation as much as the bottom-up, self-determination strategies pursued by the Top 21 (COATES, 2016). This topic could also be pursued in the wider context of the “resource curse” or “oil curse” that has been widely discussed in the international literature on economic development and democracy (ROSS, 2013).

Some of the Top 21 have approached natural resources differently, taking advantage of current trends in environmentalism. The Tsou’ke, Alderville, Whitefish River, and Simpcw First Nations are developing various forms of green energy—wind,

7. Indian Oil and Gas Canada has a web page giving a contact list for First Nations (<http://www.pgic-iogc.gc.ca/eng/1100110010161/1100110010162>) but publishes no information about production or revenues.

solar, and run-of-river hydro—depending on circumstances. The Leq’a:mel First Nation is making a business of environmental monitoring. Finally, many of these First Nations have set up their own programs of job training, sometimes in connection with their own enterprises, such as construction companies, sometimes as part of their labour-force contracting with outside business partners.

In short, these First Nations have developed business strategies to take advantage of their lands and location. Lacking large populations for manufacturing, or highly skilled workforces for technology, or large pools of capital for investment, they are capitalizing on the one factor of production in which they are relatively strong—land, with attendant location and resources. Control of land can lead to real-estate leasing, to hosting hospitality and recreational industries, and in some cases to development of natural resources. Also, these First Nations are trying to leverage their lands and resources in order to foster entrepreneurship and job creation, rather than simply collecting rents.

To summarize with a single term, this is “opportunism” in the best sense. These First Nations are taking advantage of the opportunities that present themselves. They do not try to improve their situation just with words or even will power. They have become players in the economy around them. They have prospered by entering into cooperative relations with other Canadians. For community capitalism to be successful, First Nations have to sell things that other Canadians want—their labour, their resources, the advantages of their location—to obtain a contemporary Canadian standard of living. Cooperation demands a degree of mutual trust, and First Nations have many reasons to be mistrustful of other Canadians. Yet the Top 21 have been able to reach out—to hire the advisers and managers they need, to find investment partners, to invite other Canadians to do business, to enjoy themselves and sometimes even live on their reserves.

Many other First Nations, though they do not yet score as high on the CWB index, are following a similar model of self-improvement through community capitalism. One must be cautious, however, about extending these results across the 618 First Nations in Canada. To date, the community capitalism model has been most successful where the First Nation is located close to a city or town, or near a natural resource play. Not all First Nations have such opportunity-creating advantages. Of course, the value of a location can change for many reasons, such as mineral discoveries or the construction of a major pipeline. Or improved transportation might make it possible for a remote First Nation to enter the recreational market with a hunting or fishing lodge, ocean kayaking, or whale watching. But just as all people are not equally successful in a capitalist economy, one cannot expect the community capitalism practiced by the Top 21 to work equally well for all First Nations.

Wrapping It Up

Correlation and prediction

As every student learns in statistics class, correlation is not causation. In the tangled realm of human affairs, causation is often impossible to demonstrate. Nonetheless, the discovery of statistical associations allows one to make predictions that are valid generalizations, even if they are not correct for all particular cases. Consider the case of cardiovascular disease. Correlational studies have discovered a number of widely recognized proximal risk factors, such as smoking, excess weight, fatty diet, inactivity, and stress. Thus the best advice for maintaining a healthy cardiovascular system is to avoid smoking, control your weight, eat a sensible diet, get regular exercise, and try to manage tension. Following this advice does not guarantee greater longevity, but it does increase statistical life expectancy.

Of course, there are no sure bets. Some people may ignore all this advice and yet live long lives free from heart disease. Other may follow all the advice and yet die young from heart attack or stroke. Researchers suspect that distal factors such as a person's genetic endowment make a great deal of difference, even though in the present state of knowledge genetic sequencing is of only minor predictive value. So the general advice to reduce proximal risk is still the best advice, even if its benefits cannot be guaranteed.

Similarly, correlational research on the well-being of First Nations has now established a body of advice that is not only consistent with general economic theory but has been empirically tested against results. Here are the main findings, boiled down to simple guidelines:

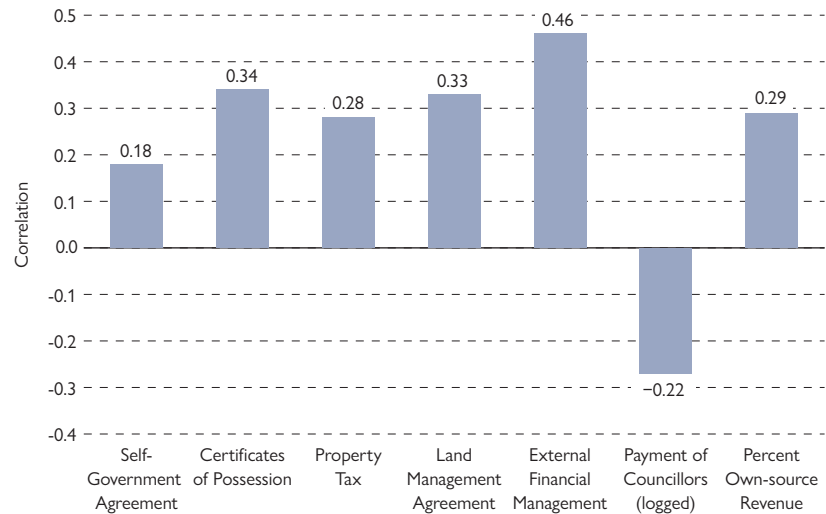
- ♦ run a stable, fiscally prudent government that stays out of debt and does not overpay chief and especially council;
- ♦ as much as possible, take control of affairs away from INAC and the *Indian Act*, and take advantage of available options such as property tax legislation and the Land Management Agreement;

- ♦ capitalize on the value of property rights, both individual (CPS) and collective (band land);
- ♦ make use of whatever opportunities are afforded by the Nation’s location, from recreation and tourism to the exploitation of human and natural resources;
- ♦ be open to the surrounding society for investments, cooperative ventures, contracts, employment, and other economic transactions.

The evidence shows that First Nations that follow these principles are more likely to succeed. As in medicine, there are no guarantees, but the odds are better.

As an exercise in prediction, Laura Johnson and I developed a prototype First Nations Governance Index (FNGI). We started with seven factors demonstrated to correlate with the 2011 CWB. All correlations shown in FIGURE 5.1 are statistically significant at better than the .01 level.

Figure 5.1: Correlation of governance indicators with CWB scores in 2011



SOURCE: FLANAGAN AND JOHNSON, 2015B.

TABLE 5.1 shows the coefficients and probabilities for the multiple regression of the 2011 CWB Index upon six of these seven governance factors. The variable for self-government agreements is not included in the equation because, when it was combined with all the other variables, missing cases caused all the variance in self-government to be deleted. The multiple correlation (*R*) of 0.63 is highly significant statistically, and the *R* Squared of .40 shows that the six factors taken together

Table 5.1: Multiple regression of 2011 Community Well-Being Index upon governance factors

	Coefficients	Standard Error	t Stat	P-value
Intercept	45.44	1.58	28.73	1.66E-92
Property Taxation	0.31	0.10	3.06	0.00238
Default Management	1.17	0.17	7.01	1.23E-11
Land Management	0.46	0.14	3.38	0.000803
Parcel/pop	9.36	2.01	4.66	4.54E-06
Councillors' remuneration	-3.97	9.39	-4.23	2.97E-05
Percent own source revenue	9.10	2.22	4.09	5.35E-05

NOTE: 2011 CWB = 45.44 + 0.32 Independent Property Taxation Score + 1.17 Default Management Score + 0.47 Land Management Score + 9.4 Parcel/pop – 4.0 Councillors' Remuneration + 9.1% Own Source Revenue

SOURCE: FLANAGAN AND JOHNSON, 2015B: 12.

explain 40% of the variance in the 2011 CWB Index. This is an impressive result. By way of comparison, years of expensive research in genomics have identified dozens of genes whose presence correlates significantly with heart disease, but together they explain less than 10% of the variance (PRUM, 2017: 80).

The CWB is undoubtedly affected by factors other than governance, such as the First Nation's cultural background, location, endowment with natural resources, and access to education and employment. But, even if governance cannot explain everything about differences in CWB, it explains quite a bit—and what is explained by governance is especially important because it is under the control of First Nations themselves. To some degree, they have it within their power to provide their own people with a higher standard of living and a better quality of life by improving their governance.

Multiple regression is the best statistical procedure for analyzing the data, but it does not produce intuitively understandable results for readers unless they have some formal training in statistics. The results are easier to convey by combining the governance factors into a single First Nations Governance Index. (Self-government is included here because of its self-evident validity, even though it could not be tested in the multiple regression analysis.) This can be done by normalizing all factors on a scale that runs from 0 to 10 and adding the results.

Missing data, however, present a problem for construction of the FNGI. As in the multiple regression analysis, a First Nation can only be included if its values are present in all variables. If there is missing data, a First Nation will not have a FNGI score. Broadly

Table 5.2: Inclusiveness and predictive power of various formulas of the First Nations Governance Index

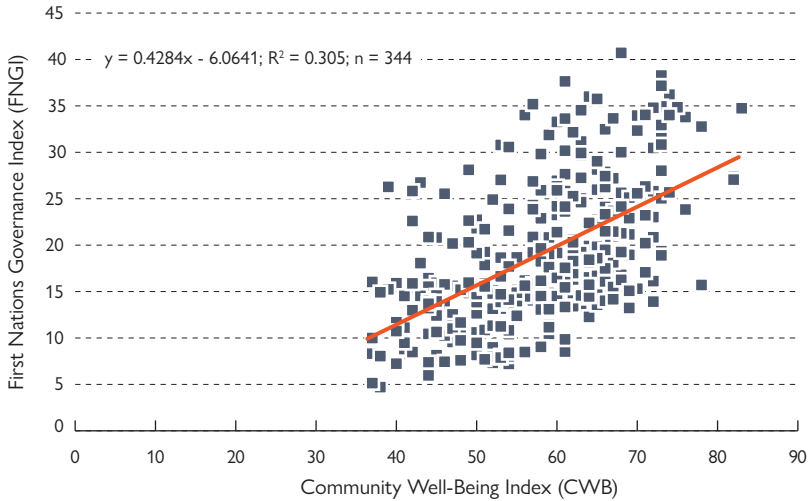
Formula	n included	Correlation with 2011 CWB
A = property tax + default management + land management + self-government (4 factors)	461	.49
B = first four + parcel/pop (5 factors)	376	.37
C = first four + councillors' compensation (5 factors)	426	.49
D = first four + own source revenue (5 factors)	421	.51
E = first four + parcel/pop + councillors' compensation (6 factors)	347	.55
F = first four + parcel/pop + own-source revenue (6 factors)	343	.65
G = first four + councillors' compensation + own-source revenue (6 factors)	421	.53
H = first four + parcel/pop + councillors' compensation + own-source revenue (7 factors)	343	.57

SOURCE: FLANAGAN AND JOHNSON, 2015B: 13.

speaking, there is a trade-off between predictive value and inclusiveness. More variables used to construct the FNGI will make it a better predictor but will also exclude more First Nations because of the missing data problem. TABLE 5.2 highlights the issue.

Not surprisingly, the six- and seven-factor FNGI formulas predict CWB more accurately than do the four- and five-factor formulas. The most accurate predictor is formula F, a six-factor FNGI combining these variables: [1] property tax system; [2] staying out of default management; [3] entry into a Land Management Agreement; [4] self-government; [5] prevalence of individual allotments (CPS); [6] generation of own-source revenue. With a correlation coefficient of 0.65, this six-factor FNGI is an even better predictor than the multiple regression equation ($R = 0.63$). But there is a price to pay for increased accuracy. Because of missing data, Formula F can be computed for only 343 cases. If and when the missing data can be filled in, another formula may prove to be superior to this one. The results, therefore, should be seen as provisional, subject to improvement by updating and locating missing data.

Nonetheless, the six-factor FNGI performs impressively well (FIGURE 5.2). The six-factor FNGI is obviously a useful predictor. The regression line trends up and to the right, showing a positive association. The slope of the regression line (0.43) shows that on average an increase of one point in the FNGI is associated with an increase of 0.43 in the 2011 CWB. That is a practically as well as statistically significant association. If a First Nation could take decisions to increase its FNGI by 10 points, thereby leading over time to an increase of 4.3 in its CWB, that would represent a noticeable improvement in well-being.

Figure 5.2: Scatterplot of six-factor formula F, FNGI × 2011 CWB

SOURCE: FLANAGAN AND JOHNSON, 2015.

As always in statistical analysis, the data points do not lie directly on the regression line; rather, they make up a cloud around it, showing that the FNGI is an imperfect predictor of CWB. But an index does not have to be a perfect predictor in order to be useful; it only has to highlight a general tendency, which in this case is the positive relationship between good governance and well-being in First Nation communities. With a correlation of 0.65, *R* squared is 0.42; that is, the six-factor formula F explains 42% of the variation in the 2011 CWB.

The six variables making up the FNGI tap into multiple underlying factors, including property rights and governmental efficiency. Granting CPS, adopting a property-tax system, entering the Land Management Agreement, and generating own-source revenue show respect for property rights and recognition of real property as a valuable asset that can create a stream of income for the First Nation's government and members. Adopting a property-tax system, qualifying for the Land Management Agreement, and staying out of external financial supervision also show a degree of organization and efficiency. Earning own-source revenue is evidence of a business-like attitude toward self-government.

If a new version of the FNGI is developed in the future, it should also include the work of the First Nations Financial Management Board, which offers various levels of training and certification to the financial administrators of First Nations (<https://fnfmb.com/en>). As of September 2017, 112 First Nations had gone through the process of developing a Financial Administration Law approved by the Board. Of these 112 First Nations, a FNGI score could be found for 62. The average score for these 62

was 29.6. That should be compared to an average of 25.5 for the whole database, and 33.8 for the Top 21 (FLANAGAN & HARDING, 2016A: 15). What this means is that, on average, certification is being sought by First Nations that already have some of the institutions and practices associated with higher CWB scores. Certification would thus be a good variable to add to the FNGI.

It also should be noted that certification is not just a diploma for First Nations that are already doing well. Fifteen of those certified have FNGI scores of 20 or below, that is, well below average but showing a laudable desire for self-improvement. After enough time has elapsed, it would be a worthwhile research project to see whether certification is followed by greater than average improvement in CWB or another indicators of well-being.

Of course, no First Nation pursues all of the paths leading to a higher score on the FNGI. Some encourage their members to build better housing through use of semi-privatized land (CPS). Others generate revenue through granting leases and imposing property taxes, while still others have created band-owned businesses to create own-source revenue. Many have taken more control of their own assets by entering the Land Management Agreement. Successful First Nations also tend to stay out of financial trouble and hold councillors' compensation to reasonable values. And all of these practices can be combined in various ways. The factors of the FNGI represent a menu of possibilities associated with better governance and higher CWB scores, that is, a higher standard of living and better quality of life for those who live in First Nations communities.

One way of understanding this is through the concept of "family resemblance" developed by the philosopher Ludwig Wittgenstein (*PHILOSOPHY INDEX*, N.D.). Look at a picture of a family reunion. Apart from the exceptional case of identical twins, no two members look exactly alike. One may be blonde, another may have brown hair. Some are taller than others. There are variations in the shape of the nose. No two members have all the same characteristics, and no single characteristic is found in every member. And yet the resemblance of all the members to each other is unmistakable because they overlap in sharing traits drawn from a larger pool.

In a somewhat similar way, successful First Nations have a family resemblance to each other. No two are identical, but they all draw from a common pool of strategies in the way they run their governments, organize their legal framework of property ownership, and pursue economic opportunities. These strategies are not derived from some external source to be imposed upon First Nations. These are the best practices that successful First Nations have discovered for themselves through initiative and experimentation. The statistical methodology of the research reported here is merely a way of tabulating cases and testing them against evidence

of well-being. The purpose is not to discover something that First Nations do not know but rather to highlight the discoveries they themselves have made as they attempt to improve the well-being of their people.

Yet government policy is not irrelevant to the success of self-improving First Nations. If they have prospered, it is mainly by driving down the “off ramps” from the *Indian Act* that have been established by government action. Certificates of Possession were created by 1951 amendments to the *Indian Act* to update the older Location Tickets present in the *Act* since 1876; they are an off ramp inasmuch as they allow First Nations individuals to make decisions about property on reserve without having to get ministerial approval. Property taxation of leaseholds on reserve was first enabled by the 1988 “Kamloops Amendment” and later strengthened by the *First Nations Fiscal and Statistical Management Act, 2005*. Property taxation is an off ramp because it allows First Nations to generate some of their own revenue rather than just receiving transfers from the federal government. The First Nations Land Management Regime, established by legislation in 1996, is also an off ramp to the extent that it allows First Nations to manage and lease band land without being slowed down by waiting for the approval of senior governments. And self-government agreements, established by multiple pieces of legislation, are the ultimate off ramp, giving First Nations almost complete control of their own affairs within the constraints of law and the constitution.

It is noteworthy that these pieces of off-ramp legislation were introduced into Parliament at various times by both Liberal and Conservative governments and were left in effect by the other party when control of the government changed. Since 1988, such legislation been “First Nation led,” that is, the initiative has been taken by one or more First Nations to develop draft legislation and ask Parliament to pass it. Also important is that all such legislation has been optional for First Nations, allowing but not forcing them to take one of the off ramps.

The *Indian Act* is often condemned in extravagant terms, with ringing declarations that it must be repealed and replaced with something entirely different. Yet, up to this time there has never been widespread agreement about what the replacement would be, so Canada continues to muddle along in the legislative *status quo*. But not altogether. The history of off-ramp legislation shows that it is possible to make intelligent, consensual modifications to property rights that facilitate the voluntary self-improvement of First Nations.

Location and culture

Having surveyed political, legal, and economic strategies that are under the control of First Nations and that are associated with higher CWB scores, we should also look at factors that, though not under their control, may aid or impede their progress.

That provincial and regional differences in average CWB scores are large suggests that important factors not under direct human control are in play.⁸ But, while provincial and territorial location is a good proxy, it cannot be a true causal factor for a couple of reasons. For one thing, policy toward First Nations is largely the same across Canada because it is determined by the federal government, not the provinces and territories. The *Indian Act* is administered in more or less the same way in British Columbia as in Nova Scotia. Moreover, the larger provinces contain highly diverse settings. A First Nation located in southern Ontario is in a very different situation from one located near Hudson Bay. Similar differences exist in all the other large provinces from Quebec to British Columbia. Provincial differences in average CWB scores must be a proxy for other, deeper causal factors, of which location and culture are the most obviously relevant.

The Top 21 illustrate some of the complexities of location and culture. Eleven of the 21 First Nations in that sample are in the province of British Columbia, whereas the remaining ten are scattered across six other provinces and the Northwest Territories. Why the concentration in British Columbia? For one thing, that province has a disproportionate number of First Nations—198 out of 618, or 32% of the Canadian total. But the discrepancy in the sample ($11/21 = 52\%$) is even greater than that. One possible explanation is that no treaties were negotiated in most of British Columbia. One study found that First Nations in British Columbia and elsewhere who never signed “Historic Treaties” (that is, nineteenth-century land-surrender agreements) tend to have higher CWB scores and higher rates of improvement than those who did sign such treaties (INAC, 2012). The causality behind this finding is unclear but may have something to do with the way in which the nineteenth-century treaties promoted a culture of dependency. That would be deeply ironic: the absence of treaties in British Columbia and the Atlantic provinces has been one of the main grievances of the modern aboriginal rights movement, yet maybe First Nations have been better off without them.

Another explanation may lie in the realm of culture and geography, that is, the characteristics of British Columbia’s First Nations and the way that land reserves were allocated by the colonial government (TENANT, 1990). Most of British Columbia’s First Nations relied on fisheries, especially salmon, either on the Pacific Coast or along the shores of inland lakes and rivers. The colonial government assigned them a large number of small reserves located near fishing stations rather than a smaller number of big reserves. As a result, aboriginal peoples were broken up into numerous bands for administrative purposes, and these bands became

8. Figure 1.2 (p. 15) shows the provincial and territorial variation of average CWB scores for First Nations in 2011.

today's First Nations. For example, the Shuswap (*Secwepemc*) people are one cultural and linguistic nation, yet they are divided today into 17 bands or First Nations scattered around the mountains of southeastern and central British Columbia. That, in a nutshell, is why British Columbia has a disproportionate number of Canada's First Nations. Moreover, the creation of Indian reserves around fishing stations led many reserves to be located near cities or towns, because the new settlers also wanted to exploit the fisheries and take advantage of transportation by water in such a mountainous province.

Every one of British Columbia's eleven First Nations in the Top 21 is located either within, or not far from, a municipality. The Musqueam Indian Band is within the city of Vancouver, and the Tsawout First Nation is only 15 minutes north of Victoria. Other members of the group on Vancouver Island are located near the towns of Sooke and Campbell River. On the mainland but not far from the coast, Top 21 First Nations will be found near the cities of Mission and Chilliwack; and in the interior, near Osoyoos, Invermere, and Barriere. None of British Columbia's eleven First Nations in the sample is in a situation even remotely comparable to the impoverished First Nations in the northern parts of Saskatchewan, Manitoba, and Ontario, hundreds of kilometres from any urban settlement and reachable only by airplane or winter road.

Location near a town or city offers many advantages for economic progress, including the following:

- ◆ jobs;
- ◆ consumer goods whose price is lower because of retail competition;
- ◆ markets for the fish, game, and agricultural produce of the reserve;
- ◆ a much wider range of educational opportunities than the small schools on Indian reserves can offer;
- ◆ availability of professionals, such as lawyers and accountants, needed by entrepreneurial First Nations;
- ◆ demand for land that can be used for industrial, commercial, residential, and recreational purposes.

Thus, it is not surprising that First Nations located near towns or cities in British Columbia are the largest group in this sample of successful First Nations.

The location variable is more complicated outside British Columbia. The Membertou First Nation occupies an urban reserve in Sydney, Nova Scotia; and the Madawaska Maliseet First Nation is situated close to Edmundston, New Brunswick.

The other eight First Nations in our group are in a variety of locations, sometimes quite far from any town or city other than their own community. But there are some recurrent themes. Several are in prime recreational country, such as the Buffalo Point First Nation on the Lake of the Woods, and the Whitefish River First Nation on Georgian Bay. The Chippewas of Rama First Nation are on the shore of Lake Couchiching, near Orillia, and even more importantly are licensed to operate a major casino. Others are taking advantage of local resource development plays, such as the Fort McKay First Nation on the Athabasca River in the Alberta oil sands, and the Matatchewan First Nation, located in the mining and forestry country north of Temiskaming, Ontario. In a much larger dataset, *remoteness*, defined as being far from a city or town, and location in British Columbia were both statistically significant when used as control variables in analyzing the 2006 data, though they did not erase the significance of governmental, legal, and economic strategies (FLANAGAN & BEAUREGARD, 2013: 18).

Correspondingly, First Nations in the three Prairie Provinces are at a statistical disadvantage. Ever since the CWB was first calculated from 1981 data, the average score for Prairie First Nations has been five points or more below that of the average for all Canadian First Nations. Cultural differences may be part of the explanation. The collective enterprise of the buffalo hunt, on which the Prairie Indians were largely dependent, was more distant from the individualistic ethos of modern industrial and commercial society than were the agricultural efforts of Indians in southern Ontario and Quebec and the type of fishing practised by most Indians in British Columbia. Agriculture engendered a sort of family ownership of cultivated land, and the Pacific fisheries gave rise to family ownership of fishing stations and residential locations. It may also be that the Numbered Treaties, although very dear to the Prairie First Nations, have hindered their progress by fostering over-reliance on government promises.

Whatever the precise explanation, no one doubts the difficulty of the economic challenges facing Prairie First Nations. Yet the record shows that relative success is possible. Three of the Top 21 are from the Prairie Provinces. Even outside the small circle of the Top 21, there are striking success stories. For example, the Whitecap Dakota First Nation has leveraged its location near Saskatoon to become an economic powerhouse, with a casino, golf course, hotel, and other businesses. Other First Nations that have developed urban reserves in Saskatchewan have also experienced above-average growth (FLANAGAN & HARDING, 2016B). As with remote location, being in the prairies is not an insuperable obstacle for development-minded First Nations, though it makes the hill harder to climb.

Finally, one may speculate about the influence of Canada's historical approach to awarding and locating Indian reserves. Nineteenth-century Canadian policy-makers thought that the American practice of creating large "Indian

territories,” which were later subject to depredation by white settlers on the frontier, led to Indian wars. Canada, therefore, broke up large tribal nations such as the Cree or Dene into smaller manageable “bands,” now known as First Nations, and gave them widely separated reserves. As a colonial pacification strategy, it was effective; the Canadian frontier, as compared to the American, experienced remarkably little warfare. But it also broke up the cultural unity of the historic tribal nations. Once subdivided and widely scattered, the new bands or First Nations inevitably began to develop their own local subcultures, just as in Canadian society at large particular towns and even neighbourhoods may develop their own local character.

Although the influence of this process has not been studied, it may help to explain why, even within large tribal nations, some First Nations have forged ahead much more quickly than others. We may attribute this to the presence of inspired leadership and the adoption of best practices in governance, property rights, and economic strategy; but the question still remains, why in these particular First Nations and not others? Leadership is not a *deus ex machina*; it arises within the community and depends on community responsiveness to be effective.

Finally, it is worth commenting on First Nations’ population size. When I first started this line of research five years ago, I included population size as a variable in some regressions, but it did not seem to be significantly related to CWB. I dropped it until doing the work on the Top 21, when I noticed that the average size of membership for these First Nations in the 2011 census was only 910, compared to 1,556 in the entire database (FLANAGAN & HARDING, 2016A: 11). The First Nations in the Top 21 are energetically pursuing various versions of community capitalism, using land, resources, and location to generate own-source revenue. A smaller population may be an asset in that situation because it allows benefits of income, housing, education, and job creation to be distributed in a more concentrated way, having a greater impact on the CWB index. Small population, because it works against economies of scale in public administration, may not be an asset as such; but it seems to have been helpful for these Top 21 in coming as far as they have in a short period of time.

A Case Study—The Fort McKay First Nation

“The government has only a couple of hundred billion dollars in their spending budget and that’s small compared to the Canadian economy, which generates trillions of dollars. So if you want to know where the opportunities lie, they are in the Canadian economy and not in government largess.”

Jim Boucher, Chief of the Fort McKay First Nation,
quoted in BRADFORD, 2016: 7.

Up to this point, we have focussed on statistical generalizations, but there is also value in looking at a single case to get a more detailed understanding of community capitalism. The Fort McKay First Nation (FMFN) furnishes an excellent case study. As a result of its remarkable success, its characteristic features stand out in sharp relief. Its wholly owned and joint-venture business enterprises generated an annual average of \$506 million gross revenue in the five-year period from 2012 to 2016.⁹ But FMFN does not just have an impressive business portfolio; it has also succeeded in raising the standard of living of its members. Its score on the Community Well-Being index (CWB) has risen from 57 in 1996 to 76 in 2011, putting it 17 points above the average of First Nations, 59, and only three points below the average of non-Aboriginal Canadian communities, 79 (FLANAGAN & HARDING, 2016A: 7, 20).¹⁰ According to Statistics Canada (2017B), the average after-tax income for Fort McKay residents was \$73,571 in 2015—significantly higher than Alberta’s (\$50,683) and Canada’s (\$38,977).

9. Fort McKay First Nation. *Summary of 5 Year History: December 31, 2016*. Internal FMFN document provided to the author by administrative staff, October 3, 2017.

10. The reported CWB for the Fort McKay Indian reserve includes about 150 Métis living in the contiguous community of Fort MacKay. The Indian reserve appears more prosperous than the adjacent Métis settlement, so the reported CWB probably underestimates, if anything, the prosperity of the Fort McKay First Nation.

The Fort McKay First Nation has achieved prosperity by participating in the resource economy of the Alberta oil sands, which is important because the best hope for prosperity of many First Nations in remote locations is involvement in nearby resource plays, whether oil and gas (BAINS, 2013), hard-rock mining, forest products, fisheries, or agriculture (BELZILE, 2018). Yet the FMFN has never produced a drop of oil or earned a dollar in royalties; its success has come from providing services to natural resource corporations. This is good news for First Nations because it shows that ownership of natural resources and possession of sophisticated technology—useful as those are in the business world—are not essential. Success can come through unglamorous but necessary services—janitorial care, trucking, earth moving, and workforce lodging—that can realistically be provided by new entrants into the industrial labour force.

The success of the FMFN in generating and sharing wealth is underpinned by its approach to governance. One official described its system of governance in these terms:

In addition to its entrepreneurial focus, FMFN Chief and Council have adhered to principles of good governance and the concept of the rule of law as applied through the lens of its culture and history. The Chief and Council make decisions on a consensus basis, and the rule of law is enshrined in FMFN customary election laws. This requires the Council to work cooperatively for the community's benefit and avoids partisanship at the Council table, which can and often does paralyze First Nation governments. In addition to consultation meetings with Membership, the customary election laws require Quarterly General Meetings at locations both on and off Reserve, and all laws and policies are reviewed with members before implementation. FMFN has moved increasingly to processes of dispute resolution such as third party arbitration, separating politics from adjudicative functions. Overall, these initiatives have worked hand in hand with its economic policies to create a climate conducive to community capitalism and investment. (PERSONAL COMMUNICATION BY E-MAIL, FROM STAFF OF FORT MCKAY FIRST NATION, DECEMBER 31, 2017.)

Like all First Nations, the FMFN was and still is handicapped by the paternalistic regime of the *Indian Act*, which poses many obstacles to participation in the business world. But at the same time, FMFN has assets to draw on, including a long commercial history. The fur trade flourished in the Athabasca River valley from 1778, after Peter Pond established the first trading post at Fort Chipewyan on the Athabasca delta. The members of FMFN were self-supporting trappers and traders who had never experienced the welfare dependency that undermined many First Nations further south. FMFN thus had some cultural preparation for taking

advantage of the new trading opportunities created by development of the oil sands. Also, the Fort McKay First Nation is located in the centre of what has become one of the biggest industrial developments on earth. It is surrounded on all sides by oil sands mining and *in situ* operations, creating an enormous demand for labour and services. Even as it threatened the traditional livelihood of the FMFN, the development of the oil sands created a new world of opportunity for it to exploit.

The research methodology for the case study involved a visit to the FMFN to interview Chief Jim Boucher and senior staff members, prior and subsequent conversations and e-mail exchanges with staff, and a review of printed and online sources. When factual assertions are not documented with reference to such sources, they are based on my understanding of conversations with the Chief and staff. Audited annual financial statements for the last five years, filed under the *First Nations Financial Transparency Act*, are archived online at the INAC website under the heading of First Nation Profiles, along with a variety of other information. Journalists have already profiled the FMFN's success in the business world (*CANADIAN BUSINESS JOURNAL*, 2017). The purpose of this chapter is not to produce another such description but to analyze the legal, political, and institutional aspects of community capitalism that have made the FMFN's achievements possible.

A little history

Commercial exploitation of the oil sands began in 1967 with the opening of the Great Canadian Oil Sands (later Suncor) mine. The huge Syncrude mine, owned by a consortium of companies, was established in 1978. As oil-sands production shifted into high gear, the traditional native way of life, based on trapping, hunting, and fishing, was increasingly threatened not only by the open pit mines but by associated exploration and construction of roads and utility corridors. At first, the FMFN resisted, going so far as to erect a blockade in 1983 to slow down logging trucks rumbling through the village of Fort MacKay (TATRIE, 1983). But the FMFN's attitude shifted from confrontation to cooperation as members realized that environmentalists' opposition to the fur trade, combined with local disruption of the environment, was going to permanently undermine their traditional economy. In 1986, Chief Dorothy Hyde McDonald, who had earlier led the protests, founded the Fort McKay Group of Companies (FMGOC) as a vehicle for participating in the oil sands economy (CRYDERMAN, 2013B). The FMFN was early to see what some other First Nations have subsequently realized, that lifting themselves out of poverty does not always coincide with the agenda of environmentalism (CATTANEO, 2018).

The same year Jim Boucher, whom McDonald had hired as band administrator and who had also been a key participant in the protests, defeated McDonald in an election for the chief's position. Boucher has been chief for most of the time

since then, though he did lose an election for a two-year term in 1988 to McDonald and again in 1994 to Mel Grandjamb. With adoption of a custom electoral code in 2004, the chief's term has been extended to four years, and Boucher has been in office without interruption since 1996, though he experienced a very close call in 2011 (one vote) and another not quite so close call in 2015 (27 votes). Interestingly, his opponent in these contests was Cece Fitzpatrick, the younger sister of Dorothy Hyde McDonald (*THE GUARDIAN*, 2015). As with many First Nations, family and kinship connections constitute a powerful force in FMFN local politics. Given the small size of the community, this is unlikely to change in the foreseeable future.

The first venture of the FMGOC was a janitorial contract with Syncrude involving six employees, with later entry into hauling, delivery, earth-moving, and work-force lodging. According to Chief Boucher's recollection, growth was modest initially, with revenues of about \$120,000 the first year and \$6 million ten years later. But there was an explosion of revenue from 1999 (\$6 million) to 2004 (\$150 million). The growth of oil-sands production accelerated in those years, partly as a result of an agreement between Alberta Premier Ralph Klein and Canadian Prime Minister Jean Chrétien to reduce both royalties and corporate income taxes on oil-sands production (CRYDERMAN, 2013A). World oil prices also went up after 2002, further boosting development. The FMFN business enterprises now generate about \$500 million a year in revenue, though much of this is shared with partners in joint enterprises.

The FMGOC now consists of five wholly owned companies:

1. Fort McKay Strategic Services—construction, earthworks, site services;
2. Fort McKay Logistics—transportation and warehousing;
3. Steep Bank Earth—ownership of heavy equipment used by Strategic Services and Logistics
4. Rising Sun Services—light vehicle servicing and repairs, rentals and fleet management in conjunction with partners Summit Auto and Kiazan Auto;
5. Fort McKay Industrial Park.

In addition, the FMFN through the Fort McKay Landing holding company owns a majority share (51%) in each of eight joint enterprises, all of which are managed by the minority partners:

1. Barge Landing Lodge—accommodations for oil-sands workers;
2. Caribou Energy Industrial Park;

3. Fort McKay Savanna—drilling and well service;
4. Fort McKay Savanna—oilfield rentals;
5. Hammerstone Corporation—limestone quarry;
6. First North Catering—camp management, catering, and maintenance (majority Indigenous ownership is shared with Athabasca Chipewyan First Nation);
7. Dene Koe—lodging and catering for oil sands workers;
8. A new joint venture with Schlumberger to provide chemicals used in oil fields.

The FMFN has also acquired a 34.3% equity share in Suncor's East Tank Farm Development, financed by a \$350 million bond issue, discussed below in more detail.

The FMFN acquires or divests itself of companies to adjust to changing business conditions. What is most important here is the focus on the oil sands. This may change in the future, but for now the FMFN has built its business portfolio by investing and offering services close to home. This is a function not only of location but also of having built up good personal relations with oil-sands executives such as former Suncor CEO Rick George (GEORGE & REYNOLDS, 2012). The FMFN also encourages entrepreneurship among its own members, maintaining an industrial park on the reserve for that purpose. The Nation's website lists a score of privately owned businesses, many of which are in trucking, well-site services, earthmoving, construction, and other fields relating to the oil industry. There are now several millionaire business owners among the FMFN's members. Though not the focus of this book, individual entrepreneurialism is an important complement to community capitalism led by the FMFN government.

In 1987, about the same time that it started to participate in the oil-sands industry, the FMFN filed a treaty land entitlement claim, arguing that its population had been under-counted when its land reserves were first surveyed in 1915. After a favourable recommendation from the Indian Claims Commission (CORCORAN & PRENTICE, 1995), and after Jim Prentice became Minister of Indian Affairs and Northern Development in 2006, the FMFN received 20,000 acres of additional land and \$41.5 million in compensation for lost opportunity (TURTLE ISLAND, 2006). One tract of about 8,000 acres was selected because of subsurface bitumen deposits suitable for open-pit mining; the FMFN is holding this land for possible future development (CATTANEO, 2016). Most of the rest of the acreage has been dedicated to a reserve near Moose Lake and Namur Lake, intended to be kept as an undeveloped retreat for recreational and cultural purposes. To the west of the lakes lies the Birch Mountains Wildlands Park, which protects the reserve from

that side (FMFN, 2016: 15). The FMFN’s determination to keep a ten-kilometre corridor free of surface development to the east and south of this reserve has involved it in a long and still ongoing series of negotiations and litigation with oil companies (HENTON, 2016). The FMFN’s leaders hint that, if necessary, they would revive the civil disobedience tactics of the early 1980s to keep this area pristine. In their mind, this reserve is part of the essential balance between cultural preservation and economic development, as reflected in their motto, “Inspired by our past, invested in our future” (<http://fortmckay.com>).

In itself, the FMFN’s specific claim exemplifies “taking” rather than “making,” but the cash portion of the settlement has been carefully invested to yield annual revenue of about \$5 million a year, which helps to stabilize the budget. Also, bitumen production on the settlement lands may someday pay big economic dividends.

Budgets

TABLE 6.1 gives a summary view of FMFN’s revenues for the last five years. For these five years taken together, government transfers averaged only 5.3% of total revenues. The FMFN has indeed become largely self-sufficient through own-source revenue. OSR has been reasonably consistent around the \$60 million level over the last five years except for one bad fiscal year ending March 31, 2016, when it plunged to \$37.7 million. Leading to that decline in OSR were fluctuations in oil prices, which plunged from US\$109.89 per barrel (West Texas Intermediate) in June 2014 to US\$29.67 in January 2016 (MACROTRENDS, 2017). That year was even worse than it appears from the above, for elsewhere on the balance sheet the FMFN also showed an impairment loss of \$14.8 million on business investments. This resulted from liquidating its investment in Creeburn Lake Lodge, a previously profitable joint venture with ATCO logistics in workforce lodging. But once the FMFN got through the bad year of 2015/16 and oil prices recovered somewhat, its OSR returned to the more normal level of \$61.1 million in 2016/27.

Table 6.1: Fort McKay First Nation’s revenues (\$ millions), fiscal years ending March 31, 2013 to March 31, 2017

	2013	2014	2015	2016	2017
Total Revenue	65.4	70.0	60.3	37.7	66.2
Own-Source (OSR)	63.2	67.2	57.6	34.5	61.1
Government Transfers	2.2	2.8	2.7	3.2	5.1
Expenditures	35.0	55.1	44.9	32.8	34.9
Surplus	30.4	15.01	15.4	4.9	31.3

SOURCE: FLANAGAN, 2018A: 7.

TABLE 6.2 takes a closer look at revenues by focussing on the fiscal year ended March 31, 2017, the most recent year for which an audited statement is available. *Business enterprise income* consists of profits from the Fort McKay Group of Companies and the joint enterprises owned by the Fort McKay Landing holding company; *industry grants* are received in virtue of impact-benefit agreements or similar arrangements. The FMFN's land reserves and traditional territory are surrounded by oil-sands mines and steam-assisted wells that impinge in various ways on Treaty 8 rights of hunting, fishing, and trapping. These grants, which are a form of "taking" facilitated by the Supreme Court's doctrine of the duty to consult, have been used mainly for the construction of new capital facilities such as the youth centre, seniors centre, seniors care centre, and community arena. They thus contribute to collective well-being, though not directly to economic advancement. The FMFN's next big capital project will probably be a new school on the reserve. *Long-term sustainability funding* also comes from impact-benefit agreements. When new mines, wells, pipelines, roads, or processing facilities are proposed, the FMFN has a right to be consulted about the impact on its reserve lands and traditional territory, and the proponents contribute to the expenses of research and consultation.

Table 6.2: Fort McKay First Nation's revenue sources (\$ millions), April 1, 2016–March 31, 2017

Source	Amount	Source	Amount
Business enterprise income	27.4	Rent	2.4
Industry grants	16.1	Miscellaneous	1.1
Long-term sustainability funding	6.3	Government transfers	5.1
Investment income	4.9	Total	65.9
Property tax income	2.6		

SOURCE: FLANAGAN, 2018A: 8.

Investment income is earned mainly by a trust fund of about \$50 million that was set up after conclusion of the FMFN's treaty land entitlement claim. Its policy has been not to spend that money but to use the investment proceeds as a source of revenue for the annual budget. *Property tax income* consists of levies on leaseholds on the reserve, such as pipelines or other utility corridors, and premises rented on the Nation's industrial parks. Chief and Council have created a property-tax system as authorized by s. 83(1) (a) of the *Indian Act* (FIRST NATIONS TAX COMMISSION, 2017A). Like investment income, this is a more predictable source of revenue than business income, industry grants, or sustainability funding, which are prone to variations as the business cycle fluctuates.

Rent comes from the homes that the FMFN builds and rents to members as well as from businesses that have located on the industrial parks. *Government transfers* come mainly from INAC (\$3.3 million in the 2016/17 fiscal year) but also other federal departments, such as Health Canada; and from the Athabasca Tribal Council, which channels a small amount of money from First Nations gaming in Alberta (\$105,000).

Investment income, property tax, rent, and government transfers are reasonably stable year to year, but together they account for less than 25% of the FMFN’s revenue. More than 75% comes from business income, industry grants, and long-term sustainability, which are subject to large fluctuations depending on the price of oil and investment decisions of surrounding corporations. The FMFN’s leaders are well aware of this instability; rather than spending all their OSR, they run substantial surpluses in most years, as shown in TABLE 6.3. Surplus is defined on the audited financial statements as revenue minus depreciation, impairment charges on assets and business investments, and distribution of business profits (discussed in the next section). This surplus allows for savings and reinvestment to replace depreciated assets and make new investments in response to changing business conditions. There is no separate surplus fund; accountability for use of the surplus comes through publication of the annual budgets, which are openly discussed with members.

Table 6.3: Surplus (\$ millions) of the Fort McKay First Nation, fiscal years ending March 31, 2013–March 31, 2017

2013	14.6	2015	6.0	2017	24.5
2014	3.2	2016	−17.3	Five-year total	31.0

SOURCE: COMPILED BY THE AUTHOR FROM FMFN ANNUAL FILINGS UNDER THE FIRST NATIONS FINANCIAL TRANSPARENCY ACT (INAC, 2017A).

Sharing the wealth

Beyond the obvious need of re-investment for growing its businesses, the FMFN has used its earnings to help its members become better off. The FMFN spends a great deal on housing. Some older homes are still in use but most have been replaced with attractive, medium-sized houses that would not look out of place in a suburb of Calgary or Edmonton. The community builds, owns, and maintains the dwellings while renting them to members. A typical rent for a new home is \$500 a month. The renter is also responsible for utilities, and non-payment of rent can lead to eviction (elders do not pay rent or utility fees). It is difficult to know what a true market rent would be because the population is so small and non-members do not compete for reserve housing, but \$500 a month for a new house seems very low to

an outside observer. However, there is little tradition of paying rent in First Nation communities, so it was an achievement for the FMFN to have introduced payment of rent and responsibility for utilities.

Home ownership is rare at present except for a few successful entrepreneurs who have built large homes for themselves on informal land allotments. Certificates of Possession under the *Indian Act*, which have facilitated home ownership in some First Nations, are not in use in the FMFN and are controversial because they transfer ownership of land from the community to individuals. The FMFN, however, wants to promote home ownership, so it will attempt to use long-term leases for that purpose, more or less on the model of Canada's national parks. This avoids the conflict over Certificates of Possession because leased land remains the property of the First Nation, even though its use is transferred to an individual through the lease.

A “Long Term Leasing Law” approved by Chief and Council at the end of November 2017 allows members to acquire 99-year renewable leases of land for home ownership (FMFN, 2017). They can build new houses or convert homes they already occupy from rental to ownership. They can prepay the 99-year lease or arrange periodic payments. If they already occupy the home, they can apply previous rental payments to the purchase price. Another incentive for home ownership is the “Home Ownership Grant Policy,” which provides a \$25,000 grant for members buying or building a house. In the past, this has been used primarily by members who live off reserve in Fort McMurray or elsewhere, but in the future it may be used more often on reserve. Experience will show how much uptake there will be for the long-term lease option.

Education, too, is a high priority. The FMFN pays for extra teachers and assistants in the local school and plans to build a new school as its next infrastructure priority. The community is so small that students must go to Fort McMurray beyond grade six, and the FMFN pays for the required bussing. As well, the FMFN covers expenses for members who go on to post-secondary education or vocational training. There is also a new youth centre located not far from the school.

The FMFN is too small to have a hospital, but the community spends over \$3 million a year on community health services, about four times as much as the annual grant received from Health Canada for that purpose. A modern clinic staffed by nurses is maintained in the band's administration building, while patients requiring a doctor's immediate attention are transported back and forth to Fort McMurray as required. A doctor visits the clinic once a month while a physiotherapist comes twice a week.

The community also tries to make life comfortable for elders. In addition to free rent as mentioned above, there is an attractive seniors' centre offering various kinds of programs. Construction of a seniors' residential care centre for up to 18 residents was almost complete when I visited; the centre will require hiring of

additional staff. The FMFN funds all necessary staff training. This centre, along with rent-free housing for elders, are examples of how the revenue generated by success in the business world can be channelled in support of a traditional cultural value such as the veneration of elders.

The new seniors’ care centre is also an example of providing collective benefits through construction of buildings and other infrastructure, funded mainly by industry grants. Completed projects include a water-treatment facility, youth centre, hockey rink, seniors’ drop-in centre, and outdoor events venue. Industry grants are different in nature from other business revenue; as part of impact-benefit agreements, they are usually tied to specific projects and have a limited life span. Using these grants to construct infrastructure converts temporary cash flow into long-term assets that contribute to community well-being in a collective way, complementing the individual housing, health, and educational benefits paid for by the FMFN’s budget.

There is a massive need for labour in the oil sands, so companies fly in workers from all over Canada or even other countries, but the FMFN will also find a job in its enterprises for any member who needs work. There is a low level of unemployment in the community caused by people who are changing jobs or who do not really want or need to work; but the situation is far removed from many First Nations where unemployment is chronic and the band government is almost the only employer.

Cash payments to all members, known as *business profit distributions*, commenced in 2002, according to Chief Boucher’s recollection, as the FMFN business enterprises began to take off. The distribution is paid to all members on or off reserve (parents may elect to deposit their children’s shares in a special account). TABLE 6.4 shows the gross amount of payments in fiscal years 2013 to 2017.

Table 6.4: Business profit distributions by Fort McKay First Nation, fiscal years 2013–2017

	Gross amount (\$ millions)	Estimated per-capita annual (\$)
2013	12.4	14,300
2014	7.7	8,900
2015	4.8	5,500
2016	1.1	1,300
2017	2.0	2,300

SOURCE: FLANAGAN, 2018AA: 12.

The amounts are calculated by a formula based on business profits and are discussed with the community. Some may question whether a government should hand out money this way, but this is community capitalism, in which the FMFN as a whole owns all enterprises. From that viewpoint, the distributions resemble the

dividends received by owners of corporations in the Canadian economy. They also give members a tangible stake in the business success of the FMFN, thus helping to solidify the political basis of community capitalism. The annual amounts were much larger at the beginning of this five-year period, decreased through 2016, then started to recover. These changes seem to reflect a balance of caution over the business cycle against internal political pressures; Chief Boucher's opponent in the 2011 and 2015 elections promised larger disbursements.

Ownership and governance in the Fort McKay First Nation

Community capitalism as practiced by the FMFN is a blend of private and public-sector institutions and practices. The Crown is the legal owner of the FMFN's land reserves and subsurface resources, which the FMFN's elected government manages within the constraints of the *Indian Act*. The FMFN is the sole owner of Fort McKay Group of Companies and of the Fort McKay Landing holding company that owns the FMFN's shares of joint ventures. The owners include all the current members of the FMFN, both those who live on reserve and those who reside elsewhere. One becomes an owner by acquiring membership in the FMFN, either by birth or by acceptance under the band's membership rules.

The FMFN is a valuable entity. In addition to all the businesses it owns in whole or in part, it has about \$145 million in financial assets, \$115 million in non-financial assets, and perhaps 2.5 billion barrels of bitumen beneath the land it received in its treaty entitlement claim. That land is still legally owned by the Crown, but it is now dedicated to the use and benefit of the FMFN. Its bitumen deposits could be worth over a billion dollars if they are ever fully developed. The members of the FMFN are in some sense the owners of all assets in their business enterprises, but they do not own equity shares that can be sold, gifted, or left to heirs. The only way these owners can derive material benefits from their ownership is for the FMFN to transfer money to them; provide services such as housing, education, and health care; or build facilities for common enjoyment.

The *Indian Act* prescribes referendum decision-making for certain important questions regarding the control of land, but the normal way for the owners to affect the conduct of the FMFN's business is through the governing mechanism of Chief and Council, which the adult members can influence by voting in elections or participating in consultative meetings. Elections now take place every four years, after the adoption of custom government rules in 2004, and both on- and off-reserve members are able to vote. Consultative meetings take place frequently, both on and off reserve. Sometimes they are held just with elders, sometimes all members are invited to attend. And, of course, in such a small community, there are many opportunities for informal consultation.

The FMFN tries in some measure to separate business from politics. The board of directors of Fort McKay Landing, the holding company that owns the Nation's share in joint ventures, consists of the FMFN Chief and two senior staffers. This is a less political arrangement than prevails in some other First Nations, where business ventures are directly controlled by Chief and Council. The joint ventures are all operated by the minority partners, who have normal profit-making incentives. Each joint venture has its own board of directors that decides how much profit can be returned to the holding company and how much should be retained for reinvestment.

The Fort McKay Group of Companies has a professional management team and a board of directors appointed by the Chief and Council of the FMFN. The Chief of the FMFN chairs the board of directors, and other councillors also sometimes serve; the Chief may also invite others to attend board meetings at his discretion. However, there is normally a majority of independent members, that is, those who are not officers or staff of the FMFN. At the time of writing, the board was being reformulated and the Chief was the only active member while a search was conducted for new members.

The existence of these boards serves to insulate the FMFN's business operations from the day-to-day politics of the Nation. However, much depends on the willingness of Chief and Council, and ultimately of the members, to let business function independently. Chief and Council are responsible for appointment of the boards and approval of the direction they take; it could hardly be otherwise, since the FMFN is the owner, and Chief and Council have legal responsibility to make decisions for the FMFN. The separation of business and politics could change if the mood of the Nation changed, resulting in election of a Chief and Council with different views. To put it another way, the prosperity of the FMFN has been created by following rational strategies of investment and business operation, but the ability to follow those strategies depends upon politics in the FMFN. It is, to use the nineteenth-century phrase, a "political economy."

The Chief and Councillors of the FMFN are compensated like the president and vice-presidents of a fair-sized corporation, which in some respects they are. In 2014, the FMFN adopted a written policy that limits the salaries of Chief and Council to no more than 3% of revenues, excluding capital-related grants, so salaries may fluctuate in accord with economic conditions. In fiscal 2016/17, Chief Jim Boucher received a salary of \$632,785, while two councillors received \$466,275 and the other two got \$326,393. This is at the very high end of compensation for First Nation elected officials in Canada, even compared to others with sizable business activities (FLANAGAN & JOHNSON, 2015A). The FMFN explains this level of payment by pointing out that Chief and Council carry out business executive functions, the figures are disclosed to the membership, and the money comes from business earnings, not government grants (GEDDES, 2014).

There are also some other factors to consider. Earnings are high in the oil sands, so that young workers can pull down six-figure wages. Also, executives in publicly traded corporations often take part of their compensation in stock-option plans, but this is impossible in the FMFN, given the legal structure of community capitalism. If the Chief and Councillors of the FMFN are to be well compensated, it must be through salary. The salaries come from the business earnings of the FMFN, and the members could bring about change by electing different leaders, if they were so inclined.

Under Chief and Council, a large administrative structure is required because, in addition to the typical functions of local government, the FMFN is engaged in business development; runs housing, education, and health care for the community; and has complex relationships with surrounding businesses in regard to the use of traditional territory (sustainability). Some of the senior staff are First Nations people, though not necessarily from the FMFN; others are Canadians of various backgrounds. Many staff commute from Fort McMurray, or even Edmonton or Calgary, in the case of higher-level appointments. The main administrative building is beautifully designed and finished, perhaps calculated to make a good impression on visitors from the many business and other governments with whom the FMFN has dealings. With the large staff, travel costs, and physical facilities, band governance and administration are expensive operations for the FMFN.

Challenges of community capitalism

Despite not producing any oil, the FMFN bears some resemblance to a miniature petro-state, because its economy is almost entirely dependent on the oil industry in general, and nearby oil-sands developments in particular. Like all petro-states, the FMFN must deal with the notorious volatility of oil prices. Most recently, the collapse of oil prices that began in 2015 led to a decline in the FMFN's income from \$60.3 million in that year to \$37.7 million in 2016, a decrease of 37.5% in one year.

In response, the FMFN is moving its business strategy toward establishing income stability. One major step in that direction is the purchase of a 34.3% equity share in Suncor's East Tank Farm Development (SUNCOR, 2017). The tank farm will be an integral part of the pipeline system used to carry oil-sands products to market. Suncor will operate it while the FMFN and the Mikisew Cree First Nation will be passive partners, together owning 49% of the tank farm. The purchase is financed by senior secured notes paying 4.136% interest and marketed by RBC Capital Markets; the initial offering was quickly oversubscribed. Security for the bonds is provided not by the FMFN's other business assets but by the bitumen that three major producers are contractually obliged to provide for the next 25 years. No additional loan guarantees were required. The FMFN will borrow about \$350 million to obtain its

34.3% ownership share of the project and its expectation is that, after paying interest on its bond, its equity share will yield a predictable income for decades, based on the tolls charged to producers for storing bitumen. It is an income-producing rather than a growth investment, designed to yield more stability in annual revenues.

The FMFN has also hired more staff in its business development arm and is hoping to diversify its business strategy. In the past, the Nation has invested almost exclusively in oil-sands enterprises, taking advantage of its dense network of business and social connections in the area. The strategy was highly profitable for almost two decades while the oil sands were experiencing explosive growth; but now that international investors are leaving the oil sands and growth prospects are diminished, it may be time to start investing elsewhere as protection against further decline. The FMFN now has enough income and accumulated wealth that it can afford to incorporate hedging and balancing in its overall business model.

The FMFN also shares another problem with democratic petro-states that have used oil revenues to enhance public services and improve the lives of their citizens. New schools, clinics, community centres, and seniors' residences are not just capital expenses that can be defrayed from industry grants; they also create ongoing operating expenses for staffing and maintenance—bills that can be difficult to pay when oil prices fall. The FMFN has created a generous regime for members, including subsidized rent for high-quality homes, a well-staffed health department, support for all levels of education, quarterly business-profit dividends for all members, and various other enhanced services. Such programs are expensive to provide and may become more expensive the longer they exist, as expectations rise. Like larger democratic welfare states, the FMFN will face continual demands for more and better services.

At present, relatively stable income from rent, property taxes, and trust-fund interest pays for only a portion of these services, while the rest is financed from business activities. The Suncor East Tank Farm deal is intended to provide a further source of stable funding. The FMFN's leadership is aware of the need for stability and is working to achieve it, but petro-states are particularly prone to expand public services in boom times and then face fiscal pressures in the down part of the cycle. It takes prudent management to keep from tipping into chronic deficit-spending, as has unfortunately happened to the province of Alberta (LAFLEUR, PALACIOS, EISEN, & LAMMAM, 2015). Thus far, the FMFN's leadership has met the test of prudent management, protecting cash reserves and trust funds and returning quickly to the black after occasional deficits, such as that of in 2016. But like all democracies, the FMFN is always only one election away from higher levels of spending—Chief Jim Boucher was re-elected by just one vote in 2011, when his opponent called for greatly enhanced cash distributions to members.

There is no simple and permanent solution to this problem. In spite of attempts to separate business and politics by appointing independent boards of directors for business enterprises, all of the FMFN's enterprises are ultimately responsible to Chief and Council, who approve major investments and decide how much to allocate each year to public services and how much to re-invest in business enterprises. A change in political orientation could have important repercussions. This is a special problem for small political systems, which lack the stabilizing effect of a large permanent civil service.

Leadership is crucial, and Chief Jim Boucher has provided stable leadership and vision since 1986. But all leaders eventually retire even if they remain undefeated in electoral competition. Thus the FMFN's model of consensus government is an important part of its success. It means not only obtaining agreement of all members of council for important initiatives, but also holding frequent consultative meetings with members (both on and off reserve) while fully disclosing information such as annual audited financial statements and compensation of Chief and Councillors. Such public discussion and deliberation can help to build understanding of the need for prudent management. If the model of consensus government continues to function well, it may help to support the type of leadership necessary to ride out the unpredictable ups and downs of the international oil economy.

The Fort McKay First Nation in comparative perspective

To use the organizing concepts of this book, the FMFN is a “maker” to the extent that it participates in the oil-sands economy and a “taker” to the extent that it has received additional payments from government through its specific claims settlement and from industry through impact-benefit agreements. What has made the FMFN so successful is its ability to integrate the two sources of revenue into an overall strategy for business success and community well-being.

Most other First Nations will find it difficult to replicate the FMFN's success on the same scale. For one reason, FMFN is located in the middle of one of the largest industrial developments on the planet. It is surrounded on all sides by corporations willing to purchase the services it provides and also willing to negotiate agreements for development of oil-rich traditional territory. Indeed, some of these corporations have put unusual effort into promoting Aboriginal economic development. Second, the FMFN has a relatively small population, with only 868 Registered Indian members according to the 2011 National Household Survey. Benefits of housing, education, health services, and cash payments can be concentrated upon members in a way that would not be possible for a larger population. Because of these two factors, everything is an order of magnitude greater in the FMFN than would be possible in many other First Nations—business revenues, band budgets, and individual benefits for elected officials, employees, and members.

The FMFN does many things that other successful First Nations usually do: running a balanced budget and avoiding unmanageable debt; taking advantage of local economic opportunities; supporting stable, long-term leadership; making use of off ramps from the *Indian Act*, such as creating a property tax system (FLANAGAN, 2016B; FLANAGAN & HARDING, 2016A). The FMFN is much like other successful First Nations in these respects, although it offers higher levels of compensation for elected officials and it is experimenting with leases rather than Certificates of Possession to promote home ownership.

It is important to note the business environment created by government policy. The absence of taxation on Indian reserves provided for in the *Indian Act* has some negative aspects to which other authors and I have drawn attention (GRAHAM AND BRUHN, 2008: FLANAGAN, 2000: 105–107), but it can also help turn reserves into high-growth enterprise zones. A business-minded First Nation can take the millions of dollars that might otherwise be paid in corporate income tax and use them for re-investment, leading to more rapid growth. Another potentially positive factor is the duty to consult and accommodate created by the Supreme Court of Canada (*MIKISEW CREE FIRST NATION V. CANADA (MINISTER OF CANADIAN HERITAGE)*, [2005] 3 S.C.R. 388). Although this has generated new uncertainty and expenses for project proponents (FLANAGAN, 2015A; CHAPTER 10, P. 117), it has also greatly enhanced the leverage of First Nations in negotiating impact and benefit agreements. The FMFN has shown that the benefits can be used to enhance community well-being. Also worthy of note is Canada's specific-claims policy, which allows First Nations to pursue grievances related to non-fulfilment of treaty obligations (FLANAGAN, 2018B; CH. 8, 9). The FMFN used this to obtain, in addition to 20,000 acres of land and subsurface resources, a cash settlement of \$41.5 million, which they converted into a trust fund to yield a stable annual income of about \$5 million.

A couple of other features are evident in the FMFN experience. One is the ability to balance conflict and reconciliation. FMFN has never been shy about defending its interests. It staged a blockade against lumber trucks in 1983, it launched a treaty-entitlement specific-land claim in 1987, and it has been involved in negotiations and litigation for years to protect its remaining natural area around Moose Lake. Yet the assertive actions have not impaired its ability to reach compromise through negotiation and to maintain friendly business relationships with surrounding corporations. The FMFN's history makes an instructive contrast with that of the Lubicon Lake Nation, which for decades fought against the oil and forestry industries, as well as the governments of Alberta and Canada, without reaching a productive settlement (FLANAGAN, 2014). In 2018, after starting to negotiate seriously, the Lubicon Nation finally got a settlement similar to what had already

been received by other First Nations in the area (BENNET, 2018). One can only wonder what the Lubicon Nation might have achieved by now if, like the FMFN, their leaders had taken a more realistic view 30 years ago.

Another feature is the ability to learn from experience and take a long view of what needs to be done. The FMFN started its business ventures on a small scale in 1986 and gradually expanded into other branches of oil-sands services. Then it took advantage of the oil-sands boom in the first 15 years of this century to grow its businesses to unprecedented size. But when the price of oil collapsed in 2015, leading to a spate of red ink, the FMFN quickly got its deficit under control by cutting back discretionary items such as the distribution of business profits, and it is now embarking on diversification of investments as a hedge against uncertainty. A comparison with the province of Alberta is flattering to the FMFN, which has been more agile than the Alberta government in responding to changing conditions.

The FMFN's dramatic results are to some extent dependent on its relatively small population and the opportunities afforded by its location in the heart of the oil sands, but opportunities have to be seized in order to become beneficial. Let us give the last word to Niccolò Machiavelli (1922), who was a gifted poet as well as a great political analyst:

Few know me, Opportunity am I
 The reason that I never can be still
 Is because on a wheel my foot does lie.

The image of Opportunity balancing on Fortune's wheel is as valid now as it was in Machiavelli's time. Embrace Opportunity or she is quickly gone.

PART TWO

Taking

Part Two of this book examines how First Nations obtain wealth through the exercise of political power to transfer to themselves money and land, or to create new forms of property rights. To give a quick preview of the results, the evidence suggests that such transfers are most successful in promoting community well-being when they are fed back into the wealth-creating process—putting “taking” in the service of “making.” Transfer of money, land, and property rights by themselves seem to have little impact.

Government Spending

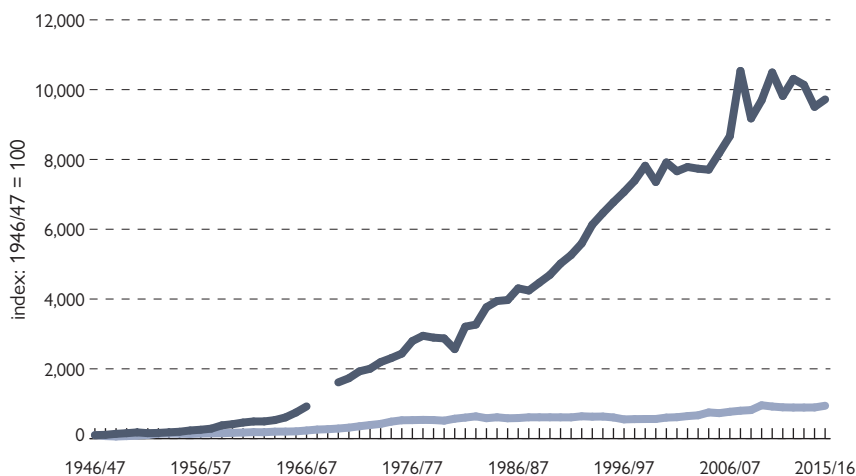
The most direct way for First Nations to use the power of the state to obtain money is through annual budgetary appropriations. But, are increased transfers an unalloyed benefit? Prominent African-American authors such as Thomas Sowell (2015), Walter Williams (2011), and Jason Riley (2014) have argued that their particular minority group has been harmed rather than helped by increases in government spending. In Canada, Tsimshian author Calvin Helin has made a similar argument in *Dances with Dependency* (2006) as well as other books. This chapter takes a closer look at monetary transfers to First Nations.

The federal budget, 1946–2015

Because Parliament has constitutional responsibility for “Indians, and lands reserved for Indians,” fiscal transfers to First Nations happen mainly through the federal budget. The provinces also spend money on Indigenous people, but much of that is for Métis and non-status Indians, or for First Nations people who live off reserve, or for consultative purposes that do not transfer resources. Within the federal budget, the main source of transfers to First Nations has always been the department of Indigenous and Northern Affairs Canada (INAC), under its ever-changing names and acronyms, now split into the two departments of Indigenous Services Canada and Crown-Indigenous Relations. Many other departments and agencies also have spending programs for First Nations and/or Registered Indians, but INAC spending has been by far the largest source of transfers.

The upper line in FIGURE 7.1 shows INAC spending on First Nations from 1946/47 through 2015/16 as recorded in the Public Accounts, while the lower line shows all federal program spending over the same period of time (FLANAGAN & JACKSON, 2017: 4). To adjust for inflation, each spending curve tracks year-over-year change in constant dollars, with the initial value set at 100. The first and most obvious observation is that INAC spending and general federal spending were on much the same growth track until the mid-1950s, when INAC spending started to accelerate. INAC spending

Figure 7.1: Growth in INAC spending compared to growth in total federal program spending, 1946/47–2015/16 (index: 1946/47 = 100)



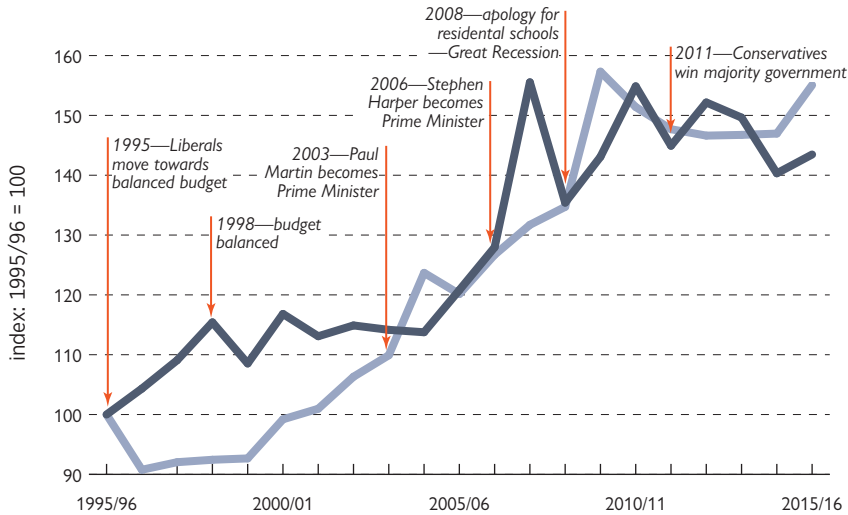
SOURCES: FLANAGAN AND JACKSON, 2017.

then grew rapidly until the mid-1990s, when it levelled off for a few years. Growth in INAC spending resumed again in 2003/04 until it reached a peak in 2006/07, after which it levelled off and even fell back a bit, though the pattern was rather irregular.

The last 20 years require a closer look. FIGURE 7.2 tracks increases in overall federal program spending and INAC spending on First Nations from 1995/96 to 2015/06, adjusted for inflation. Both curves started at 100 in 1995/96 but diverge thereafter. Initially, INAC spending grew more rapidly than general program spending but, after 2004, there were several changes in relative position. INAC spending on First Nations increased in absolute, constant-dollar terms over these 20 years but, by 2015/16, had not increased as much as overall federal program spending.

In 1995, Jean Chrétien's government began to deal with 25 years of unrestrained federal deficits by imposing real cuts on most aspects of federal spending. First Nations spending started to increase less rapidly at that point, but the subsequent pattern involved irregular increases and decreases as a result of relaxation of fiscal vigilance after the balancing of the federal budget, the replacement of Chrétien by Paul Martin as prime minister in 2003, the election of a Conservative government in 2006, the expensive apology for residential schools in 2008, the worldwide Great Recession of 2008, and the 2011 election of a Conservative majority government dedicated to imposing a new level of fiscal restraint after the spending binge of its minority-government years. Together, these political events help account for the ups and downs of the last 20 years.

Figure 7.2: Spending on First Nations by INAC compared to overall federal program spending, 1995/96–2015/16 (index: 1995/96 = 100)



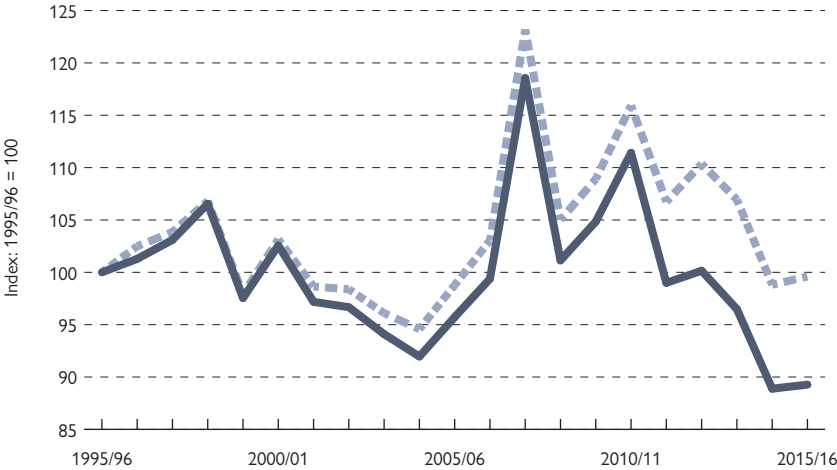
SOURCES: FLANAGAN AND JACKSON, 2017.

Overall, the nine and a half years of the Conservative government led to less rapid increases in INAC spending on First Nations, but the pattern is obscured by the very large expenditures connected with the 2008 residential school apology. Some claims are still incomplete or under appeal; and if all the process costs could be tracked and added in, the total residential school expenditure is sure to be over \$5 billion and perhaps approaching \$6 billion. This large amount counted as program spending, but as a temporary program it masked some of the changes taking place in long-term program spending.

FIGURE 7.3 (FLANAGAN & JACKSON, 2017: 6) tracks changes in INAC spending per Registered Indian over the same period of time as well as INAC spending per Registered Indian on reserve. The two curves have a similar shape, but a gap gradually opened after the year 2000. The reason for this divergence is the more rapid growth in the number of Registered Indians as compared to Registered Indians on reserve (FIGURE 7.4).

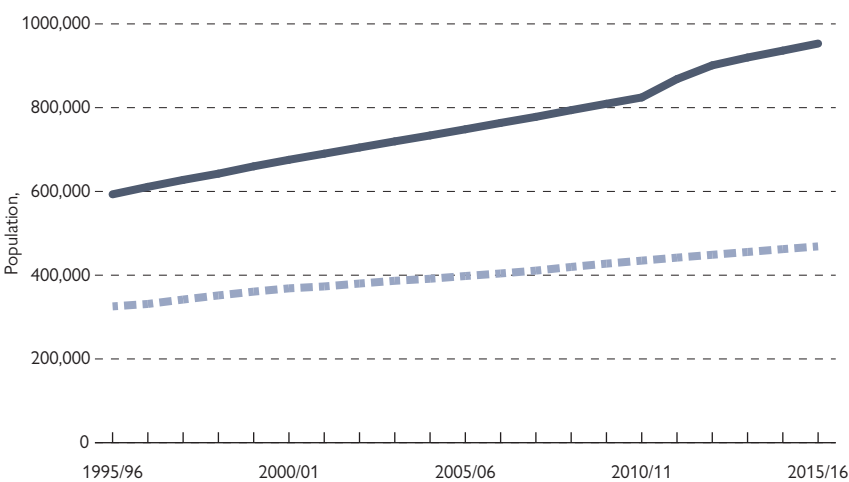
INAC expenditure per Registered Indian is a fraction in which the number of Registered Indians is the denominator. Rapid growth in the denominator causes the value of the fraction to decline correspondingly. On-reserve populations have not grown as rapidly because registered status has been extended in the last 20 years to ever larger numbers of women (and their children and grandchildren) who had lost Indian status by “marrying out.” Many of these newly Registered Indians have

Figure 7.3: Growth in INAC spending per Registered Indian and per on-reserve Registered Indian, 1995/96–2015/16 (index: 1995/96 = 100)



SOURCES: FLANAGAN AND JACKSON, 2017.

Figure 7.4: Registered Indian populations, total and on-reserve, 1995/96–2015/16



SOURCES: FLANAGAN AND JACKSON, 2017.

been living off reserve for decades and have no desire to move back. Others might like to move back but have not been accepted as members under citizenship codes adopted by their First Nations (FLANAGAN, 2017A). As a result of these developments, INAC spending per Registered Indian is now less than it was 20 years ago, whereas spending per Registered Indian on reserve is about the same in constant dollars. Both indicators are essential to grasp the whole picture. Most INAC funding is directed at reserve communities, but some programs also affect First Nations people who, though they live off reserve, are involved with the reserve community.

The largest federal spender other than INAC is Health Canada, whose expenditures on (mainly) First Nations in fiscal 2015/06 amounted to \$2.7 billion. FIGURE 7.5 shows that Health Canada's spending track experienced a greater net increase than that of INAC—84% in constant 2015 dollars from 1995/96 to 2015/16, compared to 43% for INAC.

Figure 7.5: Spending (\$ millions 2015) by Health Canada on First Nations and Inuit populations, 1995/96–2015/16

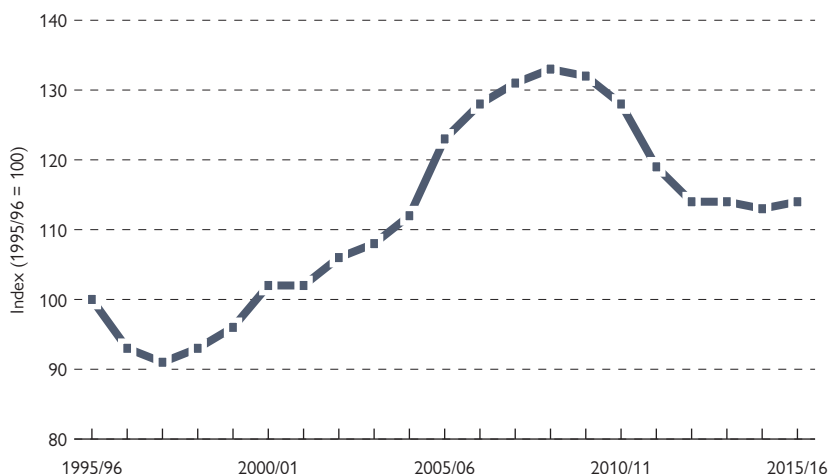


SOURCES: FLANAGAN AND JACKSON, 2017.

The steady rise of spending by Health Canada is at least partly the result of the statutory nature of some of its obligations. A large component of Health Canada's spending is the Non-Insured Health Benefits (NIHB) program, which provides free supplementary health insurance to all Registered Indians and Inuit for drugs, vision care, ambulance, and many other items. Spending on NIHB is heavily driven by the number of Registered Indians, which, as we have seen, has been increasing rapidly (Inuit make up only about 6% of those covered). Yet even as Health Canada has increased spending on Indigenous people much faster than INAC has,

its spending per Registered Indian is being diluted by the increasing number of the latter. FIGURE 7.6 shows Health Canada's spending per Registered Indian in constant dollars from fiscal 1995 to fiscal 2015, with the initial year set to 100. Health Canada spending per Registered Indian peaked in 2008/29, after which it fell for several years and then levelled off.

Figure 7.6: Spending by Health Canada per Registered Indian, 1995/96–2015/16 (1995/96 = 100)



SOURCES: FLANAGAN AND JACKSON, 2017.

Federal spending on First Nations has become more politically contentious as deficit-fighting has sometimes imposed obstacles to growth. Paul Martin was the chief proponent of balanced budgets in the early years of the Chrétien government; but shortly after becoming Prime Minister in December 2003, he started consultations leading to the Kelowna Accord. The process involved all provincial governments and major Indigenous organizations as well as numerous federal ministries. In an agreement announced in November 2005, the federal government pledged to spend an additional \$5.1 billion (nominal dollars) on Indigenous programming over the next five years. Most would be dedicated to social programs for First Nations, though some would also be spent on Inuit and Métis (PATTERSON, 2006).

The Kelowna Accord was never implemented because Paul Martin's Liberal government fell at the end of November 2005, the Liberals were defeated in the election of January 23, 2006, and Conservative leader Stephen Harper became prime minister. The Conservative platform pledged to "accept the targets" (CONSERVATIVE PARTY OF CANADA, 2006: 38) of the Kelowna Accord but did not support the plan itself, and the budgetary proposals were never implemented. The Kelowna Accord

would have bent the curve upwards by continuing the acceleration in departmental spending that began after Paul Martin became prime minister. However, the net result of Stephen Harper's ten budgets was to slow the rate of growth.

Spending in the Trudeau era

In the 2015 federal election, one of the Liberal campaign promises was to increase the level of spending on Indigenous programs (LIBERAL PARTY OF CANADA, 2015). When the first budget of the Trudeau government was released in March 2016, the Minister of Finance promised “to invest \$8.4 billion over five years, beginning in 2016–17, to improve the socio-economic conditions of Indigenous peoples and their communities and bring about transformational change” (GOVERNMENT OF CANADA, 2016: 134). The spending initiatives covered a wide range of policies, including education, child protection, clean water, housing, and governance. As the Minister noted, this was even more than had been promised in the Kelowna Accord. In fact, the total of \$8.4 billion was 40% larger than the Kelowna Accord, even allowing for inflation (FLANAGAN & JACKSON, 2017: 15).

It should be noted that the Harper government also had hoped to increase spending on First Nations, particularly in the field of education. In 2014, Prime Minister Harper and AFN National Chief Shawn Atleo struck a deal to increase federal spending on First Nations education by \$1.9 billion over three years, presumably to be extended thereafter, though the precise long-term increase was not specified. The agreement was never implemented because of internal opposition within the AFN to the accountability measures demanded by Harper (ANDERSON AND RICHARDS, 2016: APPENDIX). The money was never added to the federal budget, but conceptually it can be seen as part of the Trudeau government's increase.

Subsequent Liberal budgets have reinforced the message of greater spending, though with each new announcement the budget documents have become more opaque. *Budget 2017* proclaimed that “by 2021–22, total federal government spending on programs for First Nations, Inuit and Métis in Canada will increase from over \$11 billion in 2015–16 to over \$14 billion in 2021–22, an increase of 27 per cent” (GOVERNMENT OF CANADA, 2017A: 172). *Budget 2018* promised additional spending of \$4.757 billion over the next five fiscal years, without explaining how those promises related to the earlier promises in the two preceding budgets (GOVERNMENT OF CANADA, 2018). Assembly of First Nations Chief Perry Bellegarde claimed that the total increases announced in the three budgets amounted to \$16.5 billion spread over seven years (BARRERA, 2018A). This is probably the best available estimate because the AFN headquarters are in Ottawa and the organization is politically close to the current Liberal government. A total of \$16.5 billion additional spending over seven years amounts to an average annual increase of about \$2.4 billion over fiscal 2015/16, the last Harper budget.

The best instrument for tracking actual increases in federal spending is the Public Accounts, which report audited spending totals, but they are always about 18 months behind the budget speech. For example, the Public Accounts for the 2018/19 fiscal year will not be released until fall 2019, whereas the budget speech was delivered in March 2018. A more up-to-date indicator is the Main Estimates, which are released in spring of the year not long after the budget speech. They do not include the new spending promised in the budget speech; those items will be revealed later in the year in three instalments called Supplementary Estimates. But they do incorporate the previous year's Supplementary Estimates. Thus the Main Estimates for 2018/19 are a more or less complete record of what the government intended to spend in fiscal 2017/18.

TABLE 7.1 shows the Main Estimates for the Department of Indigenous and Northern Affairs Canada and its successors for the fiscal years 2012/13 to 2017/18. Because there is essentially a one-year lag in the Main Estimates, the first five years represent spending decisions of the Harper government, while the last one represents spending decisions of the Trudeau government. Total federal spending increased from about \$250 to \$258 billion in the first year of the Liberal government, while INAC spending increased even more rapidly—from about \$7.5 to \$10.0 billion in the same period of time.

Table 7.1 does not include INAC spending from the Main Estimates for 2018/19 because the former INAC department has been split into the Department of Indigenous

Table 7.1: Main Estimates and budgetary expenditures (\$ billions) for Indigenous and Northern Affairs Canada and its successors, fiscal years 2012/13–2018/19

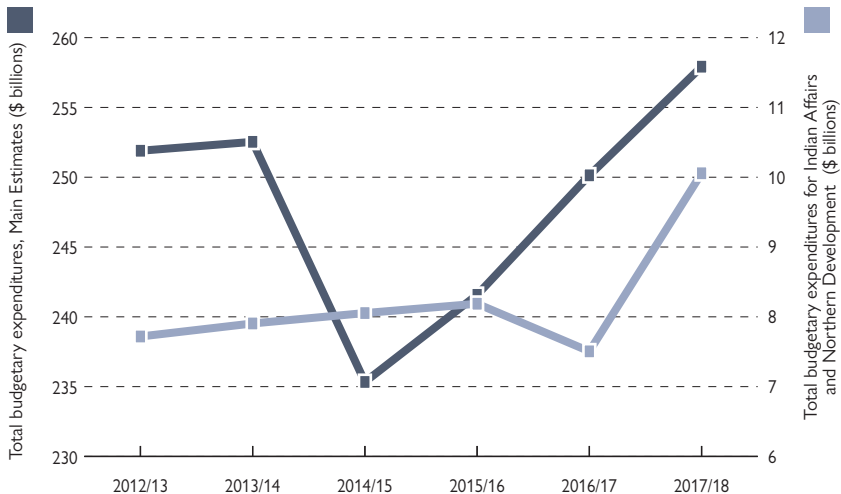
	Total budgetary expenditures from Main Estimates	Total budgetary expenditures from Main Estimates for Indian Affairs and Northern Development	Percentage of budget devoted to Indigenous spending
2012/13	\$251,896,150,000	\$7,718,288,000	3.06%
2013/14	\$252,535,057,459	\$7,904,970,562	3.13%
2014/15	\$235,334,374,675	\$8,053,975,405	3.42%
2015/16	\$241,574,296,708	\$8,187,417,868	3.39%
2016/17	\$250,136,477,494	\$7,505,552,140	3.00%
2017/18	\$257,917,634,586	\$10,056,790,513	3.90%
2018/19	\$275,967,721,577	\$12,409,416,822*	4.50%*

SOURCE: FLANAGAN, 2018C: 3; CANADA, TREASURY BOARD OF CANADA SECRETARIAT, 2012 (AND FOLLOWING YEARS).

Services and the Department of Indigenous-Crown Relations. Indigenous programs once scattered around the federal bureaucracy in various departments and agencies are being transferred to these two new departments, with the Department of Health's large Indigenous program being an early transfer to the Department of Indigenous Services. The Department of Health's total in the 2018/19 Main Estimates is about \$2.5 billion less than in 2017/18, about the size of the increase in total INAC spending over the same year. Thus, the INAC spending figure for 2018/19 is artificially inflated; \$10 billion would probably be a better estimate to keep it comparable to past years, but it is impossible to be precise amidst the flux of departmental spending and reorganization.

Under the Trudeau government, INAC spending has risen more rapidly than total spending, increasing from 3.0% of total spending in 2016/17 to 3.9% in 2017/18 and perhaps 3.6% in 2018/19 if we take into account the transfer from the Department of Health. This shift in priorities reflects the Prime Minister's statement that Canada's relationship with Indigenous peoples is the most important thing to his government. These changes are readily visible in **FIGURE 7.7**, based on the data included in table 7.1 (without INAC spending for 2018/19, because of the uncertainty about the total in that fiscal year).

Figure 7.7: Main Estimates and budgetary expenditures for Indigenous and Northern Affairs Canada, 2012/13–2017/18



SOURCES: FLANAGAN, 2018C: 4.

Publicly available data allow only an approximate conclusion at this time. It seems that what used to be considered INAC spending has taken a sudden jump of about \$2.5 billion a year, increasing from about 3% of all federal spending to

something closer to 4%. This is consistent with the promise in *Budget 2016* to invest \$8.4 billion in the welfare of Indigenous peoples over five years; with the projection in *Budget 2017* that by 2021/22, spending on Indigenous peoples would increase from something over \$11 billion to something over \$14 billion a year—a jump of 27%; and with Chief Bellegarde’s claim that the government plans to spend an additional \$16.5 billion over seven years, starting with the first Liberal budget in fiscal 2016/17. The evidence from the Main Estimates is that the Trudeau government is on track to keep its promise of spending a lot more on Indigenous peoples, even if the exact increase is not entirely clear.

Is the increased spending helpful?

Most Canadians would probably think the expense was worthwhile if it achieved its objectives of raising the Indigenous standard of living closer to Canadian norms while also promoting a cooperative, harmonious relationship between Indigenous peoples and other Canadians. But the example of Lyndon Johnson’s 1964 “Great Society” initiative as it affected African-Americans, understood at the time to be the most important target because they were the largest in number and the most oppressed by previous centuries of slavery and segregation, is not encouraging.

Prior to Johnson’s introduction of the Great Society programs, the median individual income of African-Americans had been rising more rapidly than that of White Americans for several decades. That trend flattened and even decreased in the 1970s as the effect of Great Society programs began to be felt. Median individual Black income started to rise again in the 1980s as many Great Society programs were repealed or downsized, and since then has increased more or less in parallel with median White individual income (RUSSELL SAGE FOUNDATION, N.D.). Shortly after the Great Society legislation came into effect, African-Americans also experienced a worsening of many social and economic conditions—a drastic decline in marriage and increase in single motherhood; welfare dependency; an increase in unemployment, especially of young people; escalating rates of crime, of which Black people themselves were the main victims; and violent protests that drove many businesses out of Black neighbourhoods (SOWELL, 2015: 155–172; PLUMER, 2013).

Many things were happening at the same time, so one cannot make a grand causal claim that the Great Society worsened the condition of African-Americans. However, it obviously did not live up to President Johnson’s announced goal of putting “an end to poverty and racial injustice.” The historical record does raise doubts about the efficacy of suddenly increasing government programming for a target minority population afflicted with numerous social and economic problems. This is true even, or perhaps especially, when government tries to tackle a large number of challenges simultaneously.

TABLE 7.2, drawn from the 2016 budget plan (GOVERNMENT OF CANADA, 2016: 147), gives an idea of the breadth of the federal government's policy ambitions. The plans include provisions for various levels of formal education, language retention, child protection, victims of violence, housing, employment training, community health care, water treatment and solid waste disposal, to mention only the main headings—in other words, most aspects of life for Indigenous people. In fact, the federal government has been active in all of these areas in the past, so the budget announcement amounts to extension and/or expansion of funding for various line items. Yet all studies of Indigenous programming conducted by the Auditor General “have consistently shown that government programs have failed to effectively serve Canada's Indigenous peoples” and the overall situation is “beyond unacceptable” (AUDITOR GENERAL, 2016A). Will expanded funding be the key to success in areas where previous policy has failed? Is more money the answer, or is a new vision required?

Evidence is already accumulating that progress on these initiatives can be more difficult than anticipated. The government's most publicized commitment was to end all long-term water advisories on Indian reserves by 2021/22. Early in 2018, the Department of Indigenous Services Canada announced that 62 long-term water advisories had been lifted since November 2015, while 32 new ones had been added. The announcement also provided a link to, but did not emphasize, the fact that 36 short-term water advisories had also been added in the same period of time (LUKAWIECKI, 2018). Recognizing the scale of the challenge, *Budget 2018* added \$172.6 million to its original commitment of \$1.8 billion (BARRERA, 2018A).

Guaranteeing drinkable water for all reserves is a Sisyphean task because of fundamental problems of remote, sometimes swampy, location and lack of technical expertise among small reserve populations. Even if the government reaches its announced goal of ending all long-term water advisories by 2021/22, that will be only a moment in time. New advisories will arise as a result of floods, obsolescence of older installations, and maintenance problems as a result of a lack of trained personnel. Other communities in Canada support their water systems by a combination of provincial grants, property taxes, and consumer fees. If similar financial mechanisms are not introduced for water systems on reserves, the federal government's special commitment will have to continue indefinitely.

The government's National Inquiry into Missing and Murdered Indigenous Women and Girls has also been plagued with difficulties, including complaints from relatives, quarrels and resignations among commissioners and staff, and delays that have caused its mandate to be extended until April 2019. The government has announced that it is increasing various program expenditures by about \$50 million to conform to recommendations already made by the Inquiry (MACDONALD, 2017).

Table 7.2: A better future for Indigenous Peoples (\$ millions)

	2016/17	2017/18	Total
REBUILDING THE RELATIONSHIP			
<i>National Inquiry into Missing and Murdered Indigenous Women and Girls</i>	20	20	40
<i>Engaging with Indigenous Peoples</i>	16	20	36
<i>Subtotal—Rebuilding the Relationship</i>	36	40	76
EDUCATION, CHILDREN AND TRAINING			
<i>Improving Primary and Secondary Education for First Nations Children</i>	288	383	670
<i>Fostering Better Learning Environments by Investing in First Nations Schools</i>	97	283	380
<i>Ensuring the Safety and Well-Being of First Nations Children</i>	71	99	170
<i>Aboriginal Skills and Employment Training Strategy</i>	5	10	15
<i>Subtotal—Education, Children and Training</i>	460	774	1,235
INDIGENOUS PEOPLES—SOCIAL INFRASTRUCTURE			
<i>Improving Housing in First Nations Communities</i>	277	277	554
<i>Supporting Northern and Inuit Housing</i>	76	102	178
<i>Providing Safe Shelter for Victims of Violence—Renovation and New Construction</i>	4	4	7
<i>Supporting Early Learning and Child Care</i>	29	100	129
<i>Investing in Cultural and Recreational Infrastructure</i>	35	42	77
<i>Improving Community Health Care Facilities On Reserve</i>	82	82	164
<i>Subtotal—Indigenous Peoples—Social Infrastructure</i>	503	607	1,109
<i>Indigenous Peoples—Green Infrastructure</i>			
<i>Strengthening On Reserve Water and Wastewater Infrastructure</i>	296	322	618
<i>Addressing Waste Management for First Nations Communities</i>	15	96	112
<i>Subtotal—Indigenous Peoples—Green Infrastructure</i>	311	418	729
OTHER INITIATIVES			
<i>Providing Safe Shelter for Victims of Violence—Shelter Operations</i>	5	5	10
<i>Monitoring of Water on Reserve</i>	27	27	55
<i>Investing in Community Infrastructure</i>	105	150	255
<i>Métis Nation Economic Development Strategy</i>	5	5	10
<i>Renewing the Urban Aboriginal Strategy</i>	24		24
<i>Assisting Indigenous Peoples Facing the Criminal Justice System</i>	4	4	8
<i>Aboriginal Languages Initiative</i>	5		5
<i>Support for the First Nations Finance Authority</i>	10	10	20
<i>Supporting First Nations Fishing Enterprises</i>	33		33
<i>Subtotal—Other Initiatives</i>	218	202	419
TOTAL	1,528	2,041	3,569
<i>Less funds existing in the fiscal framework</i>	-203	-243	-446
NET FISCAL COST	1,324	1,798	3,123

NOTE: TOTALS MAY NOT ADD AS A RESULT OF ROUNDING.

SOURCE: FLANAGAN, 2018C: 17.

Another problematic venture is the government's attempt to implement the Atlantic and Pacific Integrated Commercial Fisheries Initiatives mentioned in *Budget 2016*. In February 2018, the government announced that 25% of the surf clam quota would be re-assigned to a new coalition of Atlantic First Nations partnering with Premium Seafoods (CANADA, MINISTRY OF FISHERIES, OCEANS & THE CANADIAN COAST GUARD, 2018). However, this involved taking away quota from Clearwater Seafood, which had already partnered with other First Nations, for transfer to a group with allegedly better political connections. Litigation was threatened (LAKE, 2018), then averted (FORREST, 2018B), after which the government withdrew the initiative for at least one year (FORREST, 2018C). Minister Dominic LeBlanc was transferred out of the fisheries portfolio and later found to have violated ethical regulations because his plan for Premium Seafoods would have conferred benefits upon a cousin of his wife (WRIGHT, 2018).

The main issue, however, is not the failure of particular programs; even if all initiatives worked as intended, there would be a fundamental problem because the current government's approach sees the well-being of Indigenous peoples as primarily a matter of government services. In this view, the path to well-being always involves more extensive and better-funded services. Of course, effective services in crucial areas such as health and education are as important for First Nations as they are for all Canadians. But the government's almost exclusive emphasis on government-funded services ignores the research showing that Indigenous peoples are more likely to improve their well-being through their own initiative if they take control of their own affairs and raise their own revenues (FLANAGAN, 2016B; ANDERSON, 2016; CORNELL & KALT, 1992).

It is telling that the phrase "own-source revenue" does not appear in any of the three Liberal budget documents. Yet research has shown that generation of own-source revenue is strongly correlated with the well-being of Canadian First Nations, as measured by the Community Well-Being Index (FLANAGAN & JOHNSON, 2015B: 12–13). The Trudeau government's vision is mostly about transferring more federal money to First Nations rather than encouraging these communities to become more self-sufficient.

To be fair, the government's Reconciliation Framework does contain funding for some elements of the self-improvement vision. *Budget 2016* promised additional funding for the First Nations Finance Authority, which facilitates responsible borrowing for infrastructure projects on reserve, as well as for the First Nations Land Management Regime, which allows First Nations to make decisions for use of their reserve lands without recourse to ministerial approval. And it is possible that something constructive will emerge out of all the talk about a new nation-to-nation relationship and self-determination. But in fiscal terms, these remain a

small aspect of this government's overall approach, which is mostly about increasing federal expenditures on Indigenous programming. An increase of fiscal transfers benefits those who administer the programs, but it does not make communities self-determining and self-supporting.

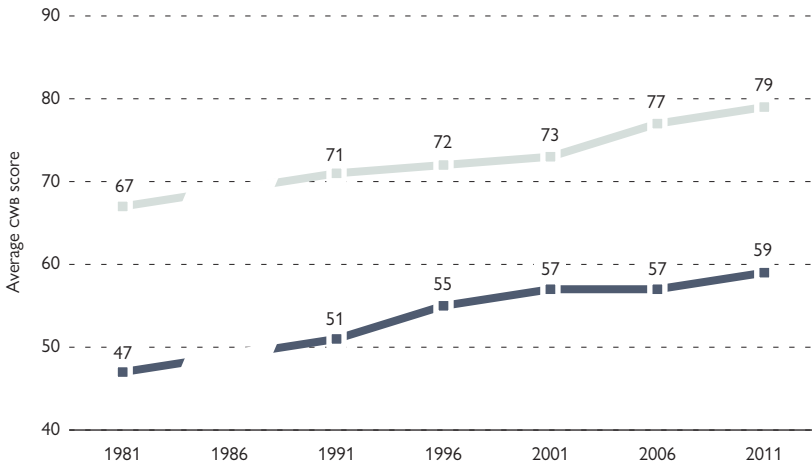
Speaking in general terms, it is not clear that spending more government money on social programs for First Nations always leads to real improvement in their standard of living or well-being. The chain from the federal treasury to the individual people of First Nations is long and convoluted. It runs from INAC through band councils, with sidebars for national, regional, and tribal organizations. There are many opportunities along the way for money to be spent on civil servants, lawyers, and consultants, or to disappear in outright corruption (FLANAGAN, 2016A). But, even if the money is spent on services for individuals, there is a still more fundamental problem: it may displace individual effort and foster a culture of dependency (HELIN, 2006).

We do not have definitive proof on the efficacy of public-sector spending, but three lines of evidence are suggestive. First, Métis and non-status Indians are much better off in income, education, employment, and all other measurable social indicators than the people of the First Nations (STATISTICS CANADA, 2015). Indeed, on some indicators they are very close to the Canadian average, after allowing for the younger age of the Métis and non-status population. Yet they do not have land reserves (except for eight small Métis settlements in Alberta), and the federal government has historically spent very little on targeted social programs for them. Are they better off than the First Nations in spite of or because of the absence of special programming?

Second, Milke (2013) showed that per-capita INAC spending on First Nations grew 128% more than per-capita federal spending on all Canadians in the fiscal years from 1946/47 to 2011/12. If federal social program spending is the key to the advancement of First Nations, one would expect to see that improvement reflected in time-series data. FIGURE 7.8 shows the time series from 1981 to 2011 for the Community Well-Being Index, comparing First Nations to other Canadian communities.

The most striking feature of figure 7.8 is the strong parallelism in improvement of First Nations and other Canadian communities over these 30 years. Things have been getting better for First Nations, as they have been for all Canadians—an increase of 12 points in the CWB for both groups over the 30 years from 1981 to 2011. But, if the well-being of First Nations has increased no more rapidly than that of Canadians in general, what is the value of all the additional spending on First Nations? Put that way, it may seem that INAC spending has had little effect on the

Figure 7.8: Average scores on the Community Well-Being Index, First Nations and non-Aboriginal communities, 1981–2011



SOURCE: INAC, 2016C.

well-being of First Nations. However, it is also true that First Nations gained ground more rapidly in the 15 years from 1981 to 1996 than they did in the following 15 years from 1996 to 2011, after INAC spending started to grow less quickly. The average CWB of First Nations rose eight points in the first period but only four points in the second. As is often the case, data can tell more than one story. Release of new CWB scores calculated from 2016 census data may bring a degree of clarification.

Specific Claims—Money

Another way First Nations use political and legal power to transfer money from taxpayers is through the pursuit of specific claims. In the jargon of Canadian Indigenous issues, “comprehensive claims” are made by First Nations that have never signed a treaty or similar agreement; they seek recognition of Aboriginal rights and title to land. “Specific claims” are made by First Nations that have already adhered to treaty but believe that the Canadian government has not properly implemented the treaty or that the government has violated the *Indian Act* in the administration of their reserve lands or trust funds (SCHWARTZ, N.D.). In one sense, specific claims are a form of “taking” because they rely on political and sometimes judicial power to transfer money. However, they can also be conceptualized as compensation for land or other assets to which the First Nation was entitled but which were never assigned to them or were improperly taken away. This is another example of the sometimes porous boundary between “making” and “taking.”

A specific claim recently decided by the Supreme Court of Canada is a good example of the genre, illustrating many of the historical, legal, economic, and administrative points to be discussed here. It involves the Williams Lake Indian Band from the Cariboo region of British Columbia, who are part of the larger Shuswap people (*WILLIAMS LAKE INDIAN BAND V. CANADA*, 2018). In 2011, it had a Registered Indian population of about 830, of whom about 230 lived on a reserve at the head of Williams Lake. The main reserve is about 1,600 hectares, or 4,000 acres, in size (INAC, 2018A). Its 2011 Community Well-Being Index of 60 is about average for First Nations (INAC, 2011).

At the time of the Cariboo gold rush, there was an Indian village site at the foot of Williams Lake, which was not respected when prospectors swarmed into the region after 1860, even though British Columbia Governor James Douglas had issued a proclamation in 1859 that village sites should not be opened for pre-emption by settlers (*WILLIAMS LAKE INDIAN BAND*, 2011). In 1871, British Columbia entered Confederation, and Canada took over responsibility for Indians. In 1881, Canada

established a reserve at the head of Williams Lake, one much larger than the land that had been claimed at the outflow. Even though the province had a legal responsibility to make land available, Canada purchased privately developed farmland for this reserve because the province was moving slowly and the Indians were in need of land to raise food.

The Williams Lake band appeared satisfied with the new reserve, though presumably they would have preferred their original site. The federal cabinet, however, had no direct authority to take back land that the province had deeded to settlers, and legislation would have been time consuming and perhaps not easy to pass because it would have cancelled settlers' acquired property rights. Canada might have sued to void British Columbia's grants of land on grounds that they violated the Governor's proclamation of 1859, but that would have meant years in court while the Indians needed land immediately. Canada's action seemed to administrators like a pragmatic, albeit imperfect, solution to practical difficulties on the ground and was apparently acceptable to the Williams Lake people at the time (CANADA, DEPARTMENT OF JUSTICE, 2011).

Fast forward to 1984, when the Supreme Court's *Guerin* decision enunciated the doctrine of Canada's fiduciary responsibility for Indian lands. In 1994, the Williams Lake Indian Band filed a specific claim alleging that the government of British Columbia, acting for the British Crown, had violated its fiduciary responsibility to protect a pre-existing Indian settlement, and Canada was now responsible. The Department of Indian Affairs rejected the claim in 1995. In 2002, the Band requested the Indian Specific Claims Commission to examine its claim. In 2006, the Commission recommended favourably for the Band, but the Department once again refused to negotiate compensation. In 2011, the Band filed its claim with the newly created Specific Claims Tribunal (WILLIAMS LAKE INDIAN BAND, 2011), which ruled in its favour in 2014. Canada went to the Federal Court of Appeal, which overturned the Tribunal's verdict in 2016 (MANDELL PINDER, 2016). The Band appealed to the Supreme Court of Canada, which restored the Tribunal's judgment on February 2, 2018. This ruling was only on the validity of the claim; the Tribunal now will hear further argument before assigning compensation, up to a maximum of \$150 million.

The case illustrates several points that arise repeatedly in specific claims: the importance of the doctrines of fiduciary responsibility and honour of the Crown, which now underpin most claims; the slowness of the process—24 years and counting; and the frequent changes in organization and process in hearing claims. Not as common but still important is the intricacy of the legal question involved here—to what extent is Canada responsible for long-ago decisions of other governments made in circumstances very different from contemporary life? This difficulty perhaps explains how divided the judges have been. Thirteen judges have ruled on this

dispute: one in the Specific Claims Tribunal, three in the Federal Court of Appeal, and nine in the Supreme Court of Canada. Of the thirteen, seven ruled against the Williams Lake Indian Band and six for it. But of course the decision of the Supreme Court, which divided 5–4, is authoritative.

Process

In 1946, after 20 years of considering various proposals, the United States enacted legislation to establish the Indian Claims Commission (ROSENTHAL, 1990: 47–110). The next year a Special Joint Committee of the House of Commons and Senate recommended creation of a similar commission for Canada. Proposals and even draft legislation followed regularly thereafter, but nothing was accomplished in the 1950s and 1960s (PELLETIER, 2015A: 20–21). Action followed the Supreme Court’s decision in *Calder v. British Columbia* ([1973] SCR 313). In a statement of August 8, 1973 by Minister of Indian Affairs and Northern Development Jean Chrétien, the government formally accepted the legitimacy of both comprehensive and specific claims and promised to deal with them (PELLETIER, 2015A: 20); and in 1974, the Department of Indian Affairs and Northern Development established the Office of Native Claims.

The government in 1982 reorganized the specific-claims process, though without fundamental changes. Within the Department of Indian Affairs, the Office of Native Claims, with advice from the Department of Justice, would remain both the investigator and adjudicator of claims. Compensation would be available only if it could be shown that the government of Canada had breached its “lawful obligations” under treaty or legislation. An improvement from the First Nations’ point of view was that the government renounced any appeal to statutes of limitation or the common law doctrine of *laches* (unreasonable delay) to forestall claims (MUNRO, 1982).

The rejigged process ticked along at a slightly faster rate in the 1980s and early 1990s, settling 33 additional claims by the end of fiscal 1990/91—about four a year, compared to about two a year in the 1970s (INAC, 2017D). But big trouble was brewing because of a claim from the Mohawks of Kahnésatake, filed with the Office of Native Claims in 1977 and dismissed in 1986. This claim went back to a 1717 land grant from the Governor of New France to the Sulpician religious order for an establishment at Oka, including a village for the Mohawks. Things came to a head in the Oka crisis of 1990 after the town announced plans to develop a golf course on land that the Mohawks said should have been theirs (SWAIN, 2010: 11–30).

After the armed confrontation was finally defused, the federal government bought the disputed lands and still holds them in trust for the Mohawks of Kahnésatake, pending resolution of issues in their system of governance (SWAIN, 2010: 163–166). At the same time, the Conservative government of Brian Mulroney appointed the Royal Commission on Aboriginal Peoples to examine native grievances in general, and also

reorganized the specific-claims process in a much more fundamental way than had been done in 1982. In 1991, the government opened the door to pre-Confederation claims, promised more money for research and negotiation, and announced formation of an independent advisory body, the Indian Specific Claims Commission (ISCC). This would be a panel of six lawyers who could investigate specific claims rejected by the Department of Indian Affairs Office of Native Claims. The ISCC could make positive recommendations for settlement, but its mandate was only advisory; final authority would remain with the Minister of Indian Affairs for smaller claims and with the Governor in Council for larger claims (BUTT & HURLEY, 2006: 5).

Many First Nations as well as some appointed members of the ISCC found these reforms insufficient (DICKSON, 2018). They argued that the concept of “lawful obligation,” based on the wording of treaties and the *Indian Act*, was too narrow and that the ISCC should also be able to recommend settlements based on a wider understanding of social justice. Under the heading of “constructive rejection,” they also wanted the Commission to take over complaints marked by long delay in the Department’s internal process, even if the Department said that it was still working on the complaint.

Despite continuing criticism, the Mulroney reforms made the specific-claims process more productive for First Nations. In the 16 years from fiscal 1991/92 to 2006/07, there were 231 settlements, representing a pace of about 14 a year (INAC, 2017D). Nonetheless, the Assembly of First Nations (AFN) wanted an independent tribunal with decision-making rather than advisory authority. It also wanted higher financial limits on settlements and more resources committed to the process so that the preliminary stages of investigation and negotiation could proceed more rapidly. The ISCC also voiced similar criticisms. The Liberal government headed by Jean Chrétien attempted to legislate with the *Specific Claims Resolution Act, 2003*, which was passed and received royal assent but was never proclaimed because the AFN was not satisfied (DICKSON, 2018: CH. 7; BUTT & HURLEY, 2006).

In early 2006, the Conservatives came to power in Ottawa and Calgary lawyer Jim Prentice became Minister of Indian Affairs and Northern Development. Prentice was intimately familiar with the file because he had served for ten years as Co-Chair of the ISCC. He was sympathetic to the cause of specific claims and determined to bring about some of the changes he had advocated when he was with the Commission. In his roughly 18 months as minister, he managed to hammer out new legislation through a joint task force with the AFN. The basic concepts were presented in a ministerial paper entitled *Justice at Last* (PRENTICE, 2007), and the *Specific Claims Tribunal Act* was passed in 2008.

The Specific Claims Tribunal was an important innovation. Equipped with decision-making rather than advisory power, it would be composed of superior court judges appointed by the Governor in Council. The government also promised

to set aside \$250 million a year for ten years in order to settle claims—a much larger sum than had ever been put on the table before. Finally, Section 41 of the *Act* provided for a comprehensive review of the new approach after giving it a chance to work for five years. However, as critics have pointed out (DICKSON, 2018), the new process was still bound by the concept of “lawful obligation,” which limited its ability to venture into the realm of social justice.

There were 158 settlements from fiscal 2007/08 to November 15, 2017, about the same average pace of 14 a year as prevailed from 1990/91 to 2006/07. That overall comparison is a bit misleading, however, as the Mulroney process was much more productive in the 1990s and slowed down thereafter. The Prentice reforms more or less restored the pace of settlements to what it had been in the 1990s.

Reviews of the specific-claims process have recently been carried out by the Auditor General’s office as well as law professor Benoît Pelletier. The general tenor of the two reports was that the *Specific Claims Tribunal Act* of 2008 was basically sound but had not lived up to expectations because of insufficient funding and overly rigid interpretation of the law. The current Liberal government has promised to make changes along lines recommended in the two reports and to discuss all changes with the AFN (INAC, 2016B).

By the numbers

There were 450 specific-claim settlements from December 12, 1974 to November 15, 2017. As part of these settlements, the federal government paid \$4.7 billion in nominal dollars (\$5.7 billion in 2017 dollars, adjusting for inflation). To illustrate the magnitude of this sum, it is in the same range as what will eventually be paid out to First Nations people who attended residential schools—\$5–6 billion (FLANAGAN & JACKSON, 2017: 5). The average settlement was \$10.4 million in nominal dollars, or \$12.7 million in 2017 dollars. However, the average is not a very meaningful statistic because of the extraordinary range of federal payments, ranging from zero to \$171 million. The median was only \$1.4 million, barely more than a tenth of the mean. The large difference between the mean and the median arises from the effect of a relatively small number of very large settlements. It should be kept in mind these payouts represent only the federal share of financial compensation. Settlements sometimes also provide for transfer of land or cash payments from provinces, but those data are not included here.

Of 618 recognized First Nations, 275 (45%) have received at least one settlement, and the average number of settlements per First Nation, among those who have received any, is about 1.6. Again, the average is not very meaningful because of the wide range of variation. TABLE 8.1 shows the number of First Nations that have received a given number of settlements.

Table 8.1: Numbers of specific claim settlements

Number of settlements per First Nation	Number of First Nations receiving settlements	Number of settlements	Number of settlements per First Nation	Number of First Nations receiving settlements	Number of settlements
25	1	25	5	3	15
10	1	10	4	4	16
9	1	9	3	25	75
8	1	8	2	69	138
7	4	28	1	163	163
6	3	18	0	343	343

SOURCE: FLANAGAN, 2018B: 9.

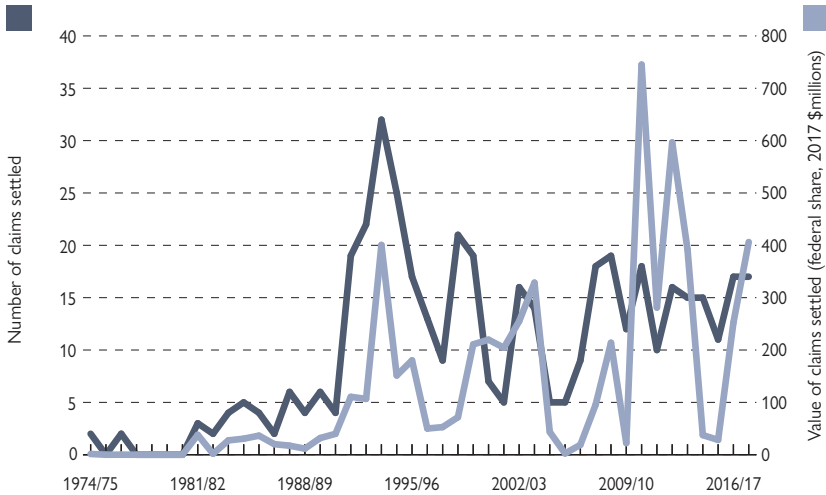
The 112 First Nations that received more than one settlement apiece received in total 342 settlements, or 76% of all settlements. The collective value of these 342 settlements was \$4.3 billion in 2017 dollars, or 74% of all payouts. Obviously, the gains from specific-claim settlements have been unequally distributed. Most First Nations have gotten nothing, while those with multiple payouts have garnered about three fourths of the total. It is unclear from published data to what extent those First Nations that have not received settlements have not (yet?) filed specific claims or have filed but have had those claims rejected.

FIGURE 8.1 shows the year-by-year pace of activity in this field from 1974 to 2107, measured in both number of settlements and constant 2017 dollars. The curves for number of settlements and total value of settlements track each other in general but not exact terms because of the highly variable value of settlements. Taking this into account, it is clear that specific claims started off slowly in 1974, whether measured in dollars or number of settlements, increased slightly after the 1982 reforms, spiked dramatically after the 1991 Mulroney reforms but gradually declined thereafter, only to increase again with the Prentice reforms of 2008. As shown in FIGURE 8.2, the average size of settlements, measured in 2017 dollars, has also tended to increase over time, though there is much variation from year to year.

Impact upon communities

The settlement of specific claims is intended mainly to right past injustices, but it is also fair to ask whether payout of this large sum of money—almost \$6 billion in 2017 dollars spread over more than 40 years—has improved the well-being of recipient communities in any measurable way. Indeed, government officials have

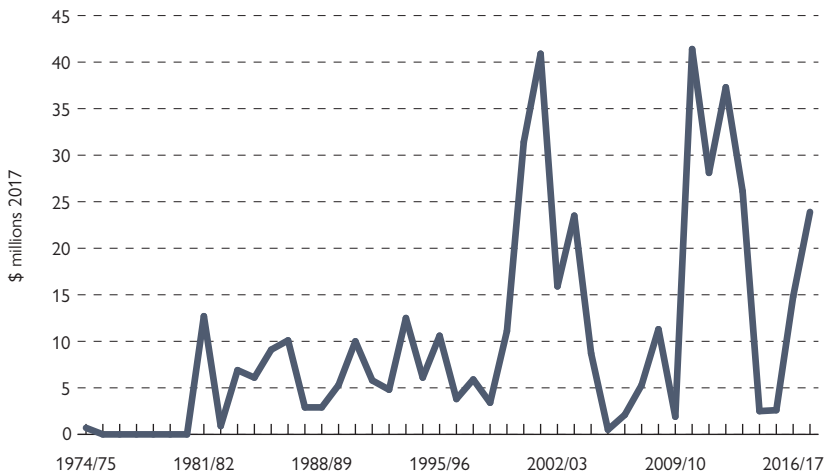
Figure 8.1: Number and value of specific claims settled in each fiscal year, 1974/75–2017/18*



NOTES: *Denotes as of Nov 22, 2017. Inflation numbers for 2017 are estimates based on the average of monthly CPI from Jan.–Nov. 2017.

SOURCE: FLANAGAN, 2018B: FIG. 2.

Figure 8.2: Average size of settlement (federal share, \$ 2017), 1974/75–2017/18*



NOTES: *Denotes as of Nov 22, 2017. Inflation numbers for 2017 are estimates based on the average of monthly CPI from Jan.–Nov. 2017.

SOURCES: FLANAGAN, 2018B.

sometimes said they expected settlements to have a positive effect on recipient communities' future economic growth (PRENTICE, 2007). Two earlier studies have tried to determine whether specific-claim settlements have a positive relationship with the Community Well-Being Index. White, Spence, and Paul (2007) looked at specific-claims data from 1974 to 2001. They divided First Nations into three groups: those that never filed a claim; those that filed but received no settlement (it is not clear whether this group was composed only of those whose claims were rejected, or includes those with claims still under review); and those that received a settlement. The researchers tracked CWB scores for the three groups from the census of 1981 to that of 2001. Although all three groups improved over this 20-year period, there was no difference in the rate of improvement among them. There was no evidence that improvement tended to accelerate after filing a claim or receiving a settlement. The researchers' findings are suggestive but not conclusive because they did not take into account the monetary amount of settlements.

As described in more detail in chapter 9, Lee Harding and I (2016B) looked at treaty land-entitlement settlements in Saskatchewan. These are a special category of specific claims in which both the provincial and federal governments contribute money to First Nations to purchase additional reserve land. We found that in general CWB did not increase any more rapidly for First Nations that received settlements than for those that did not. However, there was a noticeably more rapid improvement in CWB for a small subgroup of recipients that used their award to buy urban land for addition to their reserves and pursued an aggressive business strategy on their urban reserves (casinos, industrial and commercial parks, etc.) Again, these findings are suggestive but limited to a small subset of specific-claim settlements in one province.

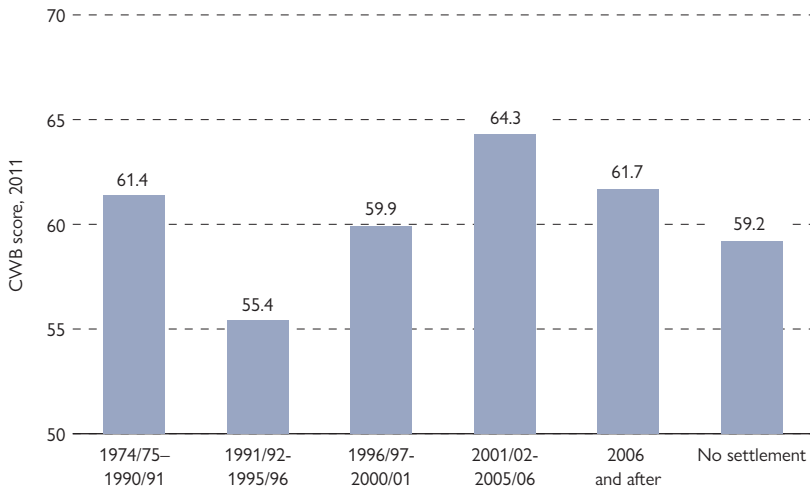
In this chapter, I approach the same issue with a larger database extending over a longer period of time. An initial observation is that the mean 2011 CWB (59.2) for those First Nations that have never received any settlement ($n = 269$) is exactly the same as for those that have received one or more settlements ($n = 241$).¹¹ A quick conclusion might be that the expenditure of \$5.7 billion (2017 dollars) over 43 years, plus process costs, has had no measurable positive impact on the well-being of recipient First Nations. However, comparisons of means at this level takes into account only one dichotomous variable, namely the reception (or not) of a settlement. But it is intuitively obvious that at least two other variables might make a difference. First is the length of time after settlement: the longer that time period, the more chance for the settlement money to be used in constructive ways that might

11 2011 CWB is available for only 510 First Nations, so the numerical totals here are different from those in the preceding section.

promote better outcomes in education, housing, employment, and income. The second variable is the size of the settlement: a larger settlement provides more cash for constructive investment.

FIGURE 8.3 shows the 2011 CWB for six groups. The first five (reading from left to right) are those that have received one or more settlements, grouped according to when the first settlement was received. The sixth is the control group of First Nations that have received no settlement. Figure 8.3 does not show any consistent impact of the time variable. If lapse of time worked as hypothesized, the first five bars in the chart should gradually decrease in height, looking from left to right, because less time would have been available for the settlement to have an effect. Instead, there is no obvious temporal pattern.

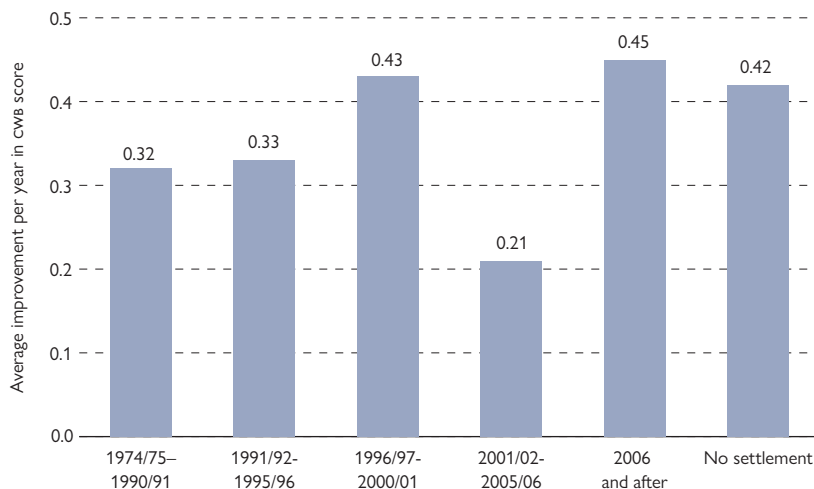
Figure 8.3: Average CWB scores in 2011, by First Nations grouped by year of first settlement



SOURCE: FLANAGAN, 2018B.

FIGURE 8.4 is a more sensitive test of the impact of the time variable. It shows the average annual rate of improvement in CWB for each of the five settlement-receiving groups, calculated from the average starting point of that group. The sixth group, whose members did not receive any settlement, is also shown for comparison. Again, there is no consistent pattern. Three of the five groups show a lower annual rate of improvement than the control (no-settlement) group, while two show a higher rate (one of which is only very slightly higher). Overall, the evidence does not suggest that First Nations that received settlements earlier have tended to improve their CWB scores more rapidly than those that received them later or did not receive any settlement.

Figure 8.4: Average improvement per year in CWB scores, by First Nations grouped by year of first settlement

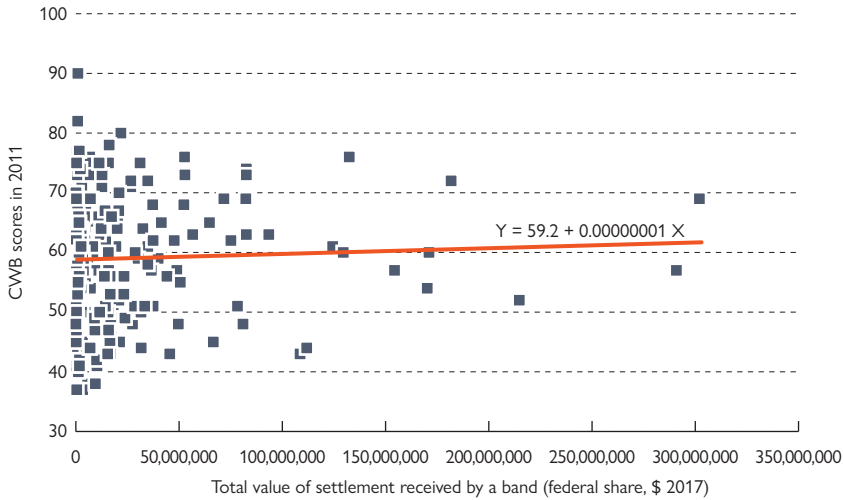


NOTE: The average improvement per year is calculated as the average of the mean CWB score in 2011 for each group (i.e., 1974/75–1990/91) minus the mean CWB score in the starting year, divided by the number of years for each group from its starting year to 2011. The starting year for the 1974/75–1990/91 group is 1981; for 1991/92–1995/96, 1991; for 1996/97–2000/01, 1996; for 2001/02–2005/06, 2001; and, for 2006 and after, 2006. For those bands that do not receive any settlement, the starting year is 1981.

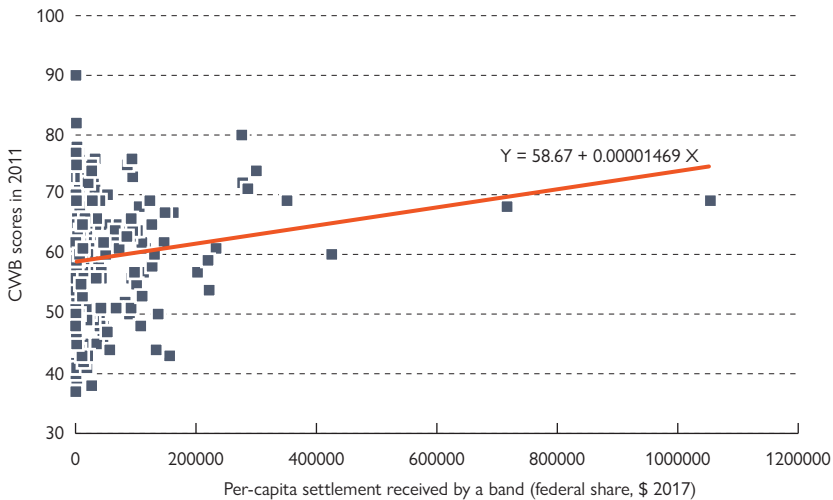
SOURCE: FLANAGAN, 2018B.

What about the impact of the monetary value or size of the settlement? FIGURE 8.5 shows a scatterplot of the regression of 2011 CWB upon monetary size of settlement measured in 2017 dollars. Note that the regression line is virtually horizontal, signifying a coefficient of zero between the two variables—in other words, no association at all. The result was similar when the regression was redone with the natural logarithm of settlement size (not shown here), which partially corrects for the non-normal distribution of that variable (long right tail).

It might also be argued, however, that the most important consideration is the monetary size of the settlement in proportion to population: a seemingly large settlement might not have as much impact if its effects were spread across a larger population. FIGURE 8.6 tries to assess the importance of population size by regressing the CWB index upon per-capita monetary size of settlement (2017 dollar value of the settlement divided by 2011 band population). Figure 8.6 does show a positive association between the two variables, statistically significant at the .05 level. The regression line slopes upward to the right, showing that an increase in settlement size per capita is positively related to higher CWB scores. However, visual inspection of the scatterplot shows the finding to be tenuous because the slope of the regression line is heavily dependent upon a small number of settlements larger than about

Figure 8.5: Regression of 2011 CWB scores upon size of settlement (\$2017) received by bands

NOTES: [1] This regression excludes bands that did not receive any settlement from the federal government or did not have a CWB score in 2011. [2] X coefficient is not statistically significant at 5%. (P - value 0.67).
SOURCE: FLANAGAN, 2018B.

Figure 8.6: Regression of 2011 CWB scores upon per-capita settlement (\$2017) received by bands

NOTES: [1] This regression excludes the bands that did not receive any settlement from the federal government or did not have a CWB score in 2011. [2] Per-capita settlement received is calculated as a ratio of total settlement received by a band to its 2011 population. [3] X coefficient is statistically significant at 5%. (P - value 0.024).
SOURCE: FLANAGAN, 2018B.

\$300,000 per capita. Indeed, the slope of the line becomes much less steep and the relationship between variables is no longer statistically significant when the natural logarithm of settlement dollars per capita is used to correct for the skewed distribution of settlement size (not shown).

To carry the analysis further, a qualitative strategy, similar to what Harding and I used for Saskatchewan treaty-land entitlement settlements (2016B), would have to be employed. One would look at each settlement, noting its date, absolute and per-capita size, and how the payment was used. Such a research strategy might well identify a subgroup of cases in which, under particular conditions, a settlement triggered subsequent improvement in CWB. Such an analysis would be worth doing for its obvious policy implications, but it cannot be attempted here because, with 450 cases to examine in detail, it would become a major project in its own right.

It is not really surprising that obtaining specific claims settlements has at best a weak statistical relationship with improvement in CWB. Settlements are awarded on the basis of events usually more than a century, sometimes two centuries, in the past, as refracted through the political pressures of the moment and the lens of contemporary legal doctrines such as fiduciary responsibility and honour of the Crown. These events have no connection with what a First Nation is doing today to improve its standard of living. Also, awards are usually made to First Nations' trust funds with restrictions on immediate spending. Except in special circumstances, recipients are free to use the annual interest but not the capital. The proceeds are no doubt useful to the First Nation's budget but would not normally have a transformational impact.

There is also another side to this finding. If specific-claim settlements are not associated with improvements in CWB, neither are they associated with poverty. Zero correlation cuts both ways. Specific claims cannot claim to be a social justice measure helping the poorest First Nations because settlements are obtained on the basis of long-ago events combined with current legal doctrines, both of which are unrelated to contemporary standard of living.

The case for time limits

It was originally envisioned that the United States Indian Claims Commission would complete its business in ten years. The 1946 legislation stipulated that claims had to be filed by 1951 and allowed another five years for disposition. In contrast, time limits for filing or disposition have never been imposed on the specific-claims process in Canada. Claims have been received since 1974, so we are now entering the 45th year of dealing with specific claims. Even if the American time limit of five years for filing was too short, 45 years seems like a sufficiently long time for First Nations to have researched their past for injustices. The federal government is now

reviewing the specific claims process again, in concert with the AFN. In return for granting some of the many concessions that the AFN is demanding, the government should insist upon a firm deadline for filing claims.

One benefit would be the termination of a special quasi-judicial organization and process with rules of evidence and procedure that do not apply elsewhere in the legal system and are particularly favourable to complainants. That would be a gain for those who believe in the classical liberal ideal of equal law and law enforcement. A second benefit would be the reduction in payments for specific-claims settlements, which have been running close to \$250 million a year. This money does not come from nowhere; the government of Canada has to provide for it in its annual budget, and the envelope for Indigenous spending has to compete against other demands upon a government that is already running large deficits with no short- or even medium-term plan for getting back in the black. The Indigenous spending envelope remains pressured from all sides. Specific-claims settlements should be a prime target for reduction in view of the statistical finding that they confer no overall measurable benefit upon First Nations and do not offer special help to the poorest.

A final reason for setting a terminal date is psychological. Specific claims, like demands for compensation for other grievances, are backward-looking. What economist Thomas Sowell wrote of the United States in 1975 is still true, and equally true of Canada:

Perhaps the minority that has depended most on trying to secure justice through political or legal processes has been the American Indian, whose claims for justice are among the most obvious and most readily documented ... Emphasis on promoting economic advancement has produced far more progress than attempts to redress past wrongs, even when historic wrongs have been obvious, massive, and indisputable. (SOWELL, 1975: 128)

In a world of limited resources, focus upon past injustices does not necessarily assist, and may even interfere with, progress towards a higher standard of living.

Treaty Land Entitlement

The settlement of specific claims often leads to the transfer of land as well as money to First Nations. The preceding chapter looked at the transfer of money; this chapter will focus on a particular type of specific claim, the treaty land entitlement, in which a monetary settlement is provided but can be used only for the purchase of land.

First Nations can acquire more land through the treaty entitlement path, by showing that the reserves originally assigned to them were not as large as they should have been. This could happen for many reasons. When the numbered treaties were signed on the prairies in the 1870s, some tribal members were off hunting the last buffalo and did not get counted. The 1885 Rebellion led to numbers of Indians taking refuge in the United States when reserves were being surveyed in Saskatchewan and Alberta. Later, in the northern parts of the provinces, families might be off hunting, fishing, or trapping when treaties were negotiated and reserves surveyed. For these and other reasons, it was often difficult to get an accurate count of band membership, upon which the size of the reserve depended.

Many First Nations in all provinces have gone through the federal specific-claims process to obtain missing land, but the province of Saskatchewan undertook a unique initiative to provide land. Like Manitoba and Alberta, Saskatchewan was legally obliged by the *Natural Resource Transfer Agreement* of 1930 to make land available for Indian reserves when requested by Ottawa, but it decided to take a more active role. In 1992, the province signed the *Saskatchewan Treaty Land Entitlement Framework Agreement* (TLE) with the federal government. Twenty-five First Nations were involved in the original agreement, and since then eight more have adhered, for a total of 33 participants in the TLE initiative (INAC, 2017G). All of this was a result of pressure from the Federation of Saskatchewan Indian Nations (FSIN)¹² and responses from both major parties as well as local politicians, culminating in a

12. In 2016, the Federation of Saskatchewan Indian Nations changed its name to Federation of Sovereign Indigenous Nations. The acronym, FSIN, remains the same.

final deal between FSIN Chief Roland Crowe and Progressive Conservative Premier Grant Devine (FLANAGAN & HARDING, 2016B: 6). It is an interesting example of provincial initiative in what is primarily a federal jurisdiction.

The TLE *Framework Agreement* provides for the transfer of “shortfall acres” to bring reserve size up to what it should have been at the time of first survey, plus “equity acres” in recognition of population growth as well as the opportunity cost of having smaller reserves for all those years. Perhaps oversimplifying a bit, the shortfall acres can be thought of as correcting past errors, while the equity acres are supposed to provide an opportunity for future economic growth for eligible First Nations.

The agreement allots money, dispensed in equal instalments over twelve years, to First Nations to purchase both shortfall and equity acres, but does not transfer land directly. The deal calculates the amount of money at a rate of about \$260 per acre. For the 33 First Nations that had adhered to the *Framework Agreement* as of 2015, the total amount of money was \$595.5 million, to purchase a minimum of 548,000 acres (shortfall acreage) and up to a maximum of 2,671,000 acres (including all equity acres).¹³ The province of Saskatchewan embraces 161,000,000 million acres, so this TLE land is potentially about 1.4% of the provincial total. It is to be added to the First Nations’ land base, approximately doubling the size of the land reserves originally allocated to them (MARTIN-MCGUIRE, 1999: 274). As of 2015, federal orders-in-council or ministerial orders had added about 48% of the total TLE acreage to Saskatchewan Indian reserves, leaving as much as 1,285,000 acres still to be selected and transferred.

The scope of the TLE initiative in Saskatchewan provided a unique research opportunity to investigate whether this sizable transfer of land was associated with improvements in the well-being of First Nations. Saskatchewan First Nations were allowed, if they wished, to purchase available land in towns and cities and add it to their reserves, thus creating business development centres in urban locations. It is almost like a natural experiment, because some First Nations took this path, while others did not. As in other research, Lee Harding and I used the Community Well-Being (CWB) index for a correlational analysis (FLANAGAN & HARDING, 2016B). The Saskatchewan TLE is a major initiative with substantial costs to federal and provincial treasuries. Policy makers should have an informed view of its results, especially because Manitoba, and to a lesser extent British Columbia, Alberta, and Ontario are now implementing similar measures (INAC, 2017F).

13. Personal communication from Martin Egan, Director General, Treaty Land Entitlement Completion, Lands and Economic Development, INAC, via e-mail to Tom Flanagan (November 10, 2015).

Urban reserves

For most First Nations, the 1992 *TLE Framework Agreement* was the genesis of urban reserves in Saskatchewan (MARTIN-MCGUIRE, 1999: 70), although some are founded on earlier land-claims negotiations as well as independent negotiations in the specific-claims process (BARRON & GARCEA, 1999). Article 9 of the agreement allows TLE money to be used to purchase non-contiguous urban land to be added to the First Nation's reserve. All purchases are to be market transactions on a "willing buyer, willing seller" basis; transfers can be made either from private owners or from any level of government holding surplus land.¹⁴ Before the transfer can be completed, arrangements have to be worked out with the municipality regarding land use and zoning, infrastructure and services, and payment of a service fee in lieu of local taxation (urban reserves, like all Indian reserves, are exempt from taxation under s. 87 of the *Indian Act*).

As of 2015, 51 parcels of land had been set apart as urban reserves in Saskatchewan. Twenty First Nations own 48 of these urban reserves. Beyond that, three urban reserves, embracing the area where Treaty No. 4 was negotiated at Fort Qu'Appelle (TREATY NO. 4 BETWEEN HER MAJESTY THE QUEEN AND THE CREE AND SAULTEAUX TRIBES OF INDIANS AT THE QU'APPELLE AND FORT ELLICE, 1874/1876), are held collectively by the 33 nations adhering to Treaty No. 4, 30 of which are in Saskatchewan, and three in Manitoba. The Peter Ballantyne Cree Nation holds 18 urban reserves in Saskatchewan. Ten of these parcels cover small northern villages, inhabited mainly by First Nations and Métis people, which have been consolidated and set apart as reserves under the so-called Northern Community Transfer (NCT). Of the 41 urban reserves not in the NCT, four have been designated under the *Indian Act* as "institutional," to be used for educational or administrative purposes. The other 37 are designated "commercial" sites for business premises, which can range from small gas stations and convenience stores to large shopping centres and business parks (INAC, 2014B).

Urban reserves give band-owned businesses as well as individual entrepreneurs access to larger markets than they would find on their original reserves, which in Saskatchewan were all in rural areas. They also provide tax advantages: businesses owned by First Nations bands or individuals do not have to collect federal payroll taxes for status Indian employees working on the reserve; they pay a service fee rather than property taxes to the municipality; and they do not have to charge the federal Goods and Services Tax or the Provincial Sales Tax to Registered Indian customers. Also, Registered Indian employees of businesses on urban reserves do

14. Governments may sometimes be pressured to transfer land to First Nations as an outcome of the duty to consult (INAC, 2018C).

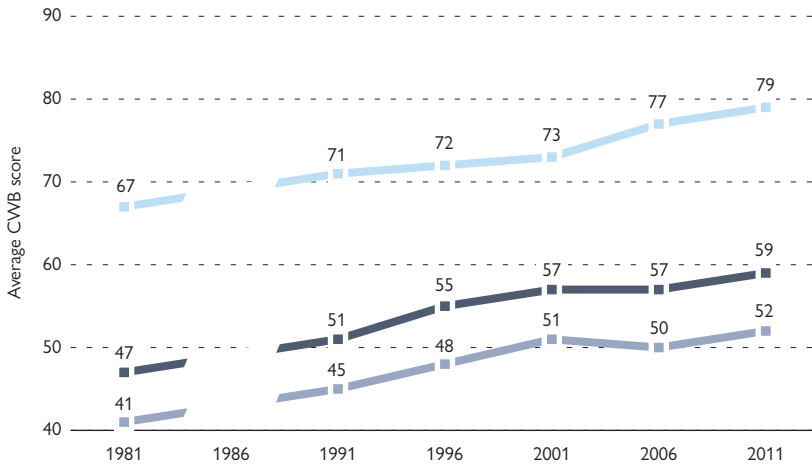
not have to pay provincial or federal taxes on income earned on reserve. The municipal governments of host cities seem satisfied with the arrangements because the service fees they collect from urban reserves are equivalent to typical property taxes, but the partial tax-haven status may contribute to friction with outside business competitors and with the general population. In a 2012 survey of public opinion in Saskatchewan, 75% of non-Aboriginal respondents agreed either “strongly” or “somewhat” that “Aboriginal people do not pay enough taxes” (WHITE, ATKINSON, BERDAHL, AND MCGRANE, 2015: 290). However, urban reserves are only a small part of the larger issue of exemption of First Nations from taxation.

The National Aboriginal Economic Development Board commissioned a study of seven Saskatchewan urban reserves as well as one in Manitoba (FISCAL REALITIES, N.D.) The seven Saskatchewan reserves were home to business operations ranging from gas-station convenience stores to large shopping centres and a casino. The study reached two main conclusions. The first was that all the urban reserves reviewed in the study were hosting viable business operations, whether large or small, and were creating substantial numbers of jobs as well as spill-over benefits for the host communities. The second conclusion was that the First Nation governments of the urban reserves were not exercising all their legal powers to levy property and sales taxes on reserve, and thus forgoing potential own-source revenue (FISCAL REALITIES, N.D.: 30–35). The remainder of this chapter examines whether urban reserves, and the TLE *Framework Agreement* that underpins most of them, have produced measurable improvements in the well-being of Saskatchewan First Nations that have participated in these programs.

Progress for people?

FIGURE 9.1 shows the change in the CWB index over the 30 years from 1981 to 2011 for Canadian non-Aboriginal communities (■), Canadian First Nations communities (■), and Saskatchewan First Nations (■). Remarkably, the CWB scores increased by 12 points for each of the three groups over this period of time, and the three lines are more or less parallel with each other. This suggests, though it is not conclusive proof, that increases in the well-being of First Nations result more from Canadian economic and social trends than from government policy. The curves for all three categories have the same general shape, always increasing from one census to the next, except for the unexplained drop affecting all of them in 2006. The TLE and urban reserve First Nations had a higher average mean CWB score than the control group in 1981 before these programs began, and they still had a higher CWB score in 2011. The gap between the urban reserve group and the control group was about the same in 2011 as it was in 1981, while the gap between the control group and the TLE group had actually narrowed a bit.

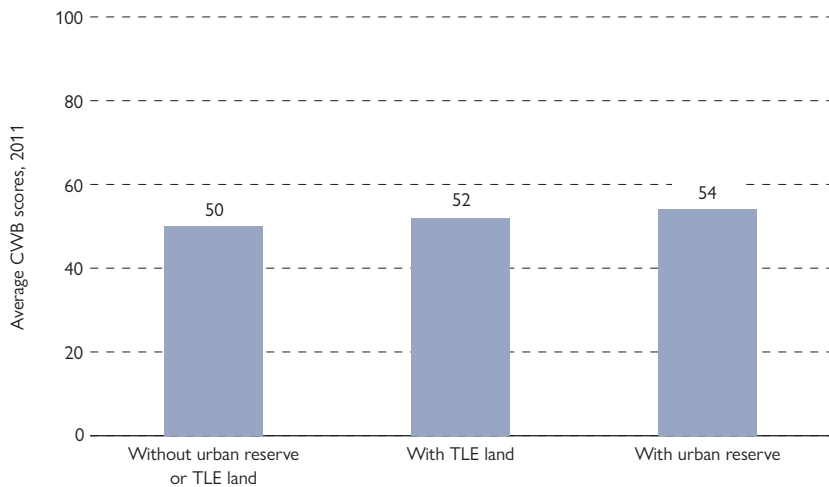
Figure 9.1: Average scores on the Community Well-Being Index, Saskatchewan First Nations ■, Canadian First Nations ■, and non-Aboriginal communities ■, 1981–2011



SOURCE: FLANAGAN AND HARDING, 2016B.

FIGURE 9.2 shows the mean 2011 CWB index for three categories of Saskatchewan First Nations: group one, those that have neither TLE land nor urban reserves; group two, those that have TLE land but no urban reserves; and group three, those that have urban reserves. (This third group includes five First Nations whose urban

Figure 9.2: Average scores on the Community Well-Being Index, Saskatchewan First Nations, 2011

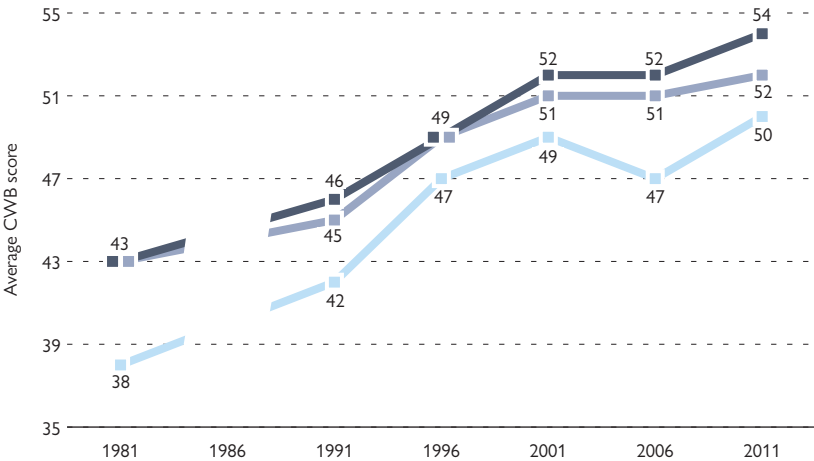


SOURCE: FLANAGAN AND HARDING, 2016B.

reserves are not located on TLE lands.) Group one, which has benefited from neither the TLE nor urban reserve programs, can be understood as a control group against which the program effects on groups two and three can be measured.

These initial data seem to provide some confirmation that the TLE and urban reserve initiatives have had a positive impact. Those who are eligible for neither have a mean CWB score of 50, while those with TLE have a mean score of 52, and those with urban reserves have the highest average CWB score, at 54. The four-point difference between 50 and 54 may not seem like much, but it is equivalent to about ten years of progress (figure 9.1). If it is true that TLE and urban reserves have led to this sort of improvement, they would constitute worthwhile policy innovations. However, this simple cross-sectional comparison takes no account of possible differences among First Nations in geographical location, physical endowment, cultural background, and political leadership. A more sophisticated approach is taken in FIGURE 9.3, which shows the changes in the CWB score of the same three groups of Saskatchewan First Nations over the 30-year period.

Figure 9.3: Average scores on the Community Well-Being Index, Saskatchewan First Nations without urban reserve or TLE land ■, *with TLE land* ■, *and with urban reserve* ■, 1981–2011



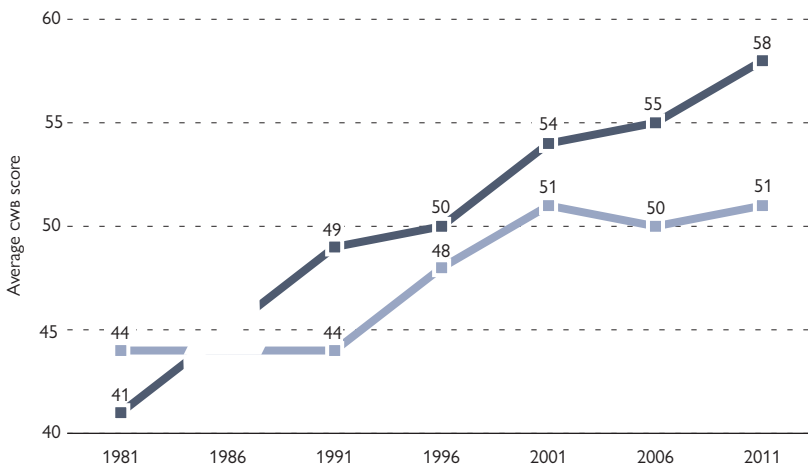
SOURCE: FLANAGAN AND HARDING, 2016B.

The curves for all three categories have the same general shape, always increasing from one census to the next, except for the unexplained drop affecting all of them in 2006. The TLE and urban reserve First Nations had a higher average mean CWB score than the control group in 1981 before these programs began, and they

still have a higher CWB score in 2011. The gap between the urban reserve group and the control group is about the same in 2011 as it was in 1981, while the gap between the control group and the TLE group has actually narrowed a bit.

Drilling even deeper into the data, FIGURE 9.4 divides the First Nations with urban reserves into two groups: eight that are making intensive economic use of their urban reserves, and 13 that are not. “Intensive use” is defined as hosting multiple business enterprises, such as casinos, hotels, golf courses, shopping centres, gas stations, and convenience stores. “Non-intensive use” is defined as no use at all at the present time, non-revenue-generating administrative or social-service facilities, or minimal economic use such as a single gas station. Figure 9.4 tells a remarkable story. In 1981, when the CWB index was first calculated and before any urban reserves existed, the eight First Nations that now make intensive use of urban reserves had no obvious advantage. Indeed, their average CWB score of 41 was below the comparator group. But by 1991 the intensive group had moved well ahead and has remained ahead ever since.

Figure 9.4: Average scores on the Community Well-Being Index, Saskatchewan First Nations with urban reserves, intensively used ■, and not intensively used ■, 1981–2011



SOURCE: FLANAGAN AND HARDING, 2016B.

TABLE 9.1 lists these ten First Nations and their business enterprises. Of these, six include casinos. Whitecap Dakota’s entrepreneurial initiative has capitalized on the fact that its original reserve is close to Saskatoon and connected by a paved road, making it for practical purposes an urban reserve. It features Dakota Dunes Casino, the Dakota Dunes Golf Links, and the Whitecap Trail Gas Bar & Confectionery. A hotel and spa have also been completed, though after the 2011 census, which is

Table 9.1: First Nations in Saskatchewan with intensive-use urban reserves

First Nation	City	Uses
English River	Saskatoon Beauval	gas bar; convenience store; restaurant; grocery store
Kahkewistahaw	Yorkton	Painted Hand Casino with lounge and restaurant; gas bar and convenience store; Yorkton Home Inn & Suites; Broadway Shopping Centre
Mosquito, Grizzly Bear's Head, Lean Man	North Battleford	Gold Eagle Casino; Kihiw Restaurant
Muskeg Lake	Saskatoon	three commercial facilities housing 40 businesses by lease; CreeWay Gas East
Nekaneet	Swift Current Regina	Living Sky Casino; commercial properties; office building with law offices; gas station and convenience store (in development)
Peter Ballantyne	Prince Albert Creighton	Northern Lights Casino; three gas bars with convenience stores administrative offices; Prince Albert Grand Council's executive office; Peter Ballantyne Health Services; education facilities; office complex; newspaper office; fitness centre; retail store;
Sakimay	Yorkton Regina	Painted Hand Casino (until 2008); office complex; gas bar; convenience store and car wash
Whitecap	Saskatoon	Dakota Dunes Casino; Dakota Dunes Golf Links; Whitecap Trail Gas Bar & Confectionery; Dakota Dunes Hotel & Spa (opened 2015)

SOURCE: FLANAGAN AND HARDING, 2016B: 12.

the latest point of data for this study. Sakimay First Nation had the Painted Hand Casino until 2008 when it was rebuilt on the urban reserve of Kahkewistahaw. Both are part of the Yorkton Tribal Council. The Painted Hand Casino also features a gas and convenience store, as well as a hotel, similar to the arrangement at the Gold Eagle Casino, run by Mosquito, Grizzly Bear's Head, and Lean Man First Nations in North Battleford. Nekaneet First Nation has a casino on its urban reserve in Swift Current, but also owns office space in Regina, with plans for a gas station and

convenience store. The Peter Ballantyne First Nation alone has 18 of Saskatchewan's 51 urban reserves. Business ventures include a casino, gas bar and convenience store, retail ventures, commercial building rentals, management, forestry, hospitality, insurance, trucking, and manufacturing.

Two of the eight bands have not had a casino on their lands. English River First Nation has a gas bar and restaurant on its Grasslands development south of Saskatoon and also offers the northern community of Beauval its only grocery store. Muskeg Lake Cree Nation has created three commercial facilities that host 40 businesses in Saskatoon, plus two gas stations in different holdings. The group's progress provides support for the vision of progress for First Nations through entrepreneurship. Their story shows that self-improvement, though not inevitable, is definitely possible. Acquiring an urban reserve does not guarantee higher living standards, but it does create opportunities for First Nations to make themselves better off by producing goods and services that other Canadians want to buy.

One important question is whether the success of the eight First Nations with intensive-use reserves is simply a result of casino gaming. Six of the eight fully or partially own a casino. Yet the two First Nations not involved in casino gaming have an average CWB score of 60, which is two points higher than the average for all eight intensive-use First Nations. In research discussed earlier in this book, it was found that only four of Top 21 First Nations with the highest CWB scores hosted casinos (FLANAGAN AND HARDING, 2016A). The evidence suggests that, while casino gaming may be very rewarding, it is not the only viable strategy for economic development.

Intensive-use urban reserves cannot be the only explanation for the progress made by these First Nations because they started to pull ahead as early as 1991, before urban reserves could have had much impact. Maybe these eight had better leadership and better community spirit, which made it possible for them to take advantage of the urban reserve initiative, along with making other improvements. But even if that is true, it is also true that their urban reserves have become an effective and continuing means toward improving their well-being.

The TLE initiative by itself has not yet had a measurable impact upon the entire group. The average CWB score for First Nations that have received TLE money has not risen any faster than for First Nations that have not received that benefit. In fact, the TLE First Nations have lost a little of the lead that they had in 1981. It is, however, too early to pronounce TLE a failure in raising First Nations' living standards. The money for acquiring land is paid out in twelve instalments; then it takes many more years to find and negotiate the purchase of suitable parcels of land; after this it can take five to seven or more years for the land to be set apart as a reserve. Acquisition of farm and ranch land without other value is unlikely to make a big difference in the future, but First Nations such as Onion Lake are buying TLE land

with sub-surface rights or forestry potential that may become valuable in the future, and urban growth may eventually bring development potential to some TLE land. But these are future possibilities. As of 2011, the evidence did not show that TLE in itself was having an impact on living standards, as measured by the CWB index.

Of course, TLE was not only about improving First Nations' standard of living; it was a justice measure for bands that had not received the *quantum* of land due to them under treaty. From that point of view, TLE would have been worth doing anyway, even if it did not lead to a measurable improvement in the standard of living. But the TLE initiative was not just about righting historical wrongs; it was also about improving future opportunities for First Nations. Only the 20% of the acreage to be purchased under the heading of shortfall acres could be construed as living up to treaty obligations, while the equity acres (80% of the total) were clearly about fostering future progress. From that point of view, positive evidence of progress is not yet there.

Urban reserves have also not had any measurable positive impact overall. First Nations that have acquired urban reserves were five points ahead of the control group in 1981 and only four points ahead in 2011—no change, really. It is not enough to acquire an urban reserve; time and investment are required to start businesses, create jobs, and produce revenues that can be used to improve a First Nation's standard of living. A hopeful pointer in that direction is the success of the eight First Nations that have made intensive economic use of their urban reserves and whose average CWB score is rising more quickly than the mean for any other group.

A final observation is that the bands who later opted into the TLE and urban reserve initiatives were already better off on average in 1981 than their counterpart bands in the control group who received no such benefits. This suggests that better-off First Nations were more able to work through the years of research, negotiation, and legal work required to obtain TLE and urban reserve benefits. This observation should not be surprising; it is exactly what Thomas Sowell found in his landmark study, *Preferential Policies: An International Perspective* (1990): in countries all over the world, policies designed to help designated racial, ethnic, and religious groups gave more assistance to better-off members of those groups than to the less well-off.

This, however, is not in itself an argument against the TLE and urban reserve initiatives. If these are shown to be effective in raising living standards over enough time to give them a fair trial, they can be considered economically beneficial, even if they cannot help all First Nations. Not being able to help everyone is not a good argument for helping no one.

The Duty to Consult

Canadian courts have imposed on both federal and provincial governments the duty to consult with First Nations before authorizing development projects on lands to which they have potential title claims, or on which they have exercised rights of hunting, fishing, and harvesting. This did not affect Indian reserves, because it has long been settled law that developers cannot use reserve land without following procedures in the *Indian Act* requiring approval by the First Nation as well as the Minister of Indian Affairs. The new duty to consult affects lands that were never yielded by treaty or that were surrendered by treaty but on which First Nations may have continuing treaty rights to hunt, fish, and harvest.

The right to be consulted is what sportscasters would call a “game changer,” because previous to the new jurisprudence, governments had always assumed they had control over Crown lands other than Indian reserves, and had accordingly reviewed and authorized development projects through their own procedures. There may have been consultation with First Nations, but it was not a high-profile constitutional right. The right to be consulted is not a formal property right as such. According to Supreme Court decisions, it does not include a veto over resource development, so it does not entail the right to exclude that is the hallmark of true property rights. In practice, however, it functions much like a property right because its exercise can be so time-consuming that it can have the effect of excluding would-be developers. For lack of a better term, let’s call it a quasi-property right.

Property rights

In today’s conventional understanding, to own property means to hold a bundle of rights over the use of a thing. Major “sticks in the bundle” include the right to control the use of the property, including selling or giving it to others; to receive the benefit of the property; and to exclude others from using or enjoying it (EPSTEIN, 2008: 20). In Canadian law, ownership in fee simple includes all of the above, subject to legal regulation, but these rights can also be separated in a variety of ways.

The modern economic theory of property is based not on assumed natural rights but on transaction costs in the context of scarcity. If good agricultural land were infinitely available, farmers would encounter no transaction costs to protect their land and crops. They could simply plant part of the commons and harvest their crops without worrying about security. But if land is scarce, others may interfere with their use of the land, destroying or stealing their crops, and leading them to invest in fences, guards, and other security measures. At a certain point, it becomes cheaper for the society to create property rights that are enforced by the collectivity, rather than leaving it to individuals. In the technical language of Harold Demsetz, property rights develop “to internalize externalities when the gains of internalization become larger than the cost of internalization” (DEMSETZ, 1968: 347–8). From an economic point of view, property rights are a question of costs and benefits in specific circumstances, not of natural rights always and everywhere.

As Hayek taught us, economics is all about the efficient use of information (HAYEK, 1945). Property rights contribute to efficiency by bringing information and incentives together. If property rights are robust, owners, who are closest to the property and thus better placed to have essential information about its most productive use, gain the benefits while bearing the risks of their decisions. We would expect this to be more efficient on average than decisions made by third parties without a direct stake in the outcome.

Nobel Prize winner Ronald Coase drew the attention of economists to the importance of transaction costs and the clear definition of property rights (COASE, 1960). In this view, what are often called externalities are actually the result of imperfectly specified property rights (ANDERSON, 2004). Those who have amplified Coase’s article into the so-called Coase theorem argue that the initial endowment of property rights can affect the distribution of wealth and income but is neutral towards economic efficiency as long as transaction costs do not impede exchange (SIMMONS, 2011: 138–9). In a world of zero transaction costs, owners would engage in mutually beneficial exchanges to achieve the most efficient use of resources. Real-world transaction costs will never be zero, but economic theory suggests that policy-makers should seek to minimize them if they wish to promote economic efficiency.

The Supreme Court’s new jurisprudence, however, has multiplied transaction costs in the course of creating a constitutional quasi-property right to be consulted. These increased transaction costs include uncertainty over ownership, multiplication of the number of decision makers, and extension of the complexity and duration of decision-making processes.

Supreme Court decisions

An important step was the Supreme Court's 1990 *Sparrow* decision, which concerned not ownership of land as such, but the right to fish for salmon in British Columbia (*R. V. SPARROW*, [1990] 1 S.C.R. 1075). The Court held that there was still an existing aboriginal right to fish for food and for related social and ceremonial activities that had not been extinguished by regulation. The “honour of the Crown”—a phrase destined to assume ever greater importance—meant that extinguishment of an aboriginal right would have had to be explicitly stated in legislation; it could not occur as an implicit consequence of regulation. And now that the right had been given constitutional status by s. 35 of the *Constitution Act, 1982*, regulation would have to be justifiable, that is, demonstrably necessary in the eyes of impartial third parties (judges), not merely imposed by administrators. The Court laid down a multi-stage process for determining when regulation would be justifiable, rather similar to its test for determining when abridgment of Charter rights was justifiable. But in a pattern that would later often recur, the Court did not itself apply the test; it called for a new trial to determine whether the regulation on the length of drift nets used in the aboriginal food fishery was really necessary.

One can see many echoes in the Court's 1997 *Delgamuukw* decision, in which the issue was ownership of land (aboriginal title) rather than the exercise of specific aboriginal rights such as hunting and fishing (*DELGAMUUKW V. BRITISH COLUMBIA*, [1997] 3 S.C.R. 1010). The court defined aboriginal title as a burden on the Crown's underlying title, which had crystallized in 1846 when Britain assumed sovereignty over what is now British Columbia. The provincial Crown's control over the use of land for the last century had not extinguished aboriginal title, because it could be extinguished only by an explicit action of the sovereign power, now the Parliament of Canada. Thus aboriginal title still existed in British Columbia. But the Court did not grant the petition of the Gitksan and Wet'suwet'en Nations to recognize their specific aboriginal title; as in *Sparrow*, that would have to be determined in another trial where the proper historical facts could be adduced. Gitksan Chief Herb George said in frustration: “Twenty-four years working on *Delgamuukw*, and when I go home, nothing has changed” (FLANAGAN, 2008: 127). Prominent lawyer and provincial civil servant Mel Smith observed that the decision “undermined everything but changed nothing” (132).

In its *Haida Nation* decision (*HAIDA NATION V. BRITISH COLUMBIA (MINISTER OF FORESTS)*, [2004] 3 S.C.R. 511), the Court elaborated upon the concept of consultation, which had been more briefly mentioned in *Delgamuukw*. The Court held that the honour of the Crown required government to consult with a First Nation before taking or permitting action that might affect aboriginal rights or title. The basic idea

is plausible enough. It does seem dishonourable for government to chip away at the value of land by allowing, say, forestry and mining projects without consulting the people whose claim would be affected. However, the “spectrum” approach to consultation propounded by the Court in *Haida Nation* is unpredictable in application. It requires authorities to gauge the level of consultation required in light of the plausibility of the claim, the degree and type of impact, and many related factors, so that it becomes very difficult to say in advance what level of consultation is adequate.

The next year, *Mikisew Cree* extended the Court’s new consultation framework beyond lands subject to claim of aboriginal title to lands already surrendered by treaty (*MIKISEW CREE FIRST NATION V. CANADA (MINISTER OF CANADIAN HERITAGE)*, [2005] 3 S.C.R. 388, 2005 SCC 69). In *Mikisew Cree*, the federal Department of the Environment had wished to build a winter road across an Indian reserve in northern Alberta. When the First Nation objected, the Department announced without further consultation that it would reroute the road to go around the edge of the reserve. But the Mikisew people were still not happy because of the impact the road might have on wildlife harvesting off the reserve. According to Treaty 8, they had the right to hunt, fish, and trap on land surrendered to the Crown except on “such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes” (TREATY NO. 8 MADE JUNE 21, 1899 AND ADHESIONS, REPORTS, ETC., 1899–1901). The issue was of great practical importance, because similar provisions exist in many other treaties. According to the Court, the honour of the Crown required government to consult with a First Nation before exercising its option to “take up” land for other purposes, because hunting and trapping were existing treaty rights protected by s. 35 of the *Constitution Act, 1982*. In effect, this decision reversed the century-old presumption that governments could make decisions about the use of Crown land previously acquired through land-surrender treaties.

Clarity and confusion

The Court’s decisions have tended to increase rather than reduce complexity. They have overturned pre-existing administrative practices, invited further litigation, multiplied the number of decision-makers, and failed to lay down clear guidelines for resolving disputes arising under the new jurisprudence. Instead of bright lines of clear authority, the court has created shadowy and overlapping fields of jurisdiction.

The Honour of the Crown

The phrase “honour of the Crown” runs like a red thread through the Supreme Court’s decisions on aboriginal rights and title. It has an older history in British law,

but its use in the context of aboriginal rights is a relatively new development. After the *Sparrow* decision (1990), it appeared again in the *Badger* decision (*R. V. BADGER*, [1996] 1 S.C.R. 771), where Justice Cory wrote:

... the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of “sharp dealing” will be sanctioned. (PARA. 41)

Over the next ten years, the honour of the Crown assumed ever greater significance. Here are some excerpts from Chief Justice McLachlin’s majority opinion in *Haida Nation*:

The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples ... It is not a mere incantation, but rather a core precept that finds its application in concrete practices ... ([2004] 3 S.C.R. 511: PARA. 16)

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably ... (PARA. 17)

The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty ... (PARA. 18)

The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of “sharp dealing” ... (PARA. 19)

Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims ... It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. (PARA. 20)

Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. (PARA. 26)

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. (PARA. 27)

As expounded here by Chief Justice McLachlin, the honour of the Crown is a master principle governing all aspects of the dealings between Canada and aboriginal people. It applies to consultation before treaties, the negotiation of treaties, the interpretation of treaties, and the administration of assets, such as land reserves, provided by treaties. It is common ground that the representatives of the Crown should not lie and cheat in negotiating treaties, and that they should keep solemn promises made in treaties. But the implications of the honour of the Crown, as expounded by the Supreme Court, go far beyond such obvious conclusions.

In practice, the honour of the Crown has become an ill-defined criterion encouraging present-day courts to use contemporary standards to review the actions of past decision-makers, who acted in a long-vanished world subject to imperatives and constraints that are not well understood today. It is an attempt to achieve what the American economist Thomas Sowell calls “cosmic justice,” imposing burdens on living people who have done nothing wrong in order to rectify injustices allegedly suffered by those who are no longer alive (SOWELL, 1999).

Below are a few representative quotes from Chief Justice McLachlin's majority opinion in *Haida Nation* regarding consultation with First Nations with potential claims to aboriginal title:

Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances ... A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. ([2004] 3 S.C.R. 511: PARA. 37)

Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown. (PARA. 38)

The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as

the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. (PARA. 39)

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice ... At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case ... Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. (PARA. 43-45)

Wording like this, emphasizing the phrase “vary with the circumstances,” is an invitation to more litigation and judicial second-guessing because no one can know in advance how the spectrum analysis will play out in specific cases. Indeed, Chief Justice McLachlin was aware of the problem, writing:

This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate. (PARA. 11)

Many thorny questions arose out of *Haida Nation*. Does the duty to consult grant First Nations a veto? Should there be consultation with individuals or only with

community representatives? How should the government carry out consultation when both a First Nation and a Métis group claim rights upon the same territory? What level of impact triggers the duty to consult? Is consultation only prospective or can it be used to address past grievances? To what extent can governments delegate the duty of consultation to local governments, tribunals, regulatory commissions, or corporations? Does the duty to consult cover only the administration of lands, or does it extend to the passage of legislation affecting First Nations (NEWMAN, 2014)?

Lower courts have gradually answered some of these questions, with occasional appeals to the Supreme Court to provide guidance on thorny issues. Consultation with multiple First Nations is particularly difficult because the duty to consult was never formulated with complex, multiple consultations in mind. Courts are not legislatures; the principles that they lay down in deciding particular cases arise from the facts before them, and the cases that gave rise to the duty to consult involved individual projects affecting the traditional territory of a single First Nation. Consider for example, a proposal for a pipeline, such as Northern Gateway, which would have crossed the traditional territories of dozens of First Nations in Alberta and British Columbia. A useful pipeline has to transit all of these territories; one holdout threatens to make the whole pipeline fail. The same difficulty could arise with highways, railways, and power lines. In any large group of actors, there will always be some who see the world in different terms and will oppose what others see as the common good. Holdout resistance may eventually be overcome, but the delay and added expense may cause the whole project to fail.

A second problem is strategic. When many actors are involved in negotiating a bargain, everyone is tempted to hang back, waiting to see what others get, then raising the ante with new demands. This type of *n*-person Prisoner's Dilemma can drive costs so high that a project becomes uneconomic. In the wider economy, the government can use its power of expropriation to grant an easement for a utility corridor or even compel purchase of land with appropriate compensation; but such legislation, which exists in all jurisdictions, does not apply to the constitutionally entrenched aboriginal title of First Nations. The Supreme Court has repeatedly said that the duty to consult does not confer a right of veto upon First Nations and that governments can infringe upon aboriginal title to empower major economic development projects. However, that might become a doomsday weapon bringing political destruction upon a government attempting to deploy it.

Benefits

The right to be consulted has some similarity to the concept of a negative easement in Anglo-American property law. The Crown remains the owner of the land, but it may not do certain things, for example, approve a pipeline, without first

consulting nearby First Nations. If the right to be consulted were a true negative easement, it would entail a power of veto, meaning that the government could not approve a project without actual consent from the First Nation(s). The Supreme Court of Canada has held, however, that the right to be consulted is not a veto (*CHIPPEWAS OF THE THAMES FIRST NATION V. ENBRIDGE PIPELINES INC.*, 2017 SCC 41), and development can proceed as long as consultation is adequate in the eyes of the courts. This weakens the impact of the duty to consult somewhat but by no means takes away all leverage. Project proponents will go to great lengths to negotiate an Impact and Benefit Agreement (IBA) that will get a First Nation onside with development, because the transaction costs of fighting and perhaps losing in court are so high, to say nothing of the bad public relations incurred by proceeding against the wishes of local First Nations. This involves pipelines and other utility corridors such as roads and electric transmission lines as well as all site-specific projects such as oil and gas wells, mines, forestry projects, and ski resorts. All in all, this could represent a sizable transfer of income to First Nations from natural resource companies. However, it is impossible to estimate how large these transfers are in the aggregate or to individual First Nations because the details of IBAs are kept secret. Both industry and First Nation governments prefer confidentiality (NEWMAN & HARVEY, 2016).

Stephen Harper's *Extractive Sector Transparency Measures Act* of 2014 was aimed mainly at payments that Canadian oil and mining companies make to foreign governments, but it also impinged upon Canadian IBAs. The Act required payments over \$100,000, including those to First Nations, to be publicly reported. Both Indigenous leaders and resource companies were opposed to being included in the bill, claiming that IBAs were private business transactions (OLENIUK, 2015). Apart from issues of corruption, disclosure might affect business negotiations, although it is hard to say whether the impact would be greater on First Nations or on companies. Suppose that IBAs for cutting seismic lines, drilling wells, and building pipelines all had to be published. Would that give greater advantage to First Nations or resource companies in negotiations?

Section 29 of the Act exempted aboriginal governments from application of the Act for two years from proclamation, that is, until June 1, 2017. As now interpreted, the Act does not impose any reporting obligation on First Nation governments. Companies have to report certain types of payments over \$100,000 to First Nations, but not the details of IBAs as such (GOVERNMENT OF CANADA, 2017B). All payments become part of the First Nation's budget, which, under the *First Nations Financial Transparency Act*, is supposed to be reported to Ottawa and posted online. But the reporting rules do not require IBA payments to be identified as such, so the public is still largely in the dark.

It is apparent, however, that such payments can be very large. The Fort McKay First Nation organizes its annual filings under the *First Nations Financial Transparency Act* in such a way that one can estimate the size of IBA or IBA-like payments. In the fiscal year ending March 31, 2017, Fort McKay reported \$16.1 million in “industry grants,” which were spent on infrastructure projects such as a new seniors care centre, and \$6.3 million in “long-term sustainability funding,” which is revenue received to consult with corporations about the oil-sands extraction projects that surround the Nation. Compare these amounts to \$27.4 million in “business enterprise income” in the same year, resulting from the sale of various services to oil-sands companies, and to overall band revenues of \$66.2 million (FLANAGAN, 2018). This is just one, undoubtedly exceptional, case, but it shows the potential of IBAs as a revenue source for First Nations. Perhaps one day a methodology will be devised to estimate how much of the approximately \$3 billion in own-source revenue reported by First Nations stems from IBAs based upon the right to be consulted. In the meantime, one can only conclude that IBAs are important, without knowing the exact magnitude of that importance. Obviously, the incidence of IBAs, like own-source revenue in general, is highly erratic. Some First Nations, like Fort McKay, may be reaping a great deal from them, while others, far from resource development projects, may be getting little or nothing.

The other side of the coin

The IBAs negotiated as a consequence of the duty to consult can be analogized to the lease of land. In a mutually profitable transaction, the First Nation, the beneficial owner, allows a developer to move forward with a project, in return for agreed-upon consideration. Seen in this light, IBAs are a business transaction like any other, and they clearly can confer major economic benefits upon some First Nations. But the lack of clarity in the quasi-property right created by the duty to consult can also undercut other First Nations while imposing costs upon the larger Canadian economy. Three major examples illustrate the point.

Mackenzie Valley pipeline

In 2005, the Mackenzie Valley pipeline, which had been delayed for 30 years by the Berger inquiry and various land-claim negotiations in the Northwest Territories, was finally ready to go forward, after TransCanada Pipelines offered the NWT native groups a one-third ownership share. But the Dene Tha’, a group of seven bands in northwestern Alberta, were still opposed, and got a ruling from the Federal Court that, in light of *Haida Nation* and *Mikisew Cree*, they had not been adequately consulted (DENE THA’ FIRST NATION V. MINISTER OF ENVIRONMENT ET AL., 2006 FC 1354). While the government was working through the consequences of this

new delay, discoveries of shale gas across North America caused the price of natural gas to fall dramatically. TransCanada withdrew from the project, and the First Nations of the NWT who had wanted to participate never got the benefits they had negotiated.

Northern Gateway pipeline

The duty to consult also played a crucial role in killing the Northern Gateway pipeline. The proponent, Enbridge, negotiated impact and benefit agreements with 45 First Nations and Métis communities along the route, while the Joint Review Panel commissioned by the National Energy Board and the Department of the Environment handled the legally required process of consultation. Approval by the National Energy Board and the federal cabinet followed. But the process had taken so long that the federal government changed as a result of the 2015 election, and newly elected Prime Minister Justin Trudeau announced a moratorium on tanker traffic off the coast of British Columbia (CBC NEWS, 2015). Then the previously obtained federal cabinet approval was overturned by the Federal Court of Appeal on the grounds that, although the Joint Review Panel had adequately consulted First Nations, the federal government had not sufficiently done so in the final phase of the process (PROCTOR, 2016). Enbridge has now thrown in the towel, writing off ten years of work and about a billion dollars in costs incurred in developing the proposal and carrying out negotiations with local communities. The First Nations that had negotiated IBAs got nothing for their effort.

Kinder Morgan and the Trans Mountain pipeline

In 1953, the Trans Mountain Pipeline, carrying oil from Alberta to Burnaby, British Columbia, was opened with a capacity of about 260,000 barrels a day, later increased to 300,000. In 2013, the American pipeline company Kinder Morgan, which had acquired ownership of Trans Mountain, filed an application with the National Energy Board to twin the line, almost tripling capacity to 890,000 barrels a day. The additional throughput would include a lot of diluted bitumen from the Alberta oil sands.

The proposal drew immediate and vociferous opposition from west-coast environmentalists, many BC politicians, and some First Nations. Yet after a favourable review from the National Energy Board, the federal cabinet headed by Liberal Prime Minister Justin Trudeau approved the expansion on November 29, 2016. Shortly thereafter, British Columbia's Liberal premier Christy Clark also announced support; but her government lost the 2017 provincial election and was replaced by a coalition of the New Democrat and Green parties, which had vowed during the campaign to block the pipeline. In spring 2018, Kinder Morgan announced that

it was suspending work on Trans Mountain because of all the political obstacles. Three months later, the federal government announced that it would pay \$4.5 billion to purchase the existing pipeline including expansion rights.

Throughout the five-year process, Kinder Morgan had negotiated (much of it done personally by Ian Anderson, president of Kinder Morgan Canada) mutual benefit agreements with First Nations located on or near the route of the pipeline. As of spring 2018, Trans Mountain was claiming the support of 43 Indigenous groups, 10 in Alberta and 33 in British Columbia (TRANS MOUNTAIN, 2018), but would not reveal the names of these groups because of confidentiality agreements. Combing through NEB filings, investigators from the Canadian Broadcasting Corporation (CBC) published a list of 42 supporters, 10 in Alberta and 32 in British Columbia (BARRERA, 2018B). Four of the British Columbia and three of the Alberta supporters are Métis or non-status Indian organizations without specific land rights and not recognized as First Nations by the federal government. All the others are recognized First Nations whose reserves and/or traditional territories or waters are crossed by the pipeline.

Meanwhile the duty to consult was carried out in two main stages, the first organized by the National Energy Board and the second by the federal cabinet. After approval was recommended in both stages, ten hold-out First Nations attacked the consultation process in the Federal Court of Appeal, where they won a stunning victory, announced in September 2018 (*TSLEIL-WAUTUTH NATION V. CANADA (ATTORNEY GENERAL)*, 2018 FCA 153). As in the Northern Gateway case, the court found fault with the final stage of consultation organized by the cabinet, holding that it consisted of just one-way note-taking rather than genuine two-way communication.

At the time of writing, it is not clear whether the Trans Mountain expansion will go ahead. Regardless of whether it is eventually built, the history to this point vividly illustrates the perils of the consultation process. After five years of consultation preceded by years of planning, Kinder Morgan gave up and sold both the existing pipeline and the expansion plan to the government of Canada. Perhaps the \$4.5 billion purchase price incorporated adequate compensation to the company for its time and effort, but the signal to potential investors in Canadian resource industries was highly negative. Financial analysts were asking whether it was even possible any longer to build a major project in Canada. Foreign investors had already been exiting the oil patch (GREEN, 2018). Taxation and other regulatory issues were important factors in this capital flight, but the Trans Mountain decision was bound to make potential investors even more skittish about putting money in the industry.

On top of the loss to the Canadian economy, First Nations that wanted to participate in the resource sector once again lost out. In the three pipeline failures

discussed here, dozens of First Nations hoping for IBAs have had their hopes dashed. Further upstream, First Nations that are not on pipeline routes but are involved in the industry as producers or service providers also lost out. Although no quantitative assessment can be done, it seems likely that the benefits conferred upon some First Nations by the duty to consult are more than balanced by the losses imposed on others. Perhaps the 207 First Nations whose current or potential stake in the industry has led them to join the Indian Resource Council will find a way to change the climate surrounding consultation and make it more productive for those who want to benefit from participation (BUFFALO, 2018).

Resource Revenue Sharing

Some Canadian First Nations are now demanding a share of government resource revenues as a matter of right. The Federation of Saskatchewan Indian Nations (FSIN) took this position, which was also adopted by Saskatchewan's New Democratic Party in the 2011 provincial election, when the party's platform spoke of "negotiating a possible Resource Revenue Sharing arrangement with First Nations communities" (SASKATCHEWAN NEW DEMOCRATS, 2011: 10). The governing Saskatchewan Party, however, rejected this demand, on the theory that natural resources belonged to all the people of Saskatchewan and the revenues should be used for purposes that benefit everyone, including First Nations. Premier Brad Wall later said, "Our position will remain unchanged as long as I am premier, as long as this government is in office, that there will be no special deals for any group regardless of that group in terms of natural resource revenue sharing" (MCCARTHY, 2013).

The Saskatchewan Party got the better of the political debate in 2011, winning 64% of the popular vote and 49 of 58 seats. Nonetheless, the demand for resource revenue sharing moved to the national stage with the replacement of Shawn Atleo by Perry Bellegarde as National Chief of the Assembly of First Nations (AFN). Bellegarde, a former provincial chief of the FSIN, has long advocated resource revenue sharing, and he emphasized the need for it in his first speech after winning the AFN election: "If our lands and resources are to be developed, it will be done only with our fair share of the royalties, with our ownership of the resources and jobs for our people. It will be done on our terms and our timeline" (KENNEDY AND WARNICA, 2014).

Resource revenue sharing is now not only a position of the Assembly of First Nations; it has received support from Ken Coates, a respected scholar writing for the Macdonald-Laurier Institute:

Resource revenue sharing is different than the impact and benefit agreements and collaboration agreements that resource companies have been negotiating

with Indigenous communities. Revenue sharing involves money from the provincial and territorial governments and would be on top of any funds secured by the Aboriginal community from their relationships with the companies. (COATES, 2015: 11)

In March 2015, a joint working group of the federal government and the AFN also recommended revenue sharing as part of the way forward, along with aboriginal participation in planning and execution of resource projects. The working group did not take a firm position on how revenue sharing could be carried out, calling rather for consultation with First Nations, various governments, and technical experts.

The First Nations Tax Commission, chaired by Chief Manny Jules, has also entered the debate, suggesting that First Nations could derive resource revenue through taxation:

Royalty sharing with provinces is inadequate. First, many provinces do not want to do it because First Nations are a federal responsibility ... Negotiating revenue arrangements with companies is bad for investment. It is time consuming, uncertain and expensive. It delays projects, adds to their costs and makes them less viable ... A better way to provide certainty for investors and a sustainable and predictable long term revenue stream would be to replace both these arrangements with a First Nations tax that could be applied by First Nations to resource development in their territories (FNTC, 2014).

Resource revenue sharing might indeed be attractive if it could replace the repeated negotiations that now lead to impact-benefit agreements (IBAs). Reducing transaction costs surrounding natural resource projects would be a victory for everyone. But that is unlikely to happen because, apart from the First Nations Tax Commission, Indigenous leaders are demanding resource revenue sharing on top of IBAs rather than as a replacement for them.

Sharing of specific resource revenues

Indigenous people already receive revenue from the development of natural resources. Following are some of the highlights:

- ♦ First Nations receive the royalties from oil and gas discovered and produced on Indian reserves. (The eight Métis settlements in Alberta also have a royalty-sharing scheme with the province.)
- ♦ Modern land-claims agreements in the Yukon, Northwest Territories, Labrador, northern Quebec, and British Columbia contain complex schemes of

revenue-sharing. Typically, the aboriginal communities own some lands outright and have resource rights in more extensive areas. In all areas covered by these agreements, no resource development will take place that does not result in a flow of revenue to aboriginal communities, although complicated, lengthy, and expensive negotiations are often involved.

- ♦ Since 2008, British Columbia has followed a policy of sharing resource revenues from specific projects, including mining, forestry, and hydroelectric power (COATES, 2015: 18–19).
- ♦ As discussed in chapter ten, natural resource projects located near aboriginal communities are generally accompanied by IBAs that provide for employment and training programs, contracting out of services to aboriginal providers, and direct payments to the local community. Companies might do this in any case in order to create a local work force and supply network; but they have also been led in this direction by the Supreme Court’s *Haida Nation* and *Mikisew* decisions, which mandated consultation with aboriginal communities.

What these programs have in common is that they are all tied to the development of specific natural resources in specific places. First Nations or Métis communities that happen to be located on or near hydrocarbon reserves, or mineral deposits, or merchantable timber, or rivers with hydroelectric potential, can receive substantial benefits through payment of royalties and participation in the economic activity. These payments may impose some costs on government and industry, but they also create positive incentives for aboriginal communities to participate in resource development on terms that they can negotiate. They are thus win-win because they lead to the creation of new wealth (“making”), not just the redistribution of existing wealth (“taking”). As the Montreal Economics Institute has said about the complex web of agreements among the Cree of northern Quebec, the government of Quebec, and resource companies developing mines and hydroelectric power in the region, “This development model, in which *the economic incentives of all of the parties are aligned* [emphasis added], holds much promise for the future” (DESCÔTEAUX, 2015).

General resource revenue sharing, in contrast, is an abstract idea, not tied to specific projects in specific localities. Although no detailed proposal is available for analysis, it seems that the idea itself, as generally propounded, would entitle all First Nations to a share of the proceeds of all resource-based economic activity anywhere in Canada. This raises formidable legal and economic difficulties, of which the major ones will be examined below.

Federalism and property rights

The basic plan of the Canadian constitution is that the public lands and minerals situated within the provinces belong to the provinces (*CONSTITUTION ACT, 1867*: s. 109). The Judicial Committee of the Privy Council ruled in the *St. Catharines Milling* case that lands and resources acquired through the Numbered Treaties belonged to the provinces, even though the federal Crown had negotiated the treaties (*ST. CATHARINES MILLING AND LUMBER COMPANY V. THE QUEEN*, [1888] UKPC 70). The ownership of land and natural resources was extended from the original provinces of Ontario, Quebec, New Brunswick, and Nova Scotia to other provinces as they were admitted to Confederation. The only exception was for Manitoba, Saskatchewan, and Alberta. Manitoba was so sparsely settled when it became a province in 1870 that the federal government decided to retain control of public lands and natural resources in order to manage immigration and the construction of railways during the subsequent era of nation-building; and the same treatment was extended to Saskatchewan and Alberta when they were admitted to Confederation in 1905. Ownership of public lands and natural resources was not extended to the Prairie Provinces until the *Natural Resource Transfer Agreements* of 1930 (FLANAGAN AND MILKE, 2005).

According to Ken Coates, “First Nations argue—as yet without agreement from the courts—that this transfer occurred without their permission and without consultation. The resource transfer, in their estimation, should have accommodated Aboriginal interests and should have provided for a significant return to the First Nations in the treaty territories” (COATES, 2015: 14). It is true that there was no consultation with native people when the *Natural Resource Transfer Agreements* were negotiated, but that would seem to make no legal difference. The *Constitution Act, 1982*, which in s. 35 gave constitutional status to “the existing aboriginal and treaty rights of the aboriginal peoples of Canada,” also listed the *Natural Resource Transfer Agreements* as part of the written constitution of Canada. It is a settled tenet of constitutional law that one part of the constitution cannot be used to overturn another part; all must be read together (*REFERENCE RE BILL 30, AN ACT TO AMEND THE EDUCATION ACT (ONT.)*, [1987] 1 S.C.R. 1148).

In short, Ontario, Manitoba, Saskatchewan, and Alberta own their public lands and natural resources without Aboriginal encumbrance on the title, save for continuing rights to hunt and fish on Crown lands as mentioned in treaties. In light of the Supreme Court’s recent jurisprudence, the same cannot be said of most parts of British Columbia, where Aboriginal title was never surrendered by treaty. It is also possible that future judicial decisions may cast a cloud over provincial resource control in southern Quebec and the Atlantic provinces, where there were treaties of

peace and friendship but not agreements to surrender land. But in Ontario and the Prairie provinces, the provinces own the property rights, except in federal enclaves such as Indian reserves and national parks.

There is, therefore, no convincing legal argument that First Nations have a legal or constitutional right to a share of resource revenues in Ontario and the Prairie provinces. First Nations will sometimes say that the treaties were only for the sharing of the land, not the sale, or that what was sold in the treaty were only surface rights, the “plough’s depth” argument. But these claims, based on oral “traditions” that only began to appear generations after the treaties were signed, are contradicted by the plain written text of the treaties (FLANAGAN, 1999). No authority, not even the federal Parliament, can impose a national scheme of resource revenue sharing because Parliament cannot legislatively override provincial constitutional rights. Resource-owning provinces will have to agree to whatever might be done in this field.

Incentives

Proponents of resource revenue sharing also rely on redistributive arguments, as shown in the title of Coates’s paper, *Sharing the Wealth* (2005). Yet from the standpoint of a market economy, wealth is not something that exists in order to be shared or “taken.” Wealth arises from “making”—creation through human ingenuity; and those who contribute to its creation—resource owners, inventors, investors, workers—are rewarded in proportion to the market value of their contribution. This understanding of how wealth is created furnishes a basis for judging proposals for resource revenue sharing, and the incentives that those proposals would generate. Existing forms of specific revenue sharing generate incentives for native people to become involved in wealth creation. First Nations and Métis communities receive royalties only if resources are actually discovered, produced, and sold. Individual members of these communities find employment and contracting opportunities only if the project becomes a reality. As in private-sector labour relations, parties may bargain hard to maximize their share of the proceeds, but they understand that they will get nothing unless the project can proceed.

But what can be said about proposals for general revenue sharing? What type of incentives would they create? In the absence of detailed proposals, it is difficult to be sure, but certain features seem intrinsic to general revenue sharing. By its very nature, general resource revenue sharing has to involve a large jurisdiction within which revenues will be pooled for distribution. Aboriginal advocates sometimes suggest that this jurisdiction could be the whole of Canada, but that is unlikely to happen, because of provincial ownership of natural resources. A more likely outcome would be a set of different provincial revenue-sharing plans.

What would be the principle of sharing? Would it be the equality of First Nations—each to receive an equal share of whatever is to be divided? Or would it be the equality of aboriginal persons, so that First Nations would receive revenues in proportion to their population? Or would it be need, so that poor First Nations would receive all or most of the distribution? Or some politically negotiated compromise based on all these principles?

Each principle has an obvious rationale but also faces obvious objections. If need is the only criterion, First Nations that have taken the initiative to create wealth for themselves and their members are penalized if some of their wealth is redistributed to others. But if need is ignored, First Nations that are already wealthy receive additional revenue. If population size is ignored, small First Nations receive as much as large ones, even though the latter face an obviously greater demand for providing services to their members. But treating First Nations as equal units recognizes the fact that each has its own government that must be financially supported.

When principles of distribution come into conflict, compromise solutions sometimes emerge. But what about incentives for wealth creation? Any general scheme of resource revenue sharing will create incentives for free riding. Most economic development projects create at least temporary nuisances of noise, dirt, odour, and visual degradation as buildings are erected and infrastructure is added. That is particularly true of natural resource projects, some of which, such as forest clear-cutting, open-pit mining, and hydroelectric power generation, may have effects that last for decades or centuries. Other things being equal, most of us would rather have the revenue without the environmental disruption and loss of amenities. The same logic would apply to First Nations that were guaranteed a share of resource revenues generated throughout the province even if they chose not to develop the resources on and around their own reserves. Specific resource revenue sharing generates incentives to create wealth, but general resource revenue sharing generates incentives to take wealth created by others. It is the familiar *n*-person Prisoner's Dilemma: if everyone reasons in the same self-interested way, nothing will get developed. Of course, Prisoner's Dilemma is just a mathematical model, and in the real world some players usually cooperate even if ruthless self-interest predicts non-cooperation. But if some First Nations opt out of local economic development because they get money from natural resource projects elsewhere, their members will be deprived of opportunities for individual advancement through employment and contracting.

Conclusion

Current programs of revenue sharing are admittedly complicated and often expensive to negotiate, but they do create positive incentives for action. First Nations negotiate over resources on their land reserves or in their "traditional territories."

The latter term refers to lands of which First Nations had historically made use, and these are usually (though not always) contiguous with, or reasonably close to, where a First Nation now lives. Under localized revenue sharing, First Nations can aim for revenues from resource development knowing that they will also have to accept concomitant nuisances and impact upon the environment. They get the benefits and bear the costs, thus making rational decisions possible.

This union of cost and benefit would be sundered in a general scheme of resource revenue sharing stretching across a jurisdiction as large as Canada, or even one of the large provinces. First Nations would obtain financial benefits from far-away resource developments that impose no cost on them, while they would bear full costs of near-by developments whose benefits would be pooled for distribution. The resultant incentives are a recipe for free-riding, which, if it became widespread, would diminish the overall pace of resource development while also reducing collateral opportunities such as jobs and contracts for individual members of First Nations.

The First Nations Tax Commission, however, continues to propose an Aboriginal Resource Tax (ART) that would avoid some of the most obvious problems of resource revenue sharing:

The FNTC is requesting support for the development of a comprehensive tax regime that interested First Nations would apply to major resource projects taking place on their traditional territories known as ART. The ART is a pre-specified First Nation tax that would be coordinated with other governments through tax reductions.

The ART could replace the present arrangements by which First Nations receive revenues from major resource projects. The ART will simplify the task of negotiating First Nation consent on major projects, it would improve the integrity of the tax system and the ability for First Nations to finance infrastructure. (FNTC, 2017B)

As described here, the ART has some attractive features. Because it would not be a generalized scheme to “share the wealth” between all First Nations and all of Canada, it would provide an incentive for First Nations to pursue natural resource development; each First Nation would levy the ART on projects within its own traditional territory. It would reduce transaction costs by replacing IBAs, obviating the accompanying negotiation and conflict.

There are some formidable obstacles, however, in the path of creating an ART. The concept of traditional territory is legally undefined, and two or more

First Nations often have overlapping claims to particular areas. Such overlapping claims would probably multiply if tax jurisdiction were involved. First Nations that feel they have done well with IBAs might not want to give them up for an untested ART system. And senior governments might not want to transfer important chunks of tax revenue to First Nations, as the proposal seems to suggest. The economic simplicity of the ART is desirable, but the political complexity appears hard to navigate.

Transfers and Off Ramps

Part Two of this book has documented how political and legal action can transfer resources to First Nations in the form of money and land (and associated natural resource rights), as well as new quasi-property rights such as the right to be consulted. The results of these transfers, however, seem mixed.

Money is primarily transferred through annual government appropriations, especially the federal budget. Because Parliament has to approve the budget, these transfers are nominally the result of legislation; but in reality the budget is controlled by the Minister of Finance and the Prime Minister, who also sets political strategy for the governing party. From small beginnings, the Indian Affairs budget grew almost unimpeded for decades until the federal government's fiscal straits caused some levelling off in the Chrétien and Harper years. But with the election of Justin Trudeau's Liberals, who deliberately appealed to Indigenous voters as part of their electoral coalition in 2015, growth has commenced again.

Another source of fiscal transfers arises from claims of historical injustice. Some of these, such as residential schools and the "Sixties Scoop," are outside the scope of this book because they result in payments to individuals; but the specific claims process has led to substantial transfers to First Nations communities (FLANAGAN, 2018C). The money is expended through the annual budget but the commitments arise from negotiations and judicial decisions rather than normal bureaucratic and political planning. Other instances, such as the Canadian Human Rights Tribunal's judgment on the inadequacy of First Nations' child protection, may result in direct pressures on Ottawa for greater budgetary funding of services (ASSEMBLY OF FIRST NATIONS, 2016).

The monetary transfers are real enough, but there is little evidence that they improve the well-being of First Nations Communities, as measured by the Community Well-Being (CWB) index. In the decades of rapid growth of Indian Affairs spending, the average CWB of First Nations increased at about the same rate as the CWB of other Canadian communities. Various statistical tests show no

particular association with improvements in the CWB of First Nations that receive monetary settlements of specific claims. It seems that transfer of money in itself does not show measurable results.

Resource revenue sharing exists today in various forms for First Nations, as described in the previous chapter (oil and gas royalties on Indian reserves, agreements in modern treaties, special arrangements in British Columbia, IBAS). I did not attempt statistical research in this area because the necessary data are not available, being protected under the heading of commercial confidentiality. Yet it is obvious that resource revenue is not always associated with a higher CWB; some Alberta First Nations with very large oil and gas revenues have low CWB scores, while Fort McKay, which has never produced a drop of oil, has achieved high scores. If the necessary data can be made available, further research in this area would be valuable because resource-revenue sharing arrangements are becoming more common all the time. Based on the findings in this book, one should test a hypothesis along these lines: increased resource revenue will be associated with a higher CWB to the extent it makes the First Nation an active partner in the enterprise through management, investment, ownership, and job creation.

General revenue sharing on a national or provincial basis has been proposed but does not exist, so there are no data for analysis. However, as argued in the previous chapter, general revenue sharing would be unlikely to promote CWB because it is a pure form of “taking” that does not create specific incentives for further wealth creation. But I would not want to be dogmatic about this conclusion without seeing the details of a proposed scheme.

This book has also analyzed the transfer of land to First Nations through the treaty land entitlement program in Saskatchewan. (Actually, the transfer is indirect; the First Nation is awarded money, which it can then use to purchase land.) The finding of research on this program is that transfer of land seems unrelated to improvements in the CWB index unless the land is used intensively for economic purposes in urban reserves. In other words, what counts is not the transfer of land but the subsequent use made of it. The finding is suggestive but future research will be required to see if it applies to other forms of land transfer, which are crucial in modern-day treaties and sometimes make up part of specific-claims settlements. One study found that modern treaties have a more positive relationship with CWB than nineteenth-century agreements, but the researchers did not attempt to quantify the land factor (INAC, 2012).

In *Haida Nation* and *Mikisew Cree*, the Supreme Court of Canada created a new right for First Nations to be consulted before government could authorize resource development on lands to which they had a potential title claim or treaty-based harvesting rights. I have called this new right to be consulted a quasi-property

right, akin in some ways to a negative easement. Although in law it does not entail a veto, its exercise can add so much time and expense to resource development that proponents will go to great lengths to offer financial inducements leading to an agreement. It is obvious that the right to be consulted has resulted in large transfers to strategically situated First Nations, but the confidentiality of IBAs has impeded statistical analysis.

It is also apparent that the right to be consulted is a two-edged sword. Because many resource projects involve lands claimed by more than one First Nation, there is a big problem involving degree of consent. The courts have not laid down explicit guidelines about the challenges of consultation when large numbers of claimants are involved, leading to assertions that unanimity is required. In practice, the time and money involved in trying to reach unanimous assent has led to the failure or endless postponement of massive development projects such as the Mackenzie Valley, Northern Gateway, and Trans Mountain pipelines, as well as the Ring of Fire mining project in northern Ontario.¹⁵ The conjunction between the duty to consult and unclear decision rules was not the only factor in producing these stalemates, but it was a crucial one.

Lack of clarity about decision rules involving multiple participants has not only led to a waste of resources, it has denied the aspirations of First Nations wanting to leverage their right to be consulted to obtain jobs, contracts, and sometimes even equity ownership through an IBA. Because of this decision-making problem, the right to be consulted may have damaged more First Nations than it has helped.

In conclusion, “taking” can look like an attractive proposition for people who believe they have suffered injustice in the past. And it works, in the limited sense that the exercise of political and legal power can lead to the transfer of money and land and the creation of new rights leading to further transfers. But the evidence suggests that “taking” is not enough if the goal is to increase the well-being of First Nations. For that to happen, “taking” must lead to “making.” The transfer of money and land, or the creation of new property rights, must incorporate incentives for wealth creation. With the right incentives, First Nations will increase their own well-being through their own initiative. But creating the right incentives is a challenge for statesmanship, and no one can claim it is easy.

¹⁵ It probably would also have emerged as a major factor in the Energy East proposal had not the National Energy Board short-circuited the development process by changing the environmental rules for approval (POITRAS, 2018).

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