MASTERS IN OUR OWN HOUSE:
THE PATH TO PROSPERITY

Report of the Think Tank on
First Nations Wealth Creation
(1999-2002)

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Skeena Native Development Society

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PREFACE

The concept of starting a Think Tank on Wealth Creation had its initial origin in the cumulative experience and knowledge of the past two generations,that of my Father and Grandfather. Certainly, the determination to undertakethis sort of activity, also came from the recognition that there is an absence of an effective economic model that is friendly to sustainability (without creating dependency), and free market growth. This thought was the catalyst that brought and held the Think Tank together.

My late Uncle Heber Maitland, a Haisla and long-term elected Chief from Kitamaat, would often voice his frustration in dealing with the federal government, and in particular, the never-ending battle with the Department of Indian Affairs. He would often state, “we are nothing more then servants in our own house.” This statement has often come to represent similar frustrations for me at government’s lack of desire, commitment, and vision to change its policies with respect to Native Peoples. Early on in the Think Tank process, the Think Tank participants changed and adapted the phrase to read, “becoming masters in our own house.”

The objective of the Think Tank on Wealth Creation was to examine how wealth is created and how the journey of economic prosperity could be reached in a free market economy on reserve. What conditions and barriers exist that prevent the creation of wealth and prosperity? Inversely, what conditions must exist to build a meaningful and sustainable economy, especially absent from the creation and reliance on characteristics of dependency.

In doing so, we quickly arrived at the conclusion that we must also simultaneously examine why poverty exists, why people are poor, and what changes would need to be implemented which are absent from the insidious tools of dependency and expectation. Using international models and experiences, comparisons were drawn into the discussion for this purpose. Together with the diverse mix of the Think Tank membership, we were able to identify, explore, compare, and explain patterns common to the objective of creating sustainable free market economies.

Over the course of the term of the Think Tank, we firmly arrived at the conclusion that there are definite identifiable elements that lead to economic prosperity in a free market. Conversely, there are also factors that inhibit and are destructive to economic growth. Common to such factors includes mixing politics with business, having an ill defined governance structure where little or no rules exist, having an absence of private property, assuming that all politics is equal to good economic sense, and having a system that is replete with high transaction costs. In short any model that encourages and creates dependency creates high expectations, instability, and discourages investment and business growth.

While there is tremendous resistance to change, it is imperative that we define ourselves outside of, and away from the Indian Act. While there may be some merit to retaining some aspects of our “fiduciary relationship” with the federal government, it, nevertheless, remains our challenge to construct economies of prosperity that takes a different road then in the past.

The various cornerstones of this research by the Think Tank, as found in this publication, is a result of intense dialogue, and years of experience. While we utilized the expertise of Mr. Graham Allen

and Dr. Ronald Mitchell of the Think Tank to record and pen our conclusions, credit goes to every member of the group, both past and present. It is necessary to acknowledge and give credit to Mr. Allen and Dr. Mitchell for their tremendous contributions, as their skills were an asset. I am extremely grateful for those that participated actively and consistently throughout the entire term of the Think Tank. My job as Chairman was made easy due to the bright minds, openness, flexibility, and patience, especially as this related back to my own impatience and desire, at times, to want to "storm the castle." This publication is a result of the combined efforts of the entire membership on the Think Tank, and I thank you.

We also had the wonderful opportunity of invited special guests such as Mr. R. Derrickson, West Bank, and Mr. Edmund Wright, Nisga'a Lisims Government, who added value and considerable experience and insight to our discussions. Lastly, public gratitude must be given to the leadership and Executive of the Skeena Native Development Society for their support of this vision and encouragement of this process. This includes Ms. Marjorie McRae, President, Mr. Clarence Martin, Vice-President, and Mr. Raymond Jones Secretary/Treasurer. Without their express support, this work would not have been possible.

Mr. Clarence Nyce
Chairman, Think Tank on Wealth Creation
Chief Executive Officer, Skeena Native Development Society

CHAPTER 1
New Models for First Nations Economic Development

"Moon Face", was carved by Master Carver, Clifford Bolton, a well respected Elder Tsimshian from Kitsumkalum. Moon face presides over the world and its inhabitants with peace, kindness, and patience. This piece is displayed in the boardroom of the Skeena Native Development Society.

New Models for First Nations Economic Development

Beginning in 1999, the Think Tank on First Nations Wealth Creation, initiated and sponsored by the Skeena Native Development Society (a native organization specializing in capacity building and business development, met to consider two questions:

1. How can First Nations people in Northwest British Columbia be masters in their own house?
2. How can economic dependency be eliminated?

We came together motivated by a unifying theme: Why are First Nations communities economically impoverished and how can these communities find and follow a pathway to prosperity? To this end, we examined our own experience with on-reserve economies, particularly in the Northwestern region of British Columbia[1]. We then considered these experiences within a more global context, reviewing the work of authors such as de Soto [18], relevant research findings such as those at the University of Victoria[2] [19] and the results of the Harvard Project on American Indian Economic Development [23]. We were successful in our analysis, being now more able to discern and to integrate previously unconnected patterns and systems that are at the core of what plagues First Nations economies and, more importantly, to discover and assemble new ideas for how to change what has gone before... to make it possible to achieve prosperity.

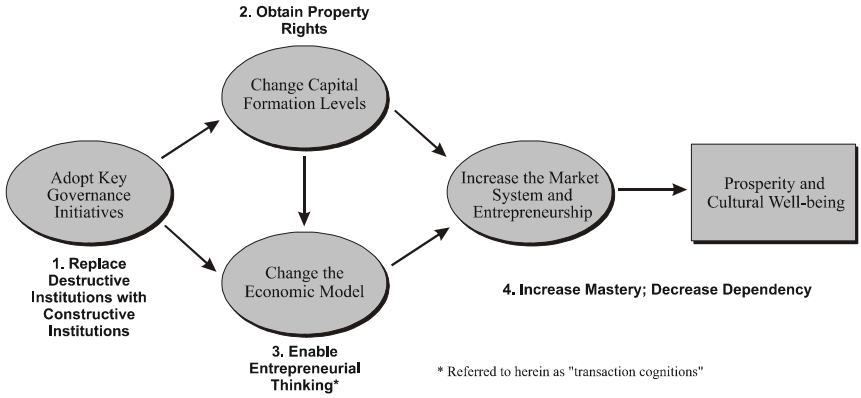
The approach we have taken is illustrated in the following diagram (Figure 1). As our deliberations progressed, we worked right to left in the diagram: from the desired end point towards the necessary beginning point. Thus, to increase mastery in the Native House and to decrease dependency, we first investigated the relationship between prosperity and increases in the market system and entrepreneurship. This led next to our considering changes in the economic model that would produce entrepreneurial thinking and also the needed changes in capital formation levels that come from viable property

[1] *From this point forward, all references to native people, aboriginal people, First Nations, etc. should be assumed to apply to the Northwestern BC area unless otherwise noted; although it appears to be likely that some of our insights and conclusions will apply more generally.*

rights (moving from "dead capital" to "live capital" in de Soto's language [18]). Finally, with these intermediate steps specified, we then addressed the key governance initiatives that would need to be adopted so that the on-reserve economic climate would be more favourable: to replace the present destructive institutions with constructive ones. Thus in this report, we identify the necessary beginning point for governance institutions, next property rights and then entrepreneurial thinking which will result, we believe, in increased economic mastery and decreased dependency.

FIGURE 1

The Think Tank Approach



Helpfully, our conclusions about a beginning point (reached independently) have been recently validated in a study of 72 former colonies throughout the world, in which William Easterly of the Centre for Global Development and Ross Levine of the University of Minnesota analyzed the relative importance for economic growth of various factors [24]. These researchers compared and contrasted geography, economic policy and institutions (meaning political stability, property rights, legal systems, patterns of land tenure etc.) to identify which of these is the most critical factor. They concluded that the creation of good institutions is the predominant reason for economic success and, hence, that the first challenge for development economics is to get from bad to good institutions. This is precisely the conclusion that we have drawn in our own deliberations; and this formed the foundation for the approach that we recommend. We explain the elements of our solution in this book,

but we describe them first in this introduction, presented according to the approach shown in Figure 1.

What do these "good institutions" look like? What institutional reforms are necessary? What model will move First Nations people from the current state of economic dependency to prosperity? As has been chronicled in other economic successes globally, how can a market economy and entrepreneurship within the context of cultural well-being be enabled? Through the Think Tank approach (Figure 1), we have identified the three essential cornerstones that form the foundations for this process:

1. The availability to First Nations people of governance powers and jurisdiction that will enable the market system to function;
2. The ability of First Nations people to control the use and development of their lands to enable capital formation;
3. The thorough understanding by First Nations people and relevant stakeholders of the economic model itself: the entrepreneurial thinking that needs to be enabled for effective entrepreneurship to flourish.

A system that successfully embraces these cornerstones will, in our view, create the institutions, make available workable property rights and enable the entrepreneurial thinking necessary to produce the prosperity and cultural well-being of First Nations people that comes from mastery in the Native House. This chapter introdues each cornerstone in turn, with more detailed emphasis on the economic model because of the previously noted requirement that it needs to be thoroughly understood to be fully useful.

1. FIRST NATIONS GOVERNANCE

We believe that, for a vibrant on-reserve economy to flourish, there is a need for genuine self-rule by First Nations people. This is because the economic environment that we envision can only be achieved by the creation of effective institutions of governance that are enabling of the market system and of entrepreneurial endeavour. With auspicious timing, the Federal

Government's currently proposed First Nations Governance Act, Bill C-7, provides for First Nations people to adopt individually tailored codes in three crucial areas: leadership selection, administration of government and financial management and accountability. Moreover, under the provisions of Bill C-7, First Nations people will be empowered to make laws in such areas as the regulation of business activities. We consider this proposed legislation to be a tremendous advance over the economically repressive provisions of the Indian Act, but still do not view it to accomplish enough in the creation of the necessary institutions.

To make Bill C-7 truly effective for the facilitation of the prosperity of First Nations people, we propose an additional provision for a fourth optional code, one that we are calling "the Prosperity Code," a system of institutions that flows from grass-roots community strategic plans. Using the criteria for governance that creates vibrant First Nations economies offered by Cornell and Kalt [23] and for governance that creates vibrant non-First Nations economies in general offered by Thompson [25], we have been able to identify a more comprehensive set of institutional conditions that are needed to replace the present destructive institutions with constructive ones. Further, we have ascertained that it comes down to what Cornell & Kalt [23] have called "cultural match" that will weigh heavily in determining whether an individualistic or collective model, for example, would be culturally appropriate for a particular community. To be "masters in your own house" should encompass the ability of a First Nation to implement whichever model its community chooses. It is our belief that a First Nation operating under all four codes and with a First Nation Strategic Plan in place (to ensure that a cultural match is created from the grass roots up) would have everything it needs to create the "good institutions" that are one of the crucial preconditions for prosperity.

Having made this claim, we do not wish to be misunderstood. For us, genuine self-rule means the kind of legal autonomy enjoyed by the Nisga'a and Sechelt, not a governance regime imposed by an umbrella Federal statute. Our recommendations do not do this. Rather, for First Nations that wish to do so, our recommendations provide a minimum set of necessary steps to put them on a path to prosperity that is based upon an increased market system and entrepreneurship. As noted earlier, these intermediate steps include mak-

ing changes to capital formation levels and changes to the on-reserve economic model. We introduce our ideas for capital formation next as we summarize our approach to rights to the land.

2. RIGHTS TO THE LAND

Our next conclusion is that property rights to their own land are critical for First Nations; this is a fundamental of being "masters in your own house". We realized early in our deliberations that we must accept the reality that the Indian Act has stultified First Nations people and their economies, and that this statute is justifiably disparaged for its destructive effects on capital formation. In Chapter 3, we evaluate the extent to which any desirable level of economic mastery is available under the Indian Act and conclude that, overall, it is not. We argue therein that, in fact, it would be surprising indeed for legislation that had disrupted and substantially impaired the traditional economies that had sustained First Nations people for thousands of years could do anything but lead—as it has—to dependency and wretchedness. We have concluded that the bad institutions that flow from the Indian Act, as it presently operates, cannot be changed to good ones without systemic change.

To us, the solution to addressing the mastery-destructive institutions of the Indian Act is straightforward: First Nations people need to own their own lands. This clearly conveys what mastery really means. Without such ownership, it is highly likely that First Nations people will continue to be economically powerless and therefore remain the dubious "beneficiaries" of what de Soto [18] has termed "dead capital": lands held in trust by Her Majesty the Queen in right of Canada that are unavailable to support capital formation. In our deliberations, we have noted the Nisga'a and Sechelt achievements of such mastery. We further noted, however, that, in the absence of ownership, an intermediate step towards mastery is offered by the First Nations Land Management Act. As more fully described in Chapter 3, we assert that, with a properly constructed Land Code under this statute, a First Nation could to some extent bring into being the property rights necessary to facilitate a market economy and the capital formation necessary to support entrepreneurship-based prosperity. We believe that even this inter-

mediate step represents a significant advance over the present Indian Act land regime.

One important facet of rights to their own land for First Nations is the ability to grant individual property rights. This we discuss in Chapter 3. It is not that we are advocating individual property rights per se; we are too aware of successful community-based property rights to be that simplistic. But the choice between an individualistic or collective model, or something in between, should be legally available to each First Nation, depending upon what it considers to be culturally appropriate. To be "Masters in your own house" when it comes to land rights should encompass the ability to implement whichever model a First Nation community wants for itself.

Of course, given the sufficient autonomy that is rooted in new governance methods and given the capability for capital formation that is rooted in land rights, there must still be a viable economic model available as an option to choose and to implement. We therefore turn to a discussion of the economic model that we recommend and how it can generate the new levels of entrepreneurial thinking needed.

3. THE ECONOMIC MODEL

For most readers, this may be the most difficult cornerstone to address because of the new ideas and new terminology that must be mastered for a thorough and workable understanding to be gained. With clearing this hurdle in mind, we are providing a more comprehensive introduction of this cornerstone.

To develop the economic model that we present, we have taken a pathway beginning with things as they are and have followed it back to the basics. Along the way, we discovered answers to our questions that we believe have never been considered as a whole. In the following paragraphs, we tell the story of how we found these answers.

The story starts in a seemingly unlikely place: with globalization. We believe that two waves of globalization [4] are at the root of poverty among First Nations people in Northwest British Columbia:

1. Globalization 1: the 1800's;
2. Globalization 2: the late 1900's.

We believe that mistakes have occurred in both eras—by all parties concerned—that have led to things as they are. We also believe that mistakes continue to occur that need to be corrected. Our path of discovery has uncovered the mistakes that have led to the present situation and the basics that are needed to move beyond it.

Globalization has not been kind to First Nations people. During the first era of globalization and under its extension, the Indian Act, the strengths of First Nations people were dissipated, weaknesses were magnified, opportunities were denied and threats to traditional economic means of support were entrenched due to the substitution for the healthy institutions of trade and commerce that existed pre-contact with the unhealthy institutions that were based in colonialism and conquest.

As the second era of globalization unfolds, we now ask what is needed to reverse the present unacceptable economic status quo and to accomplish effective economic development. In the Think Tank process, we have defined economic development to mean: *prosperity and cultural well-being*.

> To understand how this can be accomplished for First Nations people, we have identified the economic basics: the cornerstones of prosperity and cultural well-being. Our analysis has revealed some surprising insights, and it is on the foundation provided by these ideas that we have based our work on a viable economic model.

The Basics

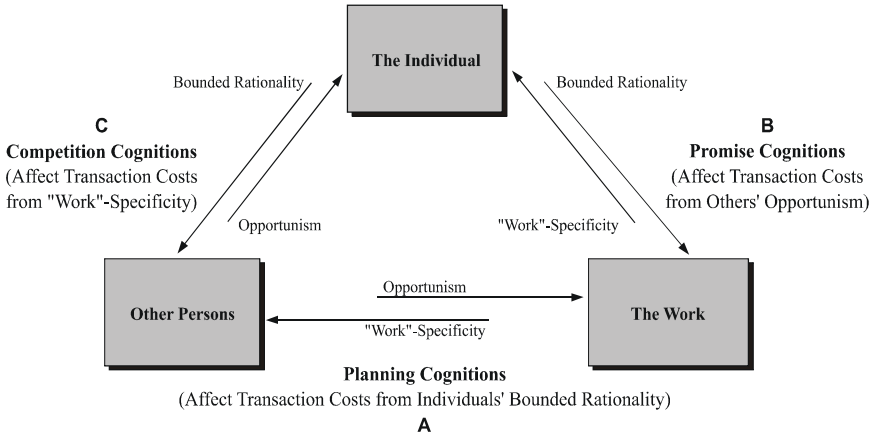
Whereas economic success during the first era of globalization required ships, guns and repressive institutions to overcome the objections of First Nations people to colonization, success during the second era of globalization now requires knowledge [4]. So, in the Think Tank process, we have naturally sought our solutions in the "people side" of economic development. Specifically, we have thoroughly investigated the new cognitive approach to economic development [5]. The cognitive approach is one that bases economic success upon effective economic thinking.

It was William James who stated that the greatest discovery of the modern age is that we become what we think about [6]. There is now a proven relationship between thinking and doing that is very well documented [7, 8]. Thus we realized in our work that the basics of economic development begins with the thinking processes of the people concerned. We therefore investigated the question: What are the thinking processes that people need in order to be successful in a market economy? This has led us to examine more closely the attributes of the core element in all economic activity: transaction thinking.

Transaction Thinking. By definition, a transaction occurs when an individual creates a "work" (some product or service) and then enters into an exchange relationship with other persons for the sale or acceptance of that work [9] as illustrated in Figure 2. Transaction cognition theory is the academic field that has most thoroughly explored the relationship of people's thinking to the capability to transact successfully.

FIGURE 2

The Elements of Transaction Thinking



Based on Gardner (1993); Williamson (1985)

We find that there are three sets of thinking skills that, as illustrated in Figure 2 (A, B & C), work together to create a successful transaction:

- Planning cognitions
- Promise cognitions
- Competition cognitions.

Acquiring these three thinking skill-sets is the primary means for a person to gain or expand the capability for entrepreneurial thinking.

The transaction cognitions that are the foundation of entrepreneurial thinking consist of specialized mental models or scripts [10-12] that guide individuals' responses to three principal sources of market opportunity. Planning-related thinking skills are important because better or worse planning affects the level of difficulty in making transactions happen. Promise-related thinking skills are necessary because transactions must happen through the willing participation of the other party in the transaction and this only occurs where the transaction "promises" to be beneficial. Similarly, competition-related thinking skills are necessary because, as human beings, we want to get the best product for our money—and so the work offered for sale must be the most competitive if it is to be purchased by the other person/customer. Where planning, promise and competition thinking skills (cognitions) are sufficient, then the difficulty of transacting that is caused by "transaction costs" is reduced and economic development happens. Recent research shows that entrepreneurs around the world have higher levels of transaction cognitions than do non-entrepreneurs [21].

Transaction Costs. The level of difficulty of transacting is the single greatest enemy of economic prosperity. Transactions become more difficult as "transaction costs" increase. Transaction costs are the costs of running the economic system. Transaction costs are like friction in a physical system [13: 48, 14: 19]. Economic opportunity occurs when entrepreneurs utilize planning, promise and competition cognitions to enact transactions that would otherwise fail due to transaction costs. This is why economic development may be considered to be a cognitive process [15] and why "entrepreneurial thinking" is essential to economic development.

In Chapter 4, we explain how this basic transaction cognition approach can be applied to assessing the difficulty of transacting among First Nations peo-

ple on-reserve. We have found on-reserve transacting to be many times more difficult than ordinary transacting in a market due to increased cognitive complexity.

Problem Areas to Address

In our analysis, we uncovered an uncomfortable reality: transacting on-reserve has too many fingers in the pie that should not be there and too few of those that should be. When compared to transacting in an ordinary market economy (e.g. the Canadian economy in general) on-reserve transacting is over three times as complex! This means that, on-reserve, transaction difficulty is up, and that transaction success is down or is non-existent. Where are these problem areas, why are they such a problem and what can be done about them?

It is our belief that these problem areas have arisen due to mistakes made in the past,[3] many of which appear to have been due to greed, ignorance or a combination of both. These mistakes occurred because the parties involved lacked sufficient information: both the facts and the analytical knowledge needed for the parties to recognize the scope of their errors; and this resulted in compounding negative consequences due to both errors of commission and of omission.

Lessons from Hindsight

In hindsight, it is much easier to see the nature of the economic error of past policies and how the consequences have been compounded over the years. If one were to assume for the sake of discussion, however, that throughout the world during the first era of globalization less powerful people were dispossessed and further that, during these periods of colonialism and imperialism, the mistakes made (in light of hindsight) were indeed horrendous; this nevertheless would not account for the disparity in results between those who were somehow able to correct the problems (e.g. in the case of Korea 1950

[3] *It is not our intention to attribute blame for past mistakes to any particular group or individual. As far as we can tell, many of these mistakes were made from the sheer ignorance of the parties involved at the time. However, with new analytical tools that are now available, it is clear to us that there is no reason for these mistakes or their consequences to be prolonged, and that there is every reason for them to be repaired as soon as possible.*

to 2000, or Singapore 1965 to 2000) and those who have been unable to do so (e.g. Ghana 1950 to 2000, or First Nations people under the Canadian Indian Act). Why is this the case?

The General Case. We note that both the identification of earlier errors, and the reasons for their compounding, are possible using the transaction cognition model. One original error occurred when First Nations people were economically sidelined. Because Globalization 1 was based upon the acquisition of natural resources, the colonialist model was necessarily geared towards the exploitation of colonies to extract natural resources. Thus, the people side of economic development was vastly under considered as was manifest, for example, by the sweatshops of the Industrial Revolution or by the economic marginalization of First Nations people under the Indian Act. The short sightedness of this error and its compounding negative consequences are still being felt throughout the world—especially as Globalization 2 replaces the Cold War system as the dominant transacting system on the planet [4]. It turns out that G2 is vastly larger than G1 and that rather than natural resources retaining their status as the wealth creating core of globalization, it is now people within knowledge economies that are the key factor in economic development [4].

Thus, the earlier marginalizations under the first globalization system and its aftermath system, the Cold War, may turn out to have created—due to the sheer size of G2— one of the greatest economic setbacks in history. The opportunity costs of G1 thinking are thus enormous, whether it is from ethnic wars, cultural revolutions, the marginalization of women or reserve systems for First Nations people. Under the new rules of Globalization 2, any mind that is under - or uneducated creates inevitable negative consequences for economic development as we now know it.

The Case of First Nations People. It can be assumed, without harm to the argument, that compounding of error in the case of First Nations people has occurred with the best of intentions. However, without a clear knowledge of the economic basics that has really only come into currency within the last few decades [14-16], it appears to have been impossible to foresee how the effects of past mistakes can have so compounded.

Given the ideas presented in the foregoing paragraphs, which have high-

lighted the importance of transaction thinking, one might logically expect that a solution to the disastrous state of on-reserve economies would be to reduce the transaction costs of economic development through increasing the possession by First Nations of the transaction cognitions (entrepreneurial thinking) necessary for transacting anywhere in the world [17]. Based on this argument, it would follow that this course of action would have begun to repair the damage caused by the original errors committed in Globalization 1. Instead, in attempts to redress the wrong, two complicating elements were introduced with profound negative economic consequences: (1) the ownership of First Nation lands by the Crown (as represented by the Minister of Indian Affairs), and (2) the insertion of Band Councils into almost every element of transacting on-reserve.

As we demonstrate in Chapter 4, the mandatory addition of these two additional parties to all transactions expands the cognitive complexity of successful transacting from the mastery of three necessary cognitive maps to the mastery of ten such maps (see Figure 3). Consequently, as in any "short circuit," productive energy has been erroneously and dangerously re-channelled into purposes that are useless or damaging to economic development. From an economic standpoint, these added layers therefore hinder rather than help. Transaction costs are up, and economic development is down.

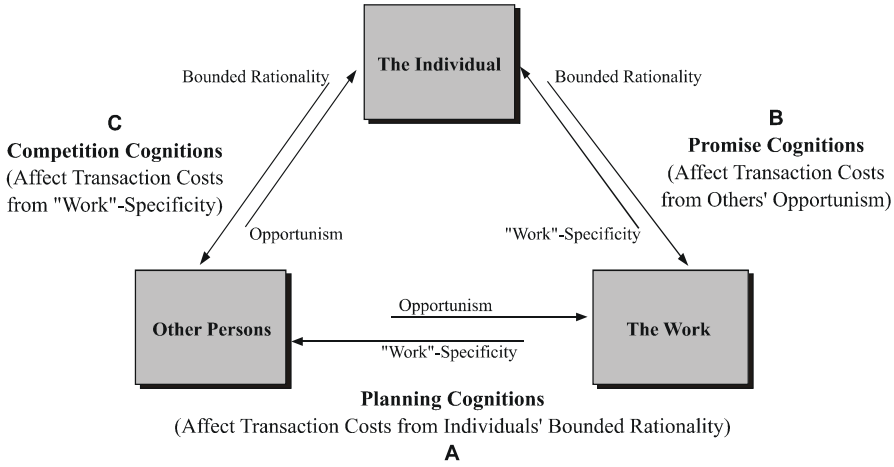
Thus, the mandatory addition of the Minister (Indian and Northern Affairs Canada: INAC) and the reserve system to the basic transaction creates transaction costs due to "dead capital" [18]. Dead capital means that people on-reserve have homes and buildings but not capital-building assets. Therefore, without the property rights (collective or individual) necessary to create capital, the complexity of capital formation is unduly burdened by transaction costs.

And the mandatory insertion of Band Councils into transacting is the equivalent of allowing the referees to also be "on-field" players in the game. The resulting confusion, opportunities for corruption and for venal decision-making also add transaction costs to economic development that doom it to bear burdens that ordinary transactions within a market economy are not saddled with. Thus, transactions fail and wealth that could and should be generated is instead dissipated in ineptly conceived bureaucracy. Chapter 4 will thoroughly explain and illustrate the two cases shown in Figure 3.

FIGURE 3

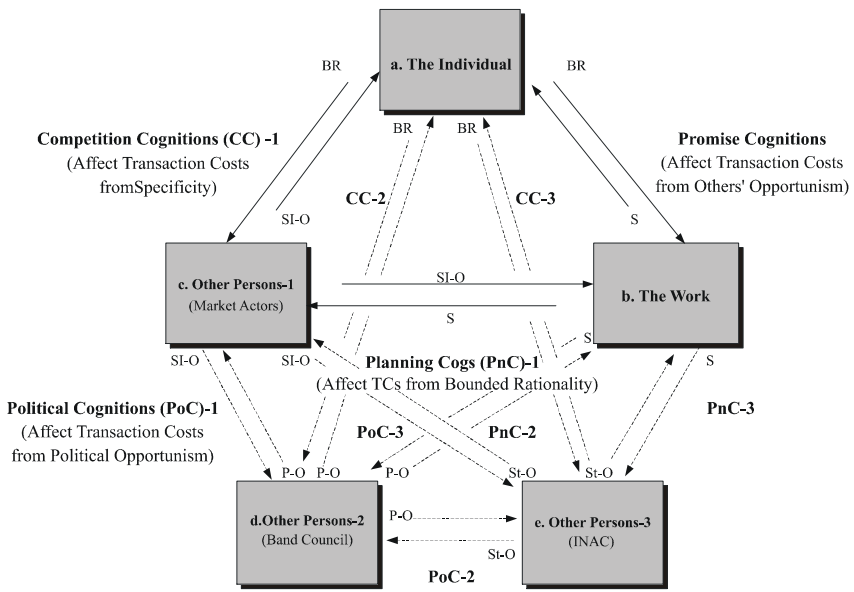
Entrepreneurial Thinking Complexity
Off- and On-reserve

The Off-reserve Case



Based on Gardner (1993); Williamson (1985)

The On-reserve Case



Focal Areas

It is the legacy of the Indian Act that the strengths of First Nations people have been dissipated, weaknesses magnified, opportunities denied and threats to traditional economic means of support entrenched. The First Nations economy in Northwest BC has flourished for many thousands of years more than it has languished. It is clear from history that, prior to first contact with Europeans during the first wave of globalization, the First Nations economy was vibrant and successful [1]. In the pre-contact economy in Northwest BC, economic strength among First Nations people consisted, for example, of highly expert knowledge in the utilization of the natural environment (e.g. use and management of the fishery). Now, as the result of a series of compounding mistakes that are rooted in the colonialist use of institutions, this has been reversed: from full employment prior to first contact to the present 64% overall unemployment rate [2].

At the time of first contact, First Nations people were not in possession of the technologies required to lead in the first wave of globalization which included, among other things, intercontinental ships, modern firearms and the institutions of imperialism. These weaknesses made us susceptible to the imposition of the institutions of colonization through the use of coercive power [3]. Further, First Nations people possessed no natural immunity to such diseases as smallpox or other European diseases. When confronted with European colonialism, therefore, these weaknesses magnified the dangers to economic well-being that are inherent to transacting among unequally powerful parties and, due to the power imbalance, minimized the likelihood of the continuation of economic prosperity for First Nations people after first contact.

From extensive discussions within our Think Tank meetings, it has become apparent that colonial policies applied towards First Nations people at the time were designed intentionally to dispossess us of power, both economically and politically. As a result of the reserve system and—as we will argue—the continued lack of access to the requisite tools, fair access to the modern economy has not been available. For example, in the on-reserve economy, it appears to be fairly common that there is pressure for the leadership to feel more accountable to the federal bureaucracy than they are to

their own people [26]. Economically, this institutional quagmire amounts to more than 130 years of damage under Indian Act institutions.

In addition to all of the above, economic threats have been introduced that have become entrenched and, as a result, continue to compromise the First Nations economy. Large areas of land have been occupied without treaty. The fishery and forests have been intruded upon. And, in the past, physical displacement of people has been the norm when the presence of First Nations people has been seen as an impediment to non-First Nations economic plans. And perhaps the greatest threat in the present era of Globalization 2 has been the systematic breaking of the spirit of First Nations people, such that an appreciation of education as an opportunity has instead been interpreted by many members of the on-reserve community to be a threat to cultural identity (because of misuse in past decades of education as a colonial tool). As a result, there is unfinished business: questions that must still be answered.

Unfinished Business

The most important question that we have addressed is: What is needed to repair this broken economic system and to take advantage of the opportunity presented by the next era of globalization to recapture and revitalize, and indeed repair, the system such that the vibrant economy that is possible can be a reality?

As noted earlier, in our Think Tank deliberations, we have concluded that there are at least three cornerstones of mastery within the Native House and for the elimination of dependency:

1. Constructive governance institutions,
2. Property rights, and
1. Entrepreneurial thinking.

Accordingly, Chapter 2 that follows addresses governance, Chapter 3 presents the state of play in the area of property rights and, finally, in Chapter 4, the nature and scope of effective transaction cognitions/ entrepreneurial thinking in the First Nations case is explored in a rigorously peer-reviewed

and published research article [19].

It is the conclusion of the Think Tank that this published work offers a pathway that leads towards the repair of past mistakes and offers real hope for economic development that is built upon sound economic and legal foundations. The economic model upon which our suggestions and recommendations are based implies that, through repair v. redress, we can provide a means to restore equality to the playing-field.

It does not mean that we suggest that INAC or Band Councils be eliminated. And it does not mean that we advocate individual v. collective property rights. Nor does it mean that we suggest all business to be good.

The economic model that we recommend does, however, exclude extra transaction cost-adding players from the marketplace: the field of play. It also means that First Nations people should consider adopting the First Nations Land Management Act, to allow dead capital to come alive for purposes of economic development. Further, it means that governance systems should be revised to support the foregoing. And, most importantly, it means that the real enemy of economic development is ignorance—the LACK of transaction/ entrepreneurial thinking.

Research has found that wealth creation is directly connected to entrepreneurial thinking in as many countries around the world as have been studied[4] [20, 21]. We believe that, as research continues, it will also be found that poverty is the result of the absence of these thinking patterns which is a likely extension of the foregoing research. Interestingly, in our informal studies to date among prospective entrepreneurs on-reserve in Northwest BC, we found no differences between the level of entrepreneurial thinking of First Nations pre-entrepreneurs and those of the non-First Nations pre-entrepreneurs represented by entrepreneurship students at a large BC university.

Thus, the pathway seems to be clear: foster high levels of transaction/ entrepreneurial thinking in a larger portion of the on-reserve population[5]; provide

4 *As of this printing, data have been collected and analyzed from Australia, Belarus, Canada, Chile, China, Czech Republic, France, Germany, Italy, Japan, Mexico, Russia, the United Kingdom and the United States of America.*

equal opportunities for on-reserve capital formation through attention to property rights; and adjust or transform governance structures to minimize the on-reserve transaction costs related to a Band Council governance system that is in need of an economic development-friendly overhaul.

How can First Nations people in Northwest BC be masters in their own house and how can economic dependency be eliminated? We believe that, by adopting key governance initiatives, by changing capital formation levels and by changing the economic model, the benefits of the market system and entrepreneurship will be increased, that damage from the past will be repaired, that preparedness for the opportunities of the knowledge economy will be maximized and that, thereby, prosperity and cultural well-being can be achieved.

[5] *We hope that it is not lost on the reader that the foundation for increasing transaction cognitions/ entrepreneurial thinking is a strong commitment to education. However, we have discovered that there are some methods of education that are more likely to produce transaction/ entrepreneurial thinking than are others [22]. And so we advocate models consonant with individual learning styles and the cultural pre-preparation that we find already exists in NWBC.*

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CHAPTER 2

First Nations Governance

"The Men of Medeek" pole, was carved by internationally renown Master Carver, Sam Robinson, a Haisla from Kitamaat. This piece, which covers some of the major highlights of the Medeek Story, resides in the boardroom of the Skeena Native Development Society.

FIRST NATIONS GOVERNANCE FOR ENTREPRENEURSHIP

> *…at the heart of successful Indian economies lies genuine self-rule. The evidence is that you are unlikely to have one without the other.*[1]
>
> Dr. Stephen Cornell

We agree with Dr. Cornell. From our own research and experience, effective governance, invariably meaning self-government, is a cornerstone for the facilitation of entrepreneurship on reserve lands. We mean by this the creation of effective institutions of governance that produce an environment in which capital formation can proceed with confidence, and prosperity can be built.

Although it is, of course, easy to call for effective First Nations governance, its achievement has proven to be surprisingly challenging. When we examine its modern history, the results achieved for the effort made are scant. Were it not for the recent (and timely) initiative by the Federal Government in this area, we would have little optimism for the success of what we are about to propose. But the pertinent thinking and the momentum for change within the First Nations community do appear to be coming together rather convincingly, so we are encouraged to suggest innovative possibilities.

The Implications of Past Legislative Initiatives:

Recognizing the sheer difficulty of achieving individual self-government through amendment of the *Indian Act* has propelled a few First Nations into consideration of alternative legislation. This fairly recent process has embraced proposals both for individual treatment and for "opting in" to a more comprehensive governance statute.

The first individual approach of which we are aware is that for "a separate Musqueam Lands Act",[2] proposed in the 1975 Submission to the Minister of

1 *"Nation Building and the Treaty Process". Proceedings of the Treaty Forum on Speaking Truth to Power II, p.21. Published by the B.C. Treaty Commission, 2001.*

2 *The Alliance of the Musqueam, Sechelt and Squamish Bands, "Submission to the Minister of Justice and Minister of Indian Affairs, February 1975: p.33.*

Justice and Minister of Indian Affairs by The Alliance of the Musqueam, Sechelt and Squamish Bands. This brief set forth the view that Ministerial jurisdiction over the affairs of "a sophisticated and highly advanced Band"[3] will end up "…actually proving quite prejudicial to effective business operation and self-government".[4] Hence, the Musqueam Band was proposing to take title to its reserve lands, perhaps through separate legislation, in order to attain complete independence from the Department of Indian Affairs.

The Musqueam initiative was not pursued but, in October 1981, a Sechelt delegation appeared before the Canadian Human Rights Commission to argue for its rightful place within Canadian society. The Sechelt brief declared:

> What we want is quite straightforward. We want to be masters of our own destiny as an Indian Band, liberated from D.I.A. suppression and control. This can only be realized by dislodging the jurisdiction of the present Indian Act over the Sechelt people. Can this really be so difficult to achieve? [5]

At the time the Minister of Indian Affairs, the Honourable John Munro, was engaged in the widespread promulgation of what his Department called "companion legislation" (i.e. "companion" to the *Indian Act*). There was nothing wrong with the concept, but it was articulated poorly and, as drafted, offered Bands little more than another Federal straightjacket. The Sechelt Band fought against such inflexibility and high-handedness and, in the Human Rights Commission brief, commented:

> At various times, successive Ministers have proposed a completely new Indian Act, piecemeal amendments, a charter system for Bands to opt into and, more recently, "companion legislation." All of this has foundered and will continue to founder on account of the Federal Government's deliberate refusal to acknowledge one clear and essential principle: That Indian Bands have widely divergent needs and should accordingly be allowed to advance at their own chosen pace. This was the fundamental principle espoused by The Alliance. It is the one upon which we hang our hats today. Because the expenditure

3 *Ibid., p.33.*

4 *Ibid., p.33.*

5 *Sechelt Indian Band, "Submission to the Human Rights Commission", October 1981: p.1.*

> – dissipation? – of literally millions of dollars of public funds on an Indian Act revision process predicated on rigidity of option and majority acquiescence is misguided, to put it mildly. Yet it still goes on. Like a recurring nightmare, the current game of "companion legislation" comes with built-in features and a consultative procedure that guarantee its eventual rejection. But the bureaucrats carry on anyway, abusing taxpayers' dollars and trampling on our hopes. It is folly indeed.[6]

Instead, the Sechelt representatives wished to make it known that the Band had drafted and widely circulated its own legislative proposal, tailored entirely to its own needs. The brief consequently ended with the following plea:

> We have no faith in the Federal Government's professed intentions regarding the Indian Act. Our one hope lies in the proposed Sechelt Indian Band Act, legislation that will encompass what we want to do and will unshackle us accordingly. For we are ready to control our own affairs completely. We want no further dealings with the millstone known as the Department of Indian Affairs. Let us go![7]

Although Sechelt's appearance before the Human Rights Commission did not bear immediate fruit, it did become part of a generalized impetus towards Federal action. Towards the end of 1982, the Standing Committee on Indian Affairs made clear its intention to establish a Sub-Committee on Indian Self-Government having as one of its principal tasks consideration of new legislation. On December 22, 1982, the House of Commons went further than this and appointed a Special Committee reporting directly to the House with terms of reference identical to the (now superseded) Sub-Committee. Encouraged by this development, the Sechelt Band decided to abandon its endeavours towards individual legislation and approach the challenge on a broader front by means of enabling legislation for any Band that wished to achieve self-government. An *Indian Band Government Act* was accordingly drafted, this proposed *Act* allowing any Band, at its option, to leave the jurisdiction of the *Indian Act* and to become self-governing under its individual Band charter or constitution.

Sechelt's proposed *Indian Band Government Act* received a positive

6 *Ibid., p.2.*

7 *Ibid., p.3.*

response from the Special Committee when it was presented on February 15, 1983. In the Committee's eventual report there were favourable references to the need for an interim legislative step whilst awaiting constitutional entrenchment of the right to self-government. Although the widespread wish to proceed with this constitutional recognition was carefully acknowledged, the Special Committee also provided for the legislative path in the following passage:

> Many witnesses opposed any legislation prior to the recognition of self-government and/or the settlement of land claims or treaty matters, believing that such legislation would be restrictive rather than expansive. The Committee recognizes the validity of these concerns and has taken them into account in proposing legislation as an important part of the process of federal recognition of Indian governments in Canada and, ultimately, of constitutional entrenchment.
>
> A broad framework of general principles would appear to be the only model that would both permit consensus to be achieved and be flexible enough to accommodate a great diversity of arrangements, ranging from those set out by the Sechelt Band and to those based on traditional laws and customs. Not only would Indian self-government be enhanced, but the special relationship of the federal government with Indian peoples, and any residual federal responsibilities to them, would be reaffirmed.[8]

After then analyzing what it termed "The New Context for Legislation", the Special Committee concluded with the following:

> The Committee recommends that the federal government commit itself to constitutional entrenchment of self-government as soon as possible. In the meantime, as a demonstration of its commitment, the federal government should introduce legislation that would lead to the maximum possible degree of self-government immediately. Such legislation should be developed jointly.[9]

Unfortunately, like so many far-sighted and innovative recommendations of that period, the Special Committee Report languished, perhaps read but certainly not acted upon. The Sechelt Band returned to its original quest for individual legislation and, thanks to a change in government, was finally

8 *House of Commons, "Minutes of Proceedings of the Special Committee on Indian Self-Government", October 12 and 20, 1983: p.48.*

9 *Ibid., p.50.*

successful with the proclamation of the *Sechelt Indian Band Self-Government Act* on October 9, 1986. Sixteen years later this remains the only self-governing statute for an individual First Nation in Canada! In the face of virtually universal dislike of the *Indian Act*, this prolonged period of no visible results warrants analysis. Only the Nisga'a achieved full self-government during these years, but this was as part of their Treaty negotiation, not just a governance initiative. So we will return to this question later.

The Federal Initiative of 2001:

There have been various proposals over the past few decades to deal with the perceived deficiencies of the *Indian Act*. They ranged from the "White Paper" proposal of 1969 to abolish the whole thing; to the 1981 notion of "companion legislation"; to the ongoing piecemeal amendments in such areas as membership and land designation. But in all this time no Minister had pinpointed the area of First Nations governance as requiring specific attention. Now, with his announced initiative of April 30, 2001, the Honourable Robert Nault, Minister of Indian Affairs, has brought governance to the forefront of the Federal Government's aboriginal agenda. In his explanatory letter to all Chiefs and Councils, the Minister said:

> I would like to be clear from the outset that this legislation has yet to be drafted. It is also important to clarify that this initiative is not intended to replace treaties or to serve as a substitute for self-government. It will, however, constitute a strong interim step for effective governance. First Nations will be able to move forward at their own pace to other governance options with this important governance building block in place.
>
> This proposal to strengthen First Nations governance through legislative change is not only important in its own right, but it will also assist First Nation communities to achieve sustainable growth and facilitate self-government in the future. Building strong and stable First Nations governments won't happen overnight, but we are taking another important step forward with the discussions of this proposed governance legislation.[10]

10 *Honourable Robert D. Nault, Minister of Indian Affairs and Northern Development. Letter to Chiefs and Councils, "First Nations Governance Legislative Initiative", undated.*

Some interesting points arise from this explanation. First, it is clear that Minister Nault is moving towards the interim legislative step advocated by the Special Committee (although the attainment of full self-government will not be part of this process). Second, the lessons of the ill-fated "companion legislation" appear to have been learned, and there is to be widespread consultation before legislative drafting. Third, the Minister has recognized that some First Nations will wish to move forward with "other governance options". Finally, he was clearly aware of the relationship between effective governance and building an economy, as illustrated in his undated interview with Kurt Petrovich of CBC Radio in which he had commented:

> Governance is a modern …well, we need modern governance tools in order to build a First Nation economy and I think that's extremely important for everybody to realize, and the *Indian Act* does not have those modern instruments within it. And if we are not going to get an agreement of self-government tabled, then what alternative do we have but to move forward on changes to the *Indian Act* to give people some comfort that they have those tools necessary to build those economies and build the quality of life that we speak to in the Speech from the Throne.[11]

The proposed *First Nations Governance Act* received First Reading in the House of Commons on June 14, 2002. The Bill provides for First Nations to design their own governing codes in three areas, those of leadership selection, administration of government and financial management and accountability. It also better defines the legal capacity of a Band and clarifies and enhances a Band Council's law-making powers. There is even some recognition of the jurisdiction needed to facilitate entrepreneurship (e.g. in such proposed law-making areas as "the regulation of business activities"[12] and "conditions under which the council may enter into commercial or other transactions"[13]). But, as we explain below, this falls significantly short of what we see to be necessary for creating the environment in which prosperity can be built. If we are indeed to have "…those tools necessary to build

11 *Honourable Robert D. Nault. Personal interview, undated. "Communities First: First Nations Governance; Consultation Package", published by Indian and Northern Affairs Canada.*

12 *Bill C-61, "First Nations Governance Act", 1st Session, 37th Parliament, 2002, ss.16(1)(k) (First Reading, 14 June, 2002).*

13 *Ibid., ss.18(1)(f).*

those economies…",[14] then the proposed Act needs to be expanded.

The proposed *First Nations Governance Act* was re-introduced at the second session of the 37th Parliament, and received First Reading on October 9, 2002 as Bill C-7.

What We See to be Necessary:

The history of governance under the *Indian Act* is a fascinating one that bears upon present possibilities. The then Minister of Indian Affairs, the Honourable Jean Chretien, tried in 1969 to initiate legislative change that would affect all First Nations, but this met with widespread opposition and had to be abandoned. Not until 2001 was another Minister, the Honourable Robert Nault, willing to propose universal across-the-board change in First Nations governance. But in between these landmark years there have been a variety of specific amendments to the *Indian Act* and individual governance agreements. What is most surprising, however, is that, since the proclamation of the *Sechelt Indian Band Self-Government Act* in 1986, there have been no further statutes providing for individual self-government. Why is this? When we compare the growing popularity of the *First Nations Land Management Act* (with nearly 100 First Nations reportedly wanting to be included), what is it about "self-government" that has failed to attract similar enthusiasm and energy?

In answer, we can only speak from our own experience. Part of it, certainly in British Columbia, is the strange intertwining of treaty negotiations with self-government. The Nisga'a did indeed wish to negotiate both together but what had been a choice for them became a subsequent imposition within the British Columbia Treaty Commission process. In other words, First Nations were being told that, if they did not wish to be self-governing, they would not get a treaty, a lopsided proposition that failed to recognize the fundamental premise of treaty-making: "treating" between equals. Moreover, even if the negotiating First Nation did seek to be self-governing, there was no recognition among the parties as to what this entailed. So a great deal of that particular energy has been drawn into the treaty process, either willingly or otherwise.

14 *Honourable Robert D. Nault. Personal interview, supra at note 11.*

But, apart from within the treaty process, there has really been no movement towards individual self-government since 1986, the only exception of which we are aware being the unconcluded Westbank First Nation Self-Government Agreement. What is missing? We suspect that the absence of interest in pursuing legislative self-government subsequent to the Sechelt achievement of 1986 was very much to do with its perceived lack of relevance to fundamental First Nations concerns. Issues surrounding aboriginal rights and title are certainly in the ascendancy and the right to self-government itself was predominantly sought through constitutional amendment, culminating in the rejection of the Charlottetown Accord in 1991. Governance concerns were not a priority for First Nations organizations, and this is reflected to some extent in the AFN response to the Federal 2001 initiative. Even where a First Nation (such as Westbank) did wish to pursue self-government subsequent to 1986, it was made clear by the Federal Government that "another Sechelt" would not be permitted.

We surmise that the principal issues of First Nations governance can be categorized into two: (i) basic issues applicable to all communities; (ii) specialized issues affecting an economically advanced minority. Minister Nault is tackling the former, and we commend him for taking it on. It's the drudgery side of governance, the bread and butter stuff, and it has not been appealing enough for any one First Nation to pursue such issues at its own expense. Now there is a forum and, for the purposes of this paper, we participate accordingly to reflect our own involvement with certain "specialized issues".

Our interest is to draw attention to "other governance options" and, more specifically, to suggest an option that would, we believe, facilitate First Nations entrepreneurship. From our own research and deliberations, we have concluded that the necessary environment within which the envisaged option could flourish will require the following:

(i) For the First Nation to be in control of its own lands, an essential component for being "masters in our own house" (see Chapter 3);

(ii) For governance of the First Nations community to be both accountable and transparent, as apparently contemplated in Bill

C-7;

(iii) Implementation of the entrepreneurial model as it bears upon the transformation of the on-reserve command economy (see Chapter 4);

(iv) The creation of institutions enabling (i) (ii) and (iii) to be executed successfully and in harmony with what we have identified as the predominant stakeholder interest, the "Native culture/tradition" (see Appendix A);

(v) The development of a strategic plan for the community, to be reviewable periodically at no greater than five year intervals, again dependent on the "Native culture/tradition"(See Appendix B).

Our thinking on this topic has found resonance in the research work of Professors Stephen Cornell and Joseph P. Kalt. Since 1986, they have been engaged in the Harvard Project on American Indian Economic Development, described by Dr. Cornell as "…a major, research-based effort to understand the dynamics of self-governance and economic development on American Indian reservations"[15]. The four things that emerged from this research project are strikingly aligned with our own list above. First, there has to be genuine self-rule – "Native power to control what happens on Native lands"[16] in Dr. Cornell's words. Second, this self-rule has to be exercised effectively, explained as follows:

> Harvard Project results show that the chances of sustainable development rise as Indian nations put in place effective, non-politicized dispute-resolution mechanisms, such as tribal courts, shut down opportunistic behaviour by politicians, eradicate corruption, place buffers between day-to-day business management and politics, build capable bureaucracies, and so forth.[17]

Third, there has to be a "cultural match"[18] in the sense that the formal institutions of governance will not be effective unless they meet the particular

15 *"Nation Building and the Treaty Process", supra at note 1, p.16.*

16 *Ibid., p.18.*

17 *Ibid., p.19.*

18 *Ibid., p.19.*

First Nation's conception of how authority should be structured and exercised. Finally, strategic thinking is important, meaning that a carefully considered development strategy will pay big dividends over time.

All of this research has been distilled by Professors Cornell and Kalt into five components of what is required in order for First Nations to develop effective governing institutions of their own:

- Stable institutions and policies.
- Fair and effective dispute resolution.
- Separation of politics from business management.
- A competent bureaucracy.
- "Cultural match".[19]

This list from Professors Cornell and Kalt accords entirely with our own view of the matter. We would only expand upon "cultural match" to convey the notion of an ongoing internal process of checking and reconciling.

Our Proposal for Achieving Successful First Nations Economies Through Self-rule:

The timing is auspicious. Given the Federal initiative already underway, we have the opportunity to seek legislative change that could be incorporated into the governance revision process. What we propose is the addition to Bill C-7 of provision for a fourth code, "a prosperity code". Its objective would be the replacement of destructive institutions with constructive ones (see Figure 1 in Chapter 1). As we discussed in Chapter 1, the creation of good institutions is the predominant reason for economic success.

Because of our conclusions above as to what would be necessary for facilitating First Nations entrepreneurship, we would restrict the ability to adopt a prosperity code to those First Nations who:

19 *Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-building: The development challenge in Indian Country today". Published by the Harvard Project on American Indian Economic Development, undated, p.12.*

(i) have developed a periodically reviewable strategic plan for their communities, thereby ensuring our own view of "cultural match" as an ongoing process (see Appendix B);

(ii) have had their applications accepted under the *First Nations Land Management Act*,thereby ensuring their ability to be moving towards being "masters in their own house" as it applies to land rights.

In this chapter, we present our rationale for a Prosperity Code. We therein look to the implementation of three specific policies to provide a sufficiently comprehensive foundation for market development:

Policy #1 - The capital formation process must be protected;

Policy #2 - Capital growth must come from effective fiscal planning; and

Policy #3 - Capital use must be made more effective through healthy competition (Government should take the steps necessary to improve the intensity of "structural competition").

Our model Prosperity Code, provides for the creation of these essential policies and the institutions that will flow from them. We also incorporate the remaining components from the above list from Professors Cornell and Kalt. The resulting document, although intended to be illustrative, gives a good idea of what will really be needed to create the environment for prosperity and cultural well-being.

The foregoing proposal for First Nations governance is based upon the investigations of our Think Tank on First Nations Wealth Creation conducted over the past three and a half years. It is our conclusion that the addition to Bill C-7 of a prosperity code would be consistent with the Minister's professed intentions for the legislation, as well as assuring First Nations that "…to build those economies…"[20] was indeed a foremost objective. We invite the

[20] *Honourable Robert D. Nault, Personal interview, supra at note 11.*

comment and consideration of all interested parties; and we stand ready to refine this proposal in such a manner as to render it acceptable to interested First Nations consistent with establishing a firm foundation upon which self-rule and economic development can be built.

THE RATIONALE FOR A PROSPERITY CODE: GOVERNANCE IN SUPPORT OF ON-RESERVE MARKET INSTITUTIONS

A Summary of Conclusions of
the Skeena Native Development Society
Think Tank on First Nations Wealth Creation 1999-2002

Introduction

As noted in Chapter 1, a new pathway towards prosperity and cultural well-being for First Nations people appears to be possible. In the following paragraphs, we present our rationale for a Prosperity Code that articulates several possible governance revisions that will better support the on-reserve market institutions that we believe are necessary for those who are interested in successfully following this path[1]. The rationale for each element suggested for possible inclusion in a Prosperity Code has been developed in the chapters of this book. In these chapters, we have argued that a prosperous economy is founded upon three cornerstones:

- Governance (the establishment of institutions that support market development),
- Property rights (a workable system that supports a level playing field in capital formation), and
- Entrepreneurial thinking/cognitions (mastery of three key thinking patterns: competition, promise and planning cognitions).

A model Prosperity Code has been created to make more concrete the first cornerstone—governance that creates the institutions to support the development of markets that enable more effective on-reserve transacting—and to demonstrate within the Prosperity Code how all three cornerstones combine to support on-reserve market institutions.

At the present time, market development appears to be virtually stagnant or non-existent on all but a few First Nations reserves of which we are aware.

[1] *It is not our intention through the creation of these documents to in any way dictate to a given community the values or economic objectives that they should pursue. Our work is intended only for those who are seeking to better understand the pathway towards mastery in the Native House that we have developed and, specifically, whose objective is on-reserve prosperity.*

Many leaders, scholars and potential First Nations entrepreneurs have pondered the question of why this is the case. Some have offered partial solutions that satisfy admittedly necessary conditions (e.g. suggestions to address property rights dilemmas (Flanagan & Alcantara, 2002)). But, in our view, such approaches are not sufficient because they are not adequately comprehensive. By using the transaction cognition entrepreneurial model (see Chapters 1 and 4), we have developed a more complete recommendation: we suggest the implementation of three specific policies that will provide a sufficiently comprehensive foundation for market development. These are:

- Policies that lead to on-reserve governance that creates and enables the institutions of the market system,
- Policies that enable actual capital formation through the improvement of on-reserve property rights (e.g. reducing dead capital and enhancing live capital, (de Soto, 2000; Flanagan & Alcantara, 2002)), and
- Policies that support the creation of an economic model that comprehensively and rigorously identifies the entrepreneurial thinking needed for effectively using a working system of capital formation.

Interestingly, these policies parallel and are consistent with a more general model that has laid out clearly the necessary conditions for good management of the market system in general (Thompson, 1989). Accordingly, we have utilized Thompson's analysis as an organizing framework for the model Prosperity Code that we present so that we will not overlook important elements, while at the same time proposing ideas that have more general usefulness. We note that, in Thompson's use of terminology, the generality of his terminology is not immediately evident. Thus, in the paragraphs following, we try to improve their usefulness by taking these basic ideas and clarifying their relevance to the case of on-reserve governance—to fostering prosperity and cultural well-being in an on-reserve economy. But, as we have previously noted, we think that Thompson's outline, once applied, offers a very serviceable organizing framework. Thompson asserts:

> Just three policies, properly implemented, would go a long way towards improving the management of competition to, in turn, alleviate the problems of poverty, homelessness, inflation and (of) slow productivity growth (Thompson, 1989: 2-3).

These policies are paraphrased as follows:

Policy #1: Inflation should be driven down and kept to a low level (the capital formation process must be protected);

Policy #2: Budgets should be balanced (capital growth must come from effective fiscal planning); and

Policy #3: Government should take the steps necessary to improve the intensity of "structural competition" (capital use must be made more effective through healthy competition).

Logically, it seems clear to us that, if these three policies are necessary to manage a market economy, they must also be present for a market to exist in the first place. Thus, these policies become clear pointers to the institutions needed for markets in general to flourish. We also note the parallel between these policies and the transaction cognitions (promise, planning and competition cognitions (as re-ordered to correspond to Thompson's list)) that are essential for effective transacting within such markets (Chapter 4). This leads us to the question: How, then, do these principles apply to the creation of a Prosperity Code in the on-reserve setting?

To address this question, we now develop the logical extensions of the above general policies, to ensure that their meaning and application is clear in the on-reserve setting. We therefore examine each policy in turn.

Keeping Inflation Low: Policies that Stimulate Capital Formation

Here is the argument that relates a policy of low inflation to market-supportive governance on-reserve.

Inflation is the enemy of capital formation. It devalues wealth that has previously been created and stored in the form of money. Inflation occurs when too much money chases too few goods and services. Inflation occurs because there are not enough assets to go around given the amount of currency available and, as a result, the worth of a unit of currency is reduced as

prices are bid up for the same assets. Essentially, inflation breaks the "promise" that the value of currency will be stable, and therefore is the most serious threat to capital formation. How does this apply within the on-reserve setting? In our Think Tank discussions, we have developed the following explanation:

> We first found it necessary to define currency as the medium of exchange within a given transacting community. Most transacting communities now use money as the most common currency, but there are other currencies in operation—especially within on-reserve First Nations communities (e.g. land, access to traditional natural resources such as the fishery, trade and barter goods [such as the "grease" trail: the trading of oolichan, the survival fish or the use of salmon for food and ceremonial purposes], honour and reputation, cultural freedoms, etc.). This is because every transacting community has values and standards that lead to the treatment of certain things as currency. For example, some people will exchange money for time (e.g. pay for labour saving appliances), while other people will exchange time for money (e.g. work a second job at minimum wage), and so on.

It is therefore important that a Prosperity Code provide mechanisms that recognize and preserve the value of a community's total currency. Inflation or deflation occurs where the value of one type of currency changes with respect to other types of currency. Waste in the form of transaction costs occurs where one type of currency is arbitrarily fixed with respect to other types of currency in such a manner as to reduce the effectiveness of socio-economic relationships (they deter the transactions that optimize total currency). Capital formation must therefore be defined in terms of total currency (land, customs, money, natural resources, rights, etc.) in circulation (available to be put to work) within a given transacting community. Promise cognitions enable this intermediation because they directly affect the fixedness and/or variation among currencies.

Generally speaking, the arbitrary fixing of any type of currency tends to reduce overall wealth (e.g. the case of the gold standard in the early 1900's or, in the First Nations case, the removal of property rights from the land which then eliminates its usefulness for purposes of capital formation). Yet we also believe that free-floating exchange rates among currency types is not ideal either and must still be managed to ensure optimal promise (value

retention) and therefore optimal wealth (the sum of capital available from all the "currencies"). Traditionally, currency management has taken three main forms, each of which affects the supply of a given type of currency:

Open market operations: The conversion (purchase or sale) of one type of currency unit (the currency management target) by the governing institution into another type of currency unit (e.g. cash for bonds/ bonds for cash). In the on-reserve case we have recommended new governance mechanisms that enable this process (e.g. property rights that permit the conversion of value in land "currency" to value in cash "currency");

Adjustment of currency reserve requirements: The increase or decrease of currency available for use by requiring that the parties using such currency in their transacting "hold back" a greater or lesser proportion of the currency under their stewardship. An example in the First Nations' case might be the use of a land code under the First Nations Land Management Act or the acquisition or disposition by a First Nation of non-reserve lands for capital formation purposes; and

Adjustment of the cost of borrowing: The increase or decrease of the cost to rent a given unit of currency for a specified period of time. For example, in the First Nations' case, this might include negotiations with lending institutions of a revised loan-to-value ratio (collateralization percentage) when pledging land to secure financing.

Thus, to minimize the continuation of behaviours that promote the persistent and destructive devaluation of the most valued assets of an on-reserve community (e.g. the potential for dead v. live capital, but also the minds and/or motivation of the youth, the sustainability of natural resources, the wisdom of elders, the spiritual health of communities), policies that protect the full promise of on-reserve First Nations assets must be developed, adopted and followed by most members of that community. Said another way, these new policies must become on-reserve institutions because it has now been well-established that differences between rich and poor communities can be traced directly to differences in the institutions that exist and that govern economic behaviour within a community (Acemoglu, Johnson, & Robinson, 2001).

It is for these reasons that our model Prosperity Code suggests a set of governance policies that directly counters the devaluing institutions that have arisen consequent to the Indian Act[2] (e.g. economic dependency, pervasive distrust of others in economic matters, fatalism, hostility to education, fixation on politicking v. productivity, racism), and substitutes instead policies that decrease dead capital, increase credit, assist in fair and effective dispute resolution and provide for ethical conduct and the protection of institutions from corruption.

Balancing Budgets: Policies that Result in Effective Fiscal Planning

This section explains the link between a balanced budget policy and market-supportive governance on reserve.

A budget is simply a forecast of inflows and outflows. Where inflows are less than outflows, deficits are created and deficits mean dependency because, historically, the sacrifice of freedom has been the customary tool of debtors (and this appears to have been true in the First Nations case specifically). Where inflows are greater than outflows, surpluses are generated. The obverse of the customary debtor/ creditor relationship suggests that surpluses mean independence. Where inflows and outflows are about equal, the budget is balanced. Balanced budgets signal stability, especially when they follow periods of sufficient surplus to ensure a reasonable level of economic security: “provisions in store for an uncertain future” (Durant, 1935: 2).

Presently, almost every reserve experiences yearly money deficits which means they must depend almost exclusively upon the Department of Indian and Northern Affairs Canada (INAC) for funding the money-based needs of the community. Put another way, due to the Indian Act, most if not all reserves require and expect money infusions from INAC. Ironically, for thousands of years preceding the Indian Act, there existed (Robinson & Wright, 1962 (1936)) balanced budgets in the economic life in Northwest BC (although tallied in currencies other than modern money). Today this is only a memory. Consequently, most on-reserve individuals may well view skeptically the balanced budget-based policies proposed within the model

[2] *We are not here dealing with the Indian Act, but rather with the devaluing institutions that arise consequent to the Indian Act.*

Prosperity Code.

Effective fiscal planning policies would work to reverse this.

What would they look like? Quite simply, they would increase inflows and decrease economic outflows of key resources[3].

What are these key resources? We have determined that, in the modern economy, it is trained minds that are the most valuable resource to stimulate inflows (Friedman, 2000; Yew, 2000), and that it is corruption that is the most persistent cause of excess outflows because "corruption capital" is often misdirected (e.g. removed from the economy to another jurisdiction, expended on personal consumption v. re-investment in productive assets, used as an incentive to further corruption (Eigen, 2002; Yew, 2000)).

It is for these reasons that our model Prosperity Code suggests a set of governance policies that directly counter the deficits that have arisen consequent to the Indian Act (e.g. low employment rates, lack of skills training and motivation to pursue it, high-cost levels of social problems), and substitutes instead policies that balance budgets, increase the asset base, provide for a competent bureaucracy and educate the community in the institutions of the market system.

Ensuring Higher-Intensity Structural Competition: Policies that Ensure Sufficient Competition

In this section, we explain the connection between policies that strengthen the intensity of structural competition and market-supportive on-reserve governance.

The term "structural competition" refers to the absence of " . . . entrenched monopolies—whether they are in corporations, labor unions, government, universities, the professions, or perhaps even churches." (Thompson, 1989: 2). Thompson further suggests that entrenched monopolies, the opposite of competition, usually end up having an adverse impact on human society in

[3] *The principal inflows will be government funding, revenues from First Nation assets and property taxation. Each of these will require individual consideration, negotiation and implementation by the First Nation concerned. It is the intention of the Think Tank to produce in future a paper on the taxation/governance relationship, including the role of property taxation.*

the form of arrogance, insolence, inefficiency and complacency. Thus, for on-reserve market institutions to flourish, entrenched monopoly must be replaced with competition. Unfortunately, effective competition does not happen automatically. It must be carefully grown, nurtured and protected. How is this to be done?

In our Think Tank deliberations, we have concluded, as has Thompson (1989), that this third policy is the catalyst that makes the preceding two policies really work. At the heart of higher-intensity structural competition is the freedom to transact. The freedom to transact increases where individual and community productivity is high and, as a result, there are large numbers of buyers and sellers, the number of sellers (in particular) is not limited by government regulations, transacting is open to international trade and unionization rates are low[4] (Thompson, 1989: 8-9). Thus, where there is high structural competition, inflation is low (policy # 1) due to high productivity. And budgets are also balanced and supported by economic security surpluses (policy # 2) because high productivity is not burdened with the excess transaction costs of dependency or corruption. This is why we consider high structural competition to be catalytic to on-reserve prosperity and cultural well-being.

We therefore include within our model Prosperity Code the provisions necessary to strengthen the intensity of structural competition on-reserve[5]. It is our belief that increasing levels of entrepreneurship and entrepreneurial thinking are key ingredients in this mix. Thus, we recommend that governance policies should be geared towards the stimulation of entrepreneurial activity on-reserve that is founded upon product/ service + entrepreneurial skill development-based productivity increases and property rights-based capital formation. This will have the effect of increasing opportunities, the number of sellers, the amount of trade, etc. and of decreasing the levels of

4 *We take no expressed position against unionization or other command struture models per se. Rather, we are FOR prosperity. We see, however, any misuse of bargaining power to extract a price premium that increases transaction costs to be ultimately destructive to the highest levels of productivity in an economy because they incur first-order costs while producing only second-order benefits (Williamson, 1991). Thus, we are "anti" misused power (power used to create transaction costs).*

5 *Total competition includes two types of competition: structural competition and below-capacity competition (Thompson, 1989). The second, below-capacity competition, occurs in so-called "buyers' markets" where there are many more sellers than there are buyers. The on-reserve situation, as we assess it in Northwest BC at least, is almost universally a buyers' market for goods and services produced on-reserve where unemployment is high and very few opportunities exist. Thus, the emphasis in our deliberations has been on increasing the intensity of structural competition through fostering entrepreneurship.*

arrogance, insolence, inefficiency and complacency that are due to, for example, the INAC-based on-reserve monopoly. Accordingly, our model Prosperity Code suggests policies that refocus on-reserve economic development, separate politics and bureaucratic meddling from business management and monitor and discourage anti-competitive behaviour.

Conclusion

One of the main ideas that flows from our Think Tank deliberations is thus the rationale for a Prosperity Code: that governance should support on-reserve market institutions. We have created the model Prosperity Code with this objective in mind: to demonstrate to interested parties that a new model for economic prosperity and cultural well-being is possible. We hope that the model Prosperity Code that emerges from this analysis will be useful in achieving this objective.

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MODEL PROSPERITY CODE

- Pursuant to amended First Nations Governance Act -

Purpose: To enable the creation and management of market systems within the First Nation's economy.

(Approach: Consistent with "The Rationale for a Prosperity Code", the provisions of this Code address three essential requirements for the creation and management of market systems:

A. Stimulating Capital Formation;
B. Effective Fiscal Planning;
C. Ensuring Sufficient Competition.)

A. STIMULATING CAPITAL FORMATION

(Policies governing the stimulation of capital formation relate to making access to capital simpler and more reliable. The following provisions are accordingly aimed at stimulating the conversion of assets to capital; providing for trustworthiness in the capital formation process; and supporting the institutions that provide for this. This part is intended to be effected in conjunction with a Leadership Selection Code and an Administration of Government Code.)

(i) Decreasing dead capital:

(It has been shown that very specific processes and decisions are necessary to support the capitalization process: the movement from dead to live capital.)

(a) The First Nation's economic development department shall be charged with the responsibility, among other things, to:

1. Identify the dead capital assets of the First Nation.

2. Document the steps necessary to be able to use these on-reserve assets for the purpose of providing collateral.

3. Value the dead capital assets.

(b) The economic development department shall work with Chief and Council to develop a strategy for re-capitalizing the dead capital assets. For this purpose, they shall work together to:

1. Create agencies that will be responsible for re-capitalizing specific dead capital assets.

2. Identify and remove the legal and administrative hindrances to reducing dead capital.

(c) The economic development department and Chief and Council shall also work together to:

1. Encourage all businesses on-reserve to become operative under the legal system of the First Nation.

2. Ensure that there is no reduction in the value of any businesses as a result of re-capitalizing dead capital.

3. Develop institutions and procedures that permit economies of scale for all the activities which constitute the process of capitalization.

4. Establish incentives aimed at encouraging legal businesses and re-capitalizing dead capital.

(ii) Increasing credit:

(Credit creates an entitlement to resources.)

(a) The economic development department and Chief and Council shall endeavour to create policies, procedures and regulations that will enable qualified First Nation members to access business credit on an equal footing with persons off-reserve.

(iii) Fair and effective dispute resolution:

("Governing institutions have to be able to provide consistently non-politicized, fair dispute resolution. They have to be able to assure people that their claims and disputes… will be fairly adjudicated."[1])

(a) The parties shall first endeavour to resolve their dispute by negotiation between themselves.

(b) If negotiation fails, the parties shall endeavour to resolve their dispute with a mutually appointed mediator.

(c) If mediation fails, the parties shall proceed to arbitration under the provincial arbitration statute. If they cannot agree on the appointment of an arbitrator or third arbitrator, as the case may be, the appointment shall be made by the then President of the provincial Arbitration and Mediation Institute.

(iv) Code of ethics:

(It is essential for trustworthiness in transacting relationships that rules requiring ethical behaviour in government be provided for.)

(a) The First Nation shall prepare a code of ethics that shall govern the activities of the Chief and Councillors, all directors and officers of the FN Corporations and all employees of the First Nation and the FN Corporations.

(b) The code of ethics shall be completed within 12 months of enactment hereof following consultation with the members, and shall be reviewed annually.

1 *Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-building: The development challenge in Indian Country today". Published by the Harvard Project on American Indian Economic Development, undated, p. 13.*

(v) Protection of institutions:

(The assessment of trustworthiness in transacting relationships is best performed using an external assessment of pertinent transparency. This will ensure complete accountability of its institutions to the members of the First Nation.)

(a) Each year the First Nation shall have a survey carried out containing the pertinent items used by Transparency International in preparing its Corruption Perceptions Index.

(b) The completed survey shall be forwarded to the appropriate regional office of Transparency International.

(c) The results of the survey shall be posted in the First Nation's administration office, and published in a local newspaper.

(d) The First Nation shall endeavour to attain a transparency level that is at least equivalent to that of Canada.

(Note: A sample of the questions used by Transparency International to compute the Corruption Perceptions Index is included in Appendix C.)

B. EFFECTIVE FISCAL PLANNING

(Policies governing budgeting, management and the selection of relevant economic and educational targets are the result of, or promoted by, an effective economic plan. This plan will need to be aligned with a Financial Management and Accountability Code).

(i) Policies resulting in balanced budgets:

(A balanced budget policy signals market-supporting governance on-reserve because balanced budgets themselves signal economic stability).

(a) It shall be an objective of the First Nation to achieve a balanced

budget every fiscal year.

(b) To achieve this objective, Chief and Council, working in conjunction with the economic development department, shall seek to increase inflows and decrease outflows of economic resources.

(ii) Increase asset base:

(The pathway from poverty to prosperity requires increases in the productive asset base in every business cycle).

(a) The economic development department and Chief and Council shall work together to create policies and decision-making structures that will lead to additions, increases or improved effectiveness of the First Nation's productive assets by:

1. Increasing the community's commitment to education.

2. Expanding the land base, either by acquisition or through the pursuance of treaty and specific claims.

3. Regular re-assessment of the highest and best use of assets.
4. Other similar projects that will result in meeting the objective.

(iii) A competent bureaucracy:

("Attracting, developing and retaining skilled personnel, establishing effective civil service systems that protect employees from politics, putting in place robust personnel grievance systems, establishing regularized bureaucratic practices so that decisions are implemented and recorded effectively and reliably – all of these are crucial to the (First Nation's) ability to govern effectively and thereby to initiate and sustain a successful program of economic development."[2])

2 *Ibid., p. 18.*

(a) All employees of the First Nation and of any corporation owned by the First Nation or by a parent corporation owned by the First Nation ("FN Corporations") shall have received training in entrepreneurial thinking or will agree to undertake such training within a period prescribed by the employer.

(b) All hiring of employees by the First Nation and FN Corporations shall be based on merit except that aboriginal applicants will receive preference.

(c) Employee remuneration shall be based solely upon job performance.

(d) All employment by the First Nation and FN Corporations shall be governed by the First Nation's Personnel Policy which policy shall be approved within 12 months of enactment hereof following consultation with the members.

(iv) Educating the community:

(Because the institutions of a market system arise from the beliefs and values of a given society, it is very important that the community clearly understands the features of the market system. This will debunk the myth that the mere adoption of the market system will guarantee success. It will also provide the realization that failures need to be used as an opportunity for learning. It will change the perception that economic opportunities are a right when, in fact, they are a privilege.)

(a) The economic development department and Chief and Council shall work together to educate the community as to the need for entrepreneurs who will maximize both the financial and social returns.

C. ENSURING SUFFICIENT COMPETITION

(The effective management of competition has been shown to alleviate the

problems of poverty and of slow productivity growth. By ensuring sufficient competition on-reserve, market institutions can flourish and the arrogance, insolence, inefficiency and complacency of entrenched monopoly can be minimized.)

(i) Refocusing of economic development:

(The creation and management of a market system will be facilitated when the focus of the economic development department shifts towards capital formation, effective fiscal planning and ensuring sufficient competition.)

(a) The economic development department and Chief and Council shall work together to achieve:

1. Increasing levels of marketable skills development within the community.

2. Increasing the level of entrepreneurial thinking within the community.

(a) The economic development department may and should honour entrepreneurs in whatever manner it deems appropriate.

(ii) Separation of politics from business management:

("When politics gets involved in business operations, businesses typically either fail or become a drain on (First Nation) resources…. Business cannot compete successfully when the decisions are being made according to political instead of business criteria."[3])

(a) No Chief or Councillor or employee of the First Nation shall be a director or officer of any FN Corporations.

(b) The directors and officers of the FN Corporations do not have to be members of the First Nation.

3 *Ibid., p. 16.*

(c) All directors of the FN Corporations shall be indemnified for any liability arising from their actions in the absence of negligence.

(d) All directors of the FN Corporations shall be entitled to term contracts providing for the payment of pre-agreed severance in the event of their removal by the member/s for any cause other than negligence or incompetence.

(iii) Separation of federal bureaucracy from business management:

(Because the involvement of non-contributing parties to a transaction significantly increases transaction costs, and because it is imperative that the on-reserve economy becomes as competitive as that off-reserve, input into market transactions by the Federal bureaucracy must be eliminated beyond that required by its lawful obligations.)

(a) It shall be an objective of the First Nation to resist all interference in its economic affairs by the Department of Indian Affairs and other Federal bureaucracies except as may be required by law.

(iv) Monitor and discourage anti-competitive behaviour:

(Because an effective market system requires that the boundaries of competition be set and managed by government, it is important that anti-competitive behaviour be defined, interpreted and eliminated within the First Nation.)

(a) It shall be the objective of the First Nation to monitor and discourage anti-competitive behaviour.

(b) To achieve this objective, the economic development department shall use such analysis and tools as may be appropriate which shall include:

1. Conducting an evaluation each year of the goods and services available from businesses on-reserve.

2. Monitoring for price differentials between businesses on-reserve and those off that cannot be explained by location or other market factors.

3. Encouraging the number of sellers (i.e. the number of First Nation members offering goods and services on-reserve).

CHAPTER 3

Rights to Land

This “Medeek Pole”, carved by Gitksan Carver, Randy Stephens, from Gitanmaax. This piece, tells of one of the retribution trip up the Skeena River, which involved the Eagle People form the Land of Coor. This piece resides in the boardroom of the Skeena Native Development Society.

CAN FIRST NATIONS BE "MASTERS IN THEIR OWN HOUSE" UNDER THE INDIAN ACT?

Introduction

We have earlier argued the need for First Nations to be "masters in their own house" in order to facilitate prosperity and cultural well-being (see Chapter 1). A fundamental aspect of such mastery is for First Nations to be in complete control of the use and development of their own lands. As far as we are concerned, the full achievement of such mastery would require nothing less than legal ownership of the land base (as has already been achieved by the Sechelt Indian Band under its self-government legislation and the Nisga'a Nation by treaty). But we also recognize that becoming "masters in our own house" in this context is most likely to be a journey, a journey of incremental steps. So, in this Chapter, we ask ourselves the question: to what extent can this objective be attained under the *Indian Act* and, short of full transfer of the legal title, what other legislative mechanisms are available?

(i) Indian Act

The pertinent provisions of the *Indian Act* are sections 53, 60, 69, 81 and 83. We will examine each in turn.

(a) Section 53(1)

This subsection provides as follows:

> The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,
> (a) manage or sell absolutely surrendered lands; or
> (b) manage, lease or carry out any transaction affecting designated lands.[1]

1 *Indian Act, R.S.C. 1985, c.I-5, s.53(1).*

The first appointment of First Nations representatives "…by the Minister for the purpose"[2] was in July 1974 when the then Minister of Indian Affairs appointed the Sechelt Band Council to manage all surrendered Sechelt lands. This was at a time when there was no designation process, and the subject lands were those that had been conditionally surrendered for leasing purposes. A few months later, in November, this authorization was significantly expanded when four Sechelt Band members were appointed as Agents of the Crown for the purpose of directly signing leases arising from an 80 lot subdivision on one of their Reserves. The Sechelt Band thereafter pressed the Department of Indian Affairs to expand this subsection 53(1) signing authority to cover all its leases. It eventually prevailed in February 1978 when it was delegated the authority to manage and lease its surrendered lands "with the same authority as the Director General for the B.C. Region of the Department of Indian Affairs and Northern Development may have from time to time with respect to the signing of agricultural, commercial, industrial and residential leases, permits and assignments…".[3] What nobody realized at the time was that this represented the zenith of delegations under subsection 53(1); no other First Nation subsequently achieved this level of authority.

Other First Nations sought powers under subsection 53(1) similar to those delegated to Sechelt. It was a losing battle. In November 1983, the Special Steering Committee, comprising representatives from the Kamloops, Kitamaat, Sechelt and Westbank First Nations and the Central Interior Tribal Council, submitted a brief to the Department of Indian Affairs entitled: "A Review of Land Management and Development Policies Affecting Indian Reserve Lands in British Columbia". Whilst noting that the Musqueam and Westbank First Nations had at least succeeded in obtaining subsection 53(1) delegations, the brief bemoaned the fact of these authorities being less than had been asked for. Musqueam and Westbank

2 *Ibid.*

3 *Honourable Hugh Faulkner, Minister of Indian Affairs and Northern Development. Letter to Sechelt Chief and Council, February 1978, as quoted in the Special Steering Committee, "A Review of Land Management and Development Policies affecting Indian Reserve lands in British Columbia", November 21, 1983: p.4.*

had expected that they could receive a level of authority equivalent to Sechelt's. Instead, Departmental officials unilaterally imposed a 21 year limitation on the agreements that could be signed by Band Council appointees. This made nonsense of the delegation because neither Musqueam nor Westbank had lease agreements of such short duration. Attempting to explain his Department's reasons for this, the Minister of Indian Affairs then in office is quoted in the brief as having written:

> The decision to place a 21 year limitation on alienations of reserve land under delegated authority was arrived at for policy reasons. I recognize that this limitation was not imposed on the Sechelt Band when it received delegation of land management authority in 1974. The Sechelt Band was the first Band to receive comprehensive authority to manage its own lands, and at that time the Department had not fully thought through the implications of such delegation. In the intervening years it has become clear that, in delegating his land management authorities to Bands, the Minister of Indian Affairs does not divest himself of his statutory responsibilities for the management of reserve lands. The whole concept of a continuing responsibility has been brought into focus in the last six or seven years in a number of court cases which have raised this issue. I hope you can therefore appreciate why the Department considers some safeguards necessary where long-term alienations of reserve lands are contemplated.[4]

Significant restrictions on the delegated authority remain in effect. For example, Directive 11-02 of Chapter 11 of the INAC Land Management Manual requires the following conditions to be incorporated in both section 53 and 60 delegations:

- The form and terms of every lease, permit or other instrument shall be pre-approved by the Department of Indian Affairs and Northern Development
- The exercise of the authority must be in accordance with all

4 *Honourable John Munro, Minister of Indian Affairs and Northern Development. Letter to the Alliance of the Musqueam, Sechelt, Squamish and Westbank Bands, undated, as quoted in the Special Steering Committee Review, supra at note 3, p.5.*

relevant Departmental policies and procedures

- All leases or permits for terms of more than 5 years shall contain a periodic fee or rent review clause.[5]

This is an oppressive list, the last point in particular being one of the principal causes of mortgaging difficulty on reserve. In addition, a First Nation interested in receiving these delegated powers will face a nightmarish funding formula, one favouring volume over complexity. And, if it still can see its way clear to joining the only two successful section 53/60 applicants, it will be saddled with monitoring and reporting requirements that are little short of stifling.

It is thus hardly surprising that such a circumscribed authority has attracted little response among First Nations. Nearly 30 years after the Sechelt delegation there are only three First Nations in British Columbia, Kamloops, Musqueam and Westbank, that have been delegated subsection 53(1) authority. Throughout the whole of Canada, we know of no more than 14 communities, including the British Columbian ones, having this authority. And, just as the policy frustrations attendant upon its land management powers were a major impetus towards Sechelt self-government, so is it illustrative to note that both Musqueam and Westbank were among the original group of First Nations proceeding under the *First Nations Land Management Act.* It is clear that delegated authority under subsection 53(1), given the Department's policy restrictions, is not a viable mechanism for functioning as "Masters in our own house".

(b) Section 60(1)

This subsection provides as follows:

> The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by the Band as the Governor in Council

5 *Department of Indian Affairs and Northern Development, INAC Land Management Manual, drafted October 10, 1997.*

considers desirable.[6]

The history of this provision is even more convoluted and disappointing than that of subsection 53(1). Again it was the Sechelt Band, in April 1973, that first applied to assume "control and management over lands in the reserve".[7] This was taken by Sechelt to mean its Reserve lands that had not been conditionally surrendered, and this interpretation has been solidified in the recent definition of "reserve" in the *Indian Act* that specifically excludes designated lands from the ambit of section 60. The Departments of Indian Affairs and Justice experienced considerable difficulty in responding to this application, and this was reflected in the Submission to the respective Ministers by The Alliance of the Musqueam, Sechelt and Squamish Bands in 1975:

> Regrettably, the necessary Order in Council has still not been adopted (nearly two years after the original application) on account of quite extraordinary confusion within the two Departments as to what Section 60(1) involves. At different times, the Band has been advised that Section 60 applied to surrendered lands as well as unsurrendered; that a Band request to the Governor in Council by referendum or any other method would be superfluous; that an Order in Council was not required in order to delegate power of control and management over unsurrendered lands, etc.
>
> We three Bands of The Alliance would all be interested in assuming the control and management of lands occupied by our respective Bands. However, in view of the Sechelt Band's experience, we feel justified in first urging the two Departments to clearly formulate Federal Government policy relating to the takeover of such powers.[8]

Subsequent pressure, involving personal negotiations with no less than four Ministers of Indian Affairs, finally resulted in Order in

5 *Department of Indian Affairs and Northern Development, INAC Land Management Manual, drafted October 10, 1997.*

6 *Indian Act, supra at note 1, s.60(1).*

7 *Ibid.*

8 *The Alliance "Submision to the Minister of Justice and Minister of Indian Affairs", February 1975: p.24.*

Council P.C. 1977 –1391 granting the Sechelt Band specified management powers over its unsurrendered lands. However, when the Musqueam Band held a similar vote to request the Governor in Council to grant subsection 60(1) authority, it was met by Ottawa with a retroactively stipulated quorum requirement that Musqueam had not met. So the Musqueam Band never did attain subsection 60(1) powers. As the Chief of the time was quoted as wryly observing: "…it is easier for a Band to sell off all its lands than to assume control and management powers over them".[9]

Subsection 60(1) has attracted even less results than subsection 53(1), only the Kamloops and Westbank First Nations in British Columbia having succeeded in obtaining Orders in Council. Put another way, to the best of our knowledge not a single First Nation has successfully applied for section 60 authority in the past twenty years.

Hence, even though sections 53 and 60 are often spoken of as a package, they do in fact embrace quite different procedural and decision-making requirements. The additional complexity of attaining the latter has made it even less useful than subsection 53(1) for those First Nations trying to become "Masters in their own house".

(c) Section 69(1)

The right of a First Nation to collect its own revenues has long been debated. Subsection 69(1) provides:

> The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.[10]

A majority of First Nations in British Columbia enjoy the right to control, manage and expend their own revenue monies pursuant to this provision. But does it give them the right to collect those rev-

9 *Special Steering Committee Review, supra at note 3, p.4.*

10 *Indian Act, supra at note 1, s.69(1).*

enues? As noted by The Alliance:

> It appears to us that no single issue within the Department of Indian Affairs has created such a degree of internal dissension and contradictory interpretation as the question of whether the Section 69(1) phrasing "control, manage and expend" includes the right to collect revenue monies.[11]

Throughout the early 1970s, the Community Affairs Section in Ottawa took the position that the right to collect was necessarily included within the other powers of subsection 69(1) whilst other INAC personnel were stating otherwise. Finally, in a letter to the Sechelt Band in 1974, the then Minister of Indian Affairs appeared to lay the matter to rest:

> I am told by my Director of Legal Services that since the Sechelt Band has been authorized by the Governor in Council, pursuant to Section 69 of the *Indian Act*, to control, manage and expend its revenue monies, the Band can therefore collect the monies payable under the leases.[12]

The Alliance thereupon pressed the Minister to send a letter to all DIA offices confirming this interpretation in order to avoid future inconsistencies. It also proposed that procedures be uniformly instituted for those First Nations wishing to commence collection of their own revenues. All of this proceeded quite smoothly for nearly eight years with, by the estimate of the Special Steering Committee writing in November 1983, "more than a dozen Bands in British Columbia"[13] having been authorized to collect their own revenues. But then Departmental resistance to Band collection re-surfaced. In a memorandum of October 19, 1982, the Director of Membership and Statutory Requirements Directorate in Ottawa indicated that a Band could only collect its own revenues when a lessee was prepared to pay it to them but, otherwise, the possibility of Band collection should be played down pending a new Program Circular on

11 *The Alliance Submission, supra at note 8, p.24.*

12 *Honourable Judd Buchanan, Minister of Indian Affairs and Northern Development. Letter to Sechelt Indian Band, November 29, 1974, as quoted in The Alliance Submission, supra at note 8, p.25.*

13 *Special Steering Committee Review, supra at note 3, p.4.*

the topic. The Special Steering Committee accordingly recommended: "That the Department should provide a clear statement concerning the right of Bands to collect their own revenue monies under section 69".[14] We can find no reference to this "clear statement" ever having been made, but it can be inferred from our experience that the right to collect under the *Indian Act* no longer exists as far as the Department is concerned.

It is self-evident that an entity that cannot even collect its own money can hardly claim mastery. The pendulum swings on this issue clearly demonstrate the complete control of the Department over the fundamentals of First Nations life. Departmental refusal to allow revenue collection by First Nations under the *Indian Act* is a major blow to any notion of being "Masters in our own house".

(d) Section 81

This, and section 83, are provisions that have been enhanced in recent years to the benefit of First Nations, thus being in pleasant contradistinction to the sections previously examined. Since the by-law making powers provided for in subsection 81(1) are of immense relevance to the "masters in our own house" objective, they are reproduced in full:

> The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
> (b) the regulation of traffic;
> (c) the observance of law and order;
> (d) the prevention of disorderly conduct and nuisances;
> (e) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the

14 *Ibid., p.41.*

regulation of their duties and the provision for fees and charges for their services;

(f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;

(g) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any such zone;

(h) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;

(i) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;

(j) the destruction and control of noxious weeds;

(k) the regulation of bee-keeping and poultry raising;

(l) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

(m) the control and prohibition of public games, sports, races, athletic contests and other amusements;

(n) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

(p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;

(p.1) the residence of band members and other persons on the reserve;

(p.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

(p.3) to authorize the Minister to make payments out of capital or revenue moneys to persons

whose names were deleted from the Band List of the band;

(p.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

(q) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

(r) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.[15]

It will be noticed that several of the more significant by-law making powers refer to jurisdiction "in the reserve".[16] This was at one time an immense problem, bordering on national scandal.

The Alliance of the Musqueam, Sechelt and Squamish Bands first brought attention to the problem in their Submission of February, 1975. They referred to the decision of Corporation of Surrey et al. v. Peace Arch Enterprises Ltd. et al.[17]in which the B.C. Court of Appeal had found that a conditional surrender did not have the effect of making the land cease to be "land reserved for the Indians" within the meaning of s.91(24) of the Constitution Act 1867. As a result, municipal zoning by-laws and provincial health regulations could not validly apply to such land as that would restrict the use of "land reserved for the Indians". Since certain Department of Justice lawyers were at the time voicing the opinion that conditionally surrendered lands were not "reserve" within the meaning of the *Indian Act*, The Alliance sought Federal clarification of the ensuing regulatory situation. The response was quite prompt, a June 1975 Justice Department opinion that concluded: "…that bylaws made under Section 81 do not apply to lessees of surrendered lands".[18]

In its 1983 report, the Special Steering Committee had posed the basic question: "Who can control the planning and development of

15 *Indian Act, supra at note 1, s.81(1).*

16 *Ibid., paragraphs (a), (g), (i), (n), (o), (p), (p.1), and (p.2.).*

17 *(1970) 74 WWR 380.*

18 *Herbert M. Thornton, Department of Justice. Letter to The Alliance, June 1975, as quoted in the Special Steering Committee Review, supra at note 3, p.30.*

Indian lands in British Columbia?"[19] The answer was a wretched one. Not the Province, not municipalities, not Band Councils and – eventually conceded by the Department of Justice – not even the Federal Government as there was no applicable legislation. The then Minister of Indian Affairs was obliged to acknowledge his concern about "this regulatory vacuum".[20] Yet this vexing situation persisted for more than a decade after it had first been brought to light, causing First Nations to avoid conditional surrenders (and, hence, leasing) because of the regulatory anarchy that would be thereby precipitated.

Although many First Nations, and even the National Indian Brotherhood, lobbied for legislative change, it was the Kamloops Band, led by former Chief Manny Jules, that is principally credited with having solved the problem. Bill C-115, a package of amendments to the *Indian Act* that is often referred to as "The Kamloops Amendment", was enacted in 1988. The critical amendment for the efficacy of section 81 was the re-defining of "reserve" to include conditionally surrendered or designated land (except for a few excluded sections that did not include 81). Thereafter the Band Council would be unequivocally able to pass any by-law under subsection 81(1) to take effect over all the Band lands, including conditionally surrendered or designated areas. This was a huge advance.

There remain two areas of concern about section 81 in terms of being "masters in our own house". Firstly, section 82 requires all by-laws to be forwarded to the Minister of Indian Affairs who may disallow them within a 40 day period. Secondly, there are various provisions that need to be expanded for the purposes of effective governance (e.g. subsection 81(1)(h) leaves it unclear as to which governmental authority is to regulate the construction, repair and use of lessees' buildings).

Despite the preceding cavils, subsection 81(1) is a valuable tool

19 *Special Steering Committee Review, supra at note 3, p. 30.*

20 *Honourable Judd Buchanan, Minister of Indian Affairs and Northern Development. Letter to The Alliance, November 1975, as quoted in the Special Steering Committee Review, supra at note 3, p.30.*

towards achieving the "masters in our house" objective and, in our respectful view, its powers need to be more widely activated by First Nations. The adoption of rules, supported by legislative authority, will start to create the conditions of security and stability necessary for entrepreneurship to flourish.

(e) Section 83

Before the 1988 "Kamloops Amendment"[21], a First Nation wishing to tax interests in its land would first have to be declared by the Governor in Council to have reached "an advanced stage of development".[22] Nobody knew what this requirement meant, and it was mercifully deleted as part of the amending package. Property taxation was the main focus of the "Kamloops Amendment", and the current form of section 83, cited below, represents a significant overhaul of its predecessor:

> 83.(1) Money by-laws – Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,
>
> (a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;
>
> (a.1) the licensing of businesses, callings, trades and occupations;
>
> (b) the appropriation and expenditure of moneys of the band to defray band expenses;
>
> (c) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (a);
>
> (d) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (a);

21 *Indian Act, S.C. 1988, c.23, c.39, c.52, c.57.*

22 *Indian Act, R.S.C. 1970, c.I-6, s.83(1).*

(e) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest;

(e.1) the imposition and recovery of interest on amounts that are payable pursuant to this section, where those amounts are not paid before they are due, and the calculation of that interest;

(f) the raising of money from band members to support band projects; and

(g) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

(2) Restrictions on expenditures – An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by-law of the council of the band.

(3) Appeals – A by-law made under paragraph 1(a) must provide an appeal procedure in respect of assessments made for the purposes of taxation under that paragraph.

(4) Minister's approval – The Minister may approve the whole or a part only of a by-law made under subsection (1).

(5) Regulations re by-laws – The Governor in Council may make regulations respecting the exercise of the by-law making powers of bands under this section.

(6) By-laws must be consistent with regulations – A by-law made under this section remains in force only to the extent that it is consistent with the regulations made under subsection (5).[23]

Before 1988, the Department of Justice's interpretation of "reserve" as not including conditionally surrendered lands effectively meant that leased Band lands could not be taxed by a Band Council; they would not be "in the reserve". In the meantime, the Province of British Columbia and various municipalities taxed those interests without, in many cases, providing corresponding services. This was a state of affairs that obviously engendered constant aggravation for First Nations. In May 1980, various native leaders

23 *Indian Act, supra at note 1, s.83(1).*

joined with Federal and Provincial representatives to form the Tripartite Local Government Committee, charged with developing proposals to provide for a more effective taxation/servicing regime on British Columbian Reserves that would recognize First Nations' jurisdiction. Among the recommendations in its 1981 Report, the Tripartite Committee called for Federal legislation that would, among other things: "…abolish the distinction between reserve lands and lands released for a term but not permanently and irrevocably alienated and disposed of".[24] This recommendation was duly achieved, seven years later, by the previously described amendment of the definition of "reserve" in the *Indian Act*. It was thereafter clear that the amended section 83 provided for the taxation of interests in land that included conditionally surrendered or designated areas.

Property taxation among First Nations is a widely exercised power. We understand that more than 10% of First Nation communities in Canada have adopted taxation bylaws. The percentage is more impressive in British Columbia where 53 First Nations, more than 25% of the total, are functioning under section 83 authority. Without doubt, this ability to raise taxation revenue from their own lands, just like the Province or a municipality, is an important and unusually successful component of First Nations being "masters in our house".

In summary, the effect of "The Kamloops Amendment"[25] has been to enhance the jurisdiction of First Nations in the critical governance areas of law-making and property taxation. Should Bill C-7[26] become law, First Nations' law-making powers would be further strengthened. But the landlord side of things under the *Indian Act* falls considerably short of being "Masters in our own house", being substantially dominated by Departmental authority and policies. Our overall conclusion is that an *Indian Act* Band, despite recent gains in law-making and property taxation jurisdiction, would remain frustrated and incapable of becoming "master in its own house" under the current legislation.

24 *"Report of the Tripartite Local Government Committee respecting Indian Local Government in British Columbia", August 1981: p.26.*

25 *Indian Act, supra at note 21.*

26 *Bill C-7, "First Nations Governance Act", 2nd Session, 37th Parliament, 2002 (First Reading, October 9, 2002).*

(ii) First Nations Land Management Act[27]

This legislation represents a significant step forward for those First Nations intent on achieving considerably more authority over their land management programs than is afforded by the *Indian Act*. We discuss the scheme of this *Act* in Chapter 3. Suffice it to note, by way of conclusion to the preceding discussion, that, once a First Nation's Land Code is in effect, sections 18 – 20, 22 – 28, 30 – 35, 37 – 41, 49, 50(4), 53 – 60, 66, 69, 71 and 93 of the *Indian Act* cease to apply. This means that the various limitations that we have canvassed concerning sections 53, 60 and 69, as well as the oppressiveness of the designation process, have evaporated. A First Nation having an effective Land Code will thenceforth be able to manage all its lands and collect all its revenues without regard to INAC controls and policy, a significant liberation.

Conclusion

Does the availability of the *First Nations Land Management Act* mean that any First Nation having a Land Code thereunder has become, in our view, "master in its own house" when it comes to land rights?" We submit that two further tests remain, one that is fundamental, the other optional.

First, we view the availability of individual property rights as being a fundamental requirement for a market economy. Transcribed to the reserve setting, we would expect to see First Nations having the power to grant individual property rights if they choose to do so. That choice, of course, requires what Professor Stephen Cornell has described as a "cultural match"[28] (see Chapter 2). Some First Nations may want to develop their economies through individual development; others might prefer a collective approach. But, to us, the key remains: Can a First Nation grant individual property rights if it chooses to do so? The answer to this question has occupied a great deal of our time, and our resultant analysis is to be found in this Chapter.

27 *"First Nations Land Management Act", S.C. 1999, c.24.*

28 *Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-building: The development challenge in Indian country today". Published by the Harvard Project on American Indian Economic Development, undated, p.12.*

Second, we have noted already that both the Nisga'a and Sechelt took title to their lands from Her Majesty the Queen. They wanted to end the reserve system so they insisted upon this final step. For us, as stated at the outset, this is what being "masters in our own house" really means. Under the *First Nations Land Management Act*, by way of contrast, Her Majesty will continue to hold title to the subject lands. Is this compatible with being "masters in our own house?" Only in the sense that having your own Land Code represents an important step on the journey. An effective FNLMA Land Code will provide a lot of the tools necessary for mastery, and we see virtue in incremental progress. As noted by Hernando de Soto in The Mystery of Capital:

> …that key process was not deliberately set up to create capital but for the more mundane purpose of protecting property ownership. As the property systems of Western nations grew, they developed, imperceptibly, a variety of mechanisms that gradually combined into a process that churned out capital as never before. Although we use these mechanisms all the time, we do not realize that they have capital-generating functions because they do not wear that label. We view them as parts of the system that protects property, not as interlocking mechanisms for fixing the economic potential of an asset in such a way that it can be converted into capital. What creates capital in the West, in other words, is an implicit process buried in the intricacies of its formal property systems.[29]

Moreover, almost all the benefits of leasing can be achieved under the *First Nations Land Management Act* (perhaps the only deficiency would be the inability to register those transactions provincially). Maintaining the integrity of the land base while deriving economic benefit from letting others use it for agreed periods of time is a well-established practice. It is only the rigidity and timidity of INAC that has prevented reserve leasing from displaying its full merit. Freed from these constraints, the *First Nations Land Management Act* First Nations will be able to offer leases that compete commercially. The "variety of mechanisms"[30] referred to by de Soto can indeed emerge from a properly constructed Land Code. Hence, although there is little doubt that taking title from Her Majesty the Queen should be viewed as the overwhelmingly desirable end, there is enough power already legislatively available to let mastery begin.

29 *Hernando de Soto, "The Mystery of Capital". (New York: Basic Books, 2000), 46.*

30 *Ibid.*

INDIVIDUAL PROPERTY RIGHTS UNDER THE INDIAN ACT AND OTHER LEGISLATION

In the previous document, we proposed that a test for mastery would be the ability of the First Nations government to grant individual property rights if its community found that to be a "cultural match".[1] Hence, the choice of collective or individual property rights will always be that of the individual First Nation but, from our point of view, it is essential that the choice be actually and fundamentally available. So, in this Chapter, we are attempting to analyze the extent to which individual property rights either do exist on-reserve or could be made available. We have confined this review to British Columbia, focusing particularly on the *Indian Act*[2] land regime but also examining individual property rights under other legislation.

Our discussion is divided into three sections. In the first, we summarize individual property rights under the *Indian Act* and discuss: (i) Certificates of Possession; (ii) the impact of the Boyer[3] decision on such interests; (iii) post-Boyer analysis; and (iv) the introduction of administrative law considerations by the Tsartlip[4] decision. In the second section, we summarize individual property rights on Indian lands outside of the *Indian Act* and review: (i) customary holdings on reserve; (ii) the *Sechelt Indian Band Self-Government Act*;[5] (iii) property rights under the proposed Westbank First Nation Self-Government Agreement[6]; (iv) property rights under the Nisga'a Treaty,[7] and (v) the impact of the *First Nations Land Management Act.*[8] In our final section, we undertake a discussion as to the extent to which the property rights presently available will satisfy the stakeholder interests in prosperity and cultural well-being in the First Nations community.

1 *Chapter 2, p. 28 and Chapter 3, p. 61*

2 *Indian Act, R.S.C. 1985, c.I-5.*

3 *Boyer v. Canada and 488619 Ontario Inc., [1986] 4 CNLR 53.*

4 *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development), [2000] 3 CNLR 386.*

5 *Sechelt Indian Band Self-Government Act, S.C. 1986, c.27.*

6 *Westbank First Nation Self-Government Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation, Initialled by Negotiators, July 6, 2000.*

7 *The Nisga'a Final Agreement as enacted by The Nisga'a Final Agreement Act, S.C. 2000, c.7, and The Nisga'a Final Agreement Act, S.B.C. 1999, c.2.*

8 *First Nations Land Management Act, S.C. 1999, c.24.*

Individual Property Rights under the Indian Act

(i) Certificates of Possession

The fundamental scheme for affording individual property interests to Band members is provided for in section 20:

> 20(1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.
>
> (2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein....[9]

A provision of lesser importance is that found in subsection 20(3) deeming the holder of a Location Ticket under the *Indian Act*, *1880* to be lawfully in possession of the subject land and to hold a Certificate of Possession with respect to it. (from this earlier system arose the colloquial practice of referring to holders of Certificates of Possession as "locatees"). The Minister may also, pursuant to subsection 20(5), issue a Certificate of Occupation, being a short-term right of occupation whilst the application for a Certificate of Possession is being reviewed. In our experience, Certificates of Occupation are rare.

In addition to the Certificates provided for in the *Indian Act*, we understand that the Department of Indian Affairs maintains what it calls a "cardex holdings" system. This is the Department's way of recording section 20 allotments until a proper legal description is available. Apparently at such time as a legal survey for registration purposes has been completed, the cardex can be changed to a Certificate of Possession. According to our information, cardex holders are recognized by the Department as having the same possessory rights as Certificate of Possession holders.

Finally, we note section 22 which provides:

> Where an Indian who is in possession of lands at the time they are includ-

9 *Indian Act, supra at note 2, s.20.*

> ed in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of those lands at the time they are included.[10]

For the purposes of this Chapter, we are not concerning ourselves with questions arising from the validity of issuance of Certificates of Possession. We use as our starting-point the valid holding of such a document by an individual Band member. Our concern is more substantive: what rights does that valid holder get?

The difficulty of the question was strikingly conveyed by Mr. Justice Pratte in the 1984 Federal Court of Appeal decision in Pronovost v. Minister of Indian and Northern Affairs where he said:

> The exact legal nature of the most complete right which an Indian may hold over land located on a reserve is extremely difficult, if not impossible, to determine precisely, for the obvious reason that it is a right which has never been defined or described in terms of the usual concepts of the ordinary law, especially not those of the civil law. At most one may speak of an analogy with the traditional institutions of the Quebec Code, and even then one should be extremely careful to avoid any doctrinal construct. The Act speaks of a right of "possession" which may be proven by a Certificate of Possession, taking the place of a real estate title: it speaks of a right which does not derive from that of an owner but which may nonetheless be transferred as such, both inter vivos and mortis causa, although such a transfer can only be fully effective after it has been approved by the Minister; and this hybrid right, which is both patrimonial and personal, is applied formally to the land by the Act without specifying what becomes of buildings or improvements on the land. It has been called a sui generis right: that is undoubtedly true, but what I wish to emphasize here is that this sui generis right defies any rational classification under our traditional property law. Reasoning as if this were not so, by applying general rules framed in terms of institutions developed in a totally different context, is extremely dangerous.[11]

Nonetheless, despite Mr. Justice Pratte's cautionary words, the Federal Court of Appeal was obliged, only two years later, to engage in a full-scale analysis of the rights of a Certificate of Possession holder when opposed by his

10 *Ibid., s.22.*

11 *Provonost v. Minister of Indian and Northern Affairs, [1984] 1 CNLR 51, 56.*

Band. This was in Boyer.[12] Because reserve lands, under section 29 of the *Indian Act*, are not subject to seizure under legal process, a Certificate holder wishing to finance a development will invariably need to lease his/her holding. What happens if the Band Council then says no?

(ii) The Boyer Decision[13]

Boyer was an important decision that dominated until quite recently the thinking and practice concerning the rights of Certificate holders. It is also a particularly interesting decision, reflecting the philosophy and judicial approach of the time.

A member of the Batchewana Band of Ontario had been granted a Certificate of Possession. He applied to the Minister of Indian Affairs for the land to be leased to 488619 Ontario Inc. under the authority of subsection 58(3) which provides:

> The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.[14]

The Minister granted the lease whereupon the Band sought a declaration that it was void as neither the Band nor Band Council had consented to it. At the outset, Mr. Justice Marceau remarked on the deceptive simplicity of the issue before the court:

> Its scope and difficulty are not immediately apparent, since it presents no real problem as to the facts and involves the construction of only one short subsection of the Act. It so happens, however, that the provision contained in that subsection is not only fundamental from a practical point of view, but it concerns one of the main features of the legislative scheme adopted in the Act and quite surprisingly it has, apparently, never been scrutinized yet by any judicial authority.[15]

Although reported last, we begin with the judgment of Mr. Justice MacGuigan, something of a philosophical dissertation by a former Federal

12 *Boyer, supra at note 3.*

13 *Ibid.*

14 *Indian Act, supra at note 2, s.58(3).*

15 *Boyer, supra at note 3, 54.*

Minister of Justice and Professor of Law. He described the issue in these words:

> This case embodies a new version of the age-old problem of the person and the state, as particularized in the microcosm of an Indian community under the Indian Act....[16]

He considered the appellants to be "entirely right" in contending that the words of section 58 could not be interpreted outside of the context of the *Indian Act* as a whole. And, in the submission of the appellants, that statute set forth the fundamental principle that an Indian Reserve must be preserved intact for the whole Band, regardless of the wishes of any individual member concerning the disposition of his allotment. Thus, if the Crown and the locatee were able to bypass the Band Council in all circumstances, the former would not be able to fulfill its fiduciary duty to the whole Band, thereby failing to protect "the Indian collectivity". Moreover, the appellants took the position that the spirit of native culture is a communal rather than an individualistic one and, in consequence, the *Indian Act* should be interpreted to reflect this as much as possible. In his analysis of these submissions, Mr. Justice MacGuigan said:

> The limitations on individual Indians, in favour of the collectivity, are well set out by Judson J., for the majority in R. v. Devereux, [1965] S.C.R. 567, 572, a decision on which the appellants rely:
>
> > The scheme of the Indian Act is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s. 28(1) of the Act. If s. 31 were restricted as to lands of which there is a locatee to actions brought at the instance of the locatee, agreements void under s. 28(1) by a locatee with a non-Indian in the alienation of reserve land would be effective and the whole scheme of the Act would be frustrated.
> >
> > Reserve lands are set apart for and inalienable by the band and its members apart from express statutory provisions even when allocated to individual Indians. By definition

16 *Ibid., 62.*

(s.2(1)(o)) “reserve” means

> a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.

By s. 2(1)(a), “band” means a body of Indians

> (i) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart....

By s. 18, reserves are to be held for the use and benefit of Indians. They are not subject to seizure under legal process (s. 29). By s. 37, they cannot be sold, alienated, leased or otherwise disposed of, except where the Act specifically provides, until they have been surrendered to the Crown by the band for whose use and benefit in common the reserve was set apart. There is no right to possession and occupation acquired by devise or descent in a person who is not entitled to reside on the reserve (s. 50, subs. (1)).

One of the exceptions is that the Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered (s. 58(3))....

(Emphasis added).

However, even in the course of this analysis, which might otherwise support the appellants’ case, Judson J., describes the subsection in question here, 58(3), as an “exception” to the generally communal approach. Admittedly, it was used in the Devereux case to grant a lease for land that had been cultivated and used, so that the conclusion, which I take to be a judgment on fact and law together, is not a binding precedent; but its reasoning is nevertheless not helpful to the appellants in the final analysis, nor is the scheme of the statute itself in any way decisive in the appellants’ favour.[17]

17 *Ibid., 63/64.*

Having briefly canvassed the relevant statutory provisions and various authorities, Mr. Justice MacGuigan concluded that neither the scheme of the *Indian Act* nor the case law was decisive of the issue. He then embarked on a more broadly based view derived from general principles:

> Should analogy then be drawn to the community principle or to the personal principle? In the absence of any clear guide from statute or precedent, a court must I believe look for guidance to the words in the preamble of the Constitution Act, 1867 that Canada is to have "a Constitution similar in principle to that of the United Kingdom".
>
> Rand J., made bold to say in Saumur v. City of Quebec and Attorney-General for Quebec, [1953] 2 S.C.R. 299, 329, that:
>
> > Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery.
>
> Abbott J., went further in obiter dicta in Switzman v. Elbling and Attorney-General of Quebec, [1957] S.C.R. 285, 328:
>
> > Although it is not necessary, of course, to determine this question for purposes of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate.
>
> This is similar in approach to the Western tradition succinctly expressed by the French philosopher Jacques Maritain, in Man and the State (Chicago, University of Chicago Press, 1951), at page 13, "... man is by no means for the State. The State is for man".[18]

Mr. Justice MacGuigan concluded that the freedom of the individual in Canada is prior to what he termed "... the exigencies of the community".

18 *Ibid., 65.*

Even where group rights are given priority, the Canadian Constitution has provided for them specifically. His consequent determination was as follows:

> In sum, in the absence of legal provisions to the contrary, the interests of individual persons will be deemed to have precedence over collective rights. In the absence of law to the contrary, this must be as true of Indian Canadians as of others.[19]

Mr. Justice MacGuigan also rejected the appellants' contention that First Nations culture showed a preference for group rights, observing that there was no such evidence before the court and it was not a matter of which a court could simply take judicial notice. He concluded on a practical note: the Band Council's zoning powers under subsection 81(g), in his view, provided a sufficient protection for the concerns of the community as a whole. If the Batchewana Band Council had failed to exercise these powers, he saw no reason to create a broader alternative right.

In his judgment, Mr. Justice Marceau considered specifically this two-fold argument of the appellants: that Band Council consent would be required for a subsection 58(3) lease either by necessary implication resulting from the context or on account of the Crown's fiduciary duty towards the Band. He summarized the appellants' position:

> Under the scheme of the Indian Act, say the appellants, the interest of a locatee ... in his or her parcel of reserve land, is subordinate to the communal interest of the Band itself, and the allocation of possessory rights to Band members does not suppress the recognized interest of the Band in the development of allotted lands; besides, the rule is that non-Indians cannot have possession of reserve lands unless these lands have been surrendered by the Band and except for a few limited purposes set out in the Act, the Minister is unable to authorize non-Indian use or occupation of reserve land without consent of the Band or its Council. If, they say, s. 58(3) was construed literally and made applicable to any land developed or undeveloped, those principles could be disregarded and the scheme of the Act itself would thereby be defeated....[20]

Then Mr. Justice Marceau presented a comprehensive analysis of the indi-

19 *Ibid., 67.*

20 *Ibid., 59.*

vidual rights of First Nations people in lawful possession:

> I am afraid my understanding of the scheme of the Indian Act does not correspond totally with that of the appellants. I have already referred to a few sections of the Act where the words and expressions used in s. 58(3) are defined. It is in fact in these sections and a few others that the basic features of the legislation, with respect to reserve lands, are to be found. I see them as follows. The Band for whose use and benefit a "tract of land" has been set apart by Her Majesty no doubt has an interest in those lands, since it has the right to occupy and possess them. It is an interest which belongs to the Band as a collectivity, and the right to occupy and possess, of which it is comprised, is a collective right. This interest can be extinguished by a voluntary surrender by the Band to the Crown or by expropriation for a public purpose, but it cannot be alienated. The Band, however, acting through its Council, has the power to allot, with the approval of the Minister, parcels of land in its reserve to Band members. The right of a Band member in the piece of land which is allotted to him and of which he has "lawful possession", although in principle irrevocable, is nevertheless subject to many formal limitations. The member is not entitled to dispose of his right to possession or lease his land to a non-member (s.28), nor can he mortgage it, the land being immune from seizure under legal process (s.29), and he may be forced to dispose of his right, if he ceases to be entitled to reside on the reserve (s.25). These are all undoubtedly limitations which make the right of the Indian in lawful possession very different from that of a common law owner in fee simple. But it must nevertheless be carefully noted that all of those limitations have the same goal: to prevent the purpose for which the lands have been set apart, i.e., the use of the Band and its members, from being defeated. None of them concerns the use to which the land may be put or the benefit that can be derived from it. The land being in the reserve, its use will, of course, always remain subject to provincial laws of general application and the zoning bylaws enacted by the Band Council, as for any land in any municipality where zoning bylaws are in force, but otherwise I do not see how or why the Indian in lawful possession of land in a reserve could be prevented from developing it as he wishes. There is nothing in the legislation that could be seen as "subjugating" his right to another right of the same type existing simultaneously in the Band Council. To me, the "allotment" of a piece of land in a reserve shifts the right to the use and benefit thereof from being the collective right of the Band to being the individual and personalized right of the locatee. The interest of the Band, in the technical and legal sense, has disappeared or is at least suspended. This being my understanding of the scheme of the Act, not only do I dis-

> agree with the contention that the principles embodied therein require that the words "with the consent of the Band" be read into the provision of s.58(3), I think that those principles would be frustrated by doing so.[21]
>
> (emphasis added)

Having dealt so definitively with the appellants' first contention, Mr. Justice Marceau gave comparatively short shrift to the second string of their bow, that of the Crown's fiduciary obligation. In his opinion, the Crown, when acting under subsection 58(3), is under no fiduciary obligation to the Band. He thereupon concluded:

> The conclusion to me is clear. Bearing in mind the structure of the Indian Act and the clear wording of s. 58(3) thereof, there is no basis for thinking that the Minister is required to secure the consent of the Band or the Band Council before executing a lease such as the one here in question. It seems that the Act which has been so much criticized for its paternalistic spirit has nevertheless seen fit to give the individual member of a Band a certain autonomy, a relative independence from the dicta of his Band Council, when it comes to the exercise of his entrepreneurship and the development of his land.[22]

(iii) Post-Boyer analysis

In his paper Indian Control of Indian Lands,[23] Professor Douglas Sanders presented the view that a Band under the *Indian Act* had a choice as to whether to hold its lands collectively or individually. He first dealt with the former, the more universal perception of this landholding system. He commented:

> Reserves are popularly understood to be communal lands, collectively held by the band as a whole. Indian rights are rights of collectivities. Indian rights are group rights, not the individualistic rights of the western legal tradition. In the words of title to Part II of the Constitution Act, 1982, they are the rights of "peoples".[24]

21 *Ibid., 59.*

22 *Ibid., 61.*

23 *Professor Douglas Sanders, Faculty of Law, University of British Columbia, "Indian Control of Indian Lands", June 27, 1988.*

24 *Ibid., 11.*

Then he remarked on subsection 58(3) as being "... an individualistic alternative to the surrender process".[25] He noted subsection 18(2) which provides:

> The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or failing agreement, as may be determined in such manner as the Minister may direct.[26]

The fact that compensation is payable in these circumstances of expropriation, as also provided for in subsection 65(a), indicated to Professor Sanders a power merely paralleling that of other Canadian governments and not suggestive of any pattern of collective rights. He thus summarized:

> Indian lands may be collectively held, but the Indian Act permits a band to decide what patterns of band and individual rights to Indian lands it wishes to allow. Once a decision to permit individual rights occurs, the band is limited in its options of control over those individual rights. It is not particularly helpful to describe Indian lands as communal or collective. They can be managed as a collective asset of the band or they can be wholly or partially assigned to individuals. The drafters of the Indian Act may have assumed that a pattern of individual rigths would take over, but the Act does not compel an allotment process (as was compelled at one time in the United States).[27]

Professor Sanders next reviewed other sections of the *Indian Act*. He noted that a Certificate of Possession can be terminated with the consent of the holder (section 27); that it can be transferred to another Band member with the consent of the holder and the Minister (section 24); and that it can be inherited with the consent of the Minister (section 49). He also referred to subsection 60(1) which provides as follows:

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25 *Ibid., 11.*

26 *Indian Act, R.S.C. 1970, c. I-6, s.18(2).*

27 *"Indian Control of Indian Lands", supra at note 23, 11.*

> The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.[28]

This meant that such powers as to confirm allotments, approve transfers between Band members and permit devises could be delegated to a Band. In fact, the Sechelt Indian Band was granted all these powers (and others) in a 1977 delegation under subsection 60(1). In the opinion of Professor Sanders, the Federal Government considers itself unable to unreasonably withhold consent under these sections and would expect Bands having delegated powers to function likewise. However, we are unaware of this supposition having been put to the test, although we do know from Campbell v. Elliott[29] that Band Councils are under a general duty of fairness when dealing with the legal rights and interests of persons within the reach of their decision-making.

Another ostensibly far-reaching intrusion on individual rights was considered by Professor Sanders. This was subsection 38(1) which at that time provided:

> A band may surrender to Her Majesty any right or interest of the Band and its members in a reserve.[30]

On the face of it, this indicates what Professor Sanders called "... a victory of collective rights over individual rights".[31] But the practice, as he noted (and we have certainly experienced the same ourselves) is that the holder of a Certificate of Possession which is about to be "surrendered", will be compensated, usually from the resulting revenues. We are unaware of any situation where this section has been used to dispossess a Certificate holder without compensation. Furthermore, although we have no direct experience of the practice, it may be that the rights of the Certificate holder "revive" at the end of a term surrender or designation.

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28 *Indian Act, supra at note 26, s.60(1).*

29 *Campbell v. Elliott et al, [1988] 4 CNLR 45.*

30 *Indian Act, supra at note 26, s.38(1).*

31 *"Indian Control of Indian Lands", supra at note 23, 12.*

After referring to the line of authorities dealing with individual holdings, Professor Sanders concluded:

> None of the cases represent focused judicial analysis on the allotments or Certificates of Possession, but there is, nevertheless, a pattern of accepting these individual rights and giving force to them. The Boyer case is perhaps the strongest example of this pattern.
>
> This analysis concludes that the Indian Act is not that unclear about the rights involved in a Certificate of Possession. Confusion has arisen because of the common understanding that reserves are systems of collective rights. The Indian Act, in fact, permits collective control and development of lands or individual/private control and development of lands.[32]

Unfortunately, just as clarity was beginning to appear, Professor Sanders added another wrinkle in his paper The Present System of Land Ownership, in which he said:

> The question of the private property character of an allotment is also raised by the provisions in the Indian Act which say that the allotment cannot be transferred or devised without the consent of the Minister. There are two ways of viewing this provision. The first sees the allotment in individual private property terms. The need for Ministerial consent may have been linked to the need to keep the land within the eligible group of band members (and not otherwise to detract from the private property character of the right). The federal government are of the view that consent to a transfer or devise cannot be unreasonably withheld - meaning that the norm is to treat the interest as transferable and devisable. But the provision can also be seen in collectivist terms. If we proceed from an assumption that reserve lands have a distinctive "collective" character, then the need for consent to transfer and devise can be seen as limiting the private property rights in an allotment to a life estate. In other words the norm is that the land comes back to the collectivity at the end of the life estate, with collective decision making on future rights and use. Consent to transfer and devise now becomes the exception, available for special circumstances.
>
> Let me emphasize my assessment that the currently pervasive view of allotments as normally transferable and devisable is not dictated in any

32 *Ibid., 13.*

> way by the provisions of the Indian Act. It only seems capable of being explained on the basis of standard notions of property rights in western law. The model is non-Indian individual title, not a notion of Indian land as collectively owned by an Indian band. The "collective" idea makes the life estate view more logical than the view of the allotment as normally transferable.
>
> This analysis suggests that it is open to treat allotments as continuing, transferable titles or as life estates. If bands assume the power to approve transfers and devises (as they can under section 60), then the option to treat allotments as continuing or as life estates is with the band. We know that DIAND believes it does not have an option. And it seems that Bands do not see there being an option. But I repeat my conclusion that this question is left open by the Indian Act.
>
> In any case, the Indian Act establishes a regime of individual private property by way of the allotment system. The Act leaves open the alternative possibilities that the rights are life estates or that the rights are normally transferable and devisable.[33]

At one point, the Department of Justice viewed the locatee interest as a life estate. For example, a Department of Indian Affairs 1980 Program Circular provided the following information:

> The Department of Justice considers that since a locatee's interest in the land is a personal one, the term of any lease should not outlive his life interest.[34]

That was written in support of the then prevailing policy restricting subsection 58(3) leases to 21 year terms. Now the cut-off point is 49 years without Band consent. But the rationale for the restriction appears to have changed. According to the Land Management Manual:

> For practical purposes, a locatee lease with a very long term could be considered a way of bypassing the surrender or designation provisions of the Act. This would be especially true if the entire rent is payable in advance.

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33 *Professor Douglas Sanders, University of British Columbia, "The Present System of Land Ownership". Presented at the First Nations' Land Ownership Conference, Justice Institute of British Columbia, September 29, 1988: p. 5-6.*

34 *Department of Indian and Northern Affairs, Program Circular H-7-1, July 1, 1980, as quoted in the Special Steering Committee, "A Review of Land Management and Development Policies Affecting Indian Reserve lands in British Columbia", November 21, 1983: p.12-13.*

> In recognition of this, **a referendum is required for leases more than 49 years**.[35]

In fact, although Professor Sanders did raise an interesting issue, it is clear that the Department today does not regard Certificates of Possession as only having created life estates and, to the best of our knowledge, neither do the few First Nations enjoying subsection 60(1) authority. What we have seen though is the vulnerability of individual property rights to the changing approach in Departmental practice.

(iv) The Tsartlip decision [36]

The Boyer decision was recently considered in 2000 by the Federal Court of Appeal in Tsartlip.

Certificates of Possession had been issued to five members of the Tsartlip Band and, on the authority of subsection 58(3), the Minister had granted a lease to a company wholly owned by those individuals for the purpose of developing one of the lots as a manufactured home park for non-Indians. The Band Council had made clear to the Department of Indian Affairs its opposition to the issuance of this lease. Reflecting Mr. Justice MacGuigan's remark in Boyer that "…it is highly material that the valid concerns of the Indian community against adverse land use are well protected by its powers under s.81(g)," [37] the Band Council had even passed a zoning by-law. This by-law became legally effective on January 31, 1997, and its purpose and effect were described in the judgment:

> [25] The by-law essentially designates the reserve as a Special Development Zone, and prohibits the use or development of reserve land for commercial activities that would substantially change or impact on land in the reserve, unless the Band Council approves such use or development as an appropriate use of land, with or without terms and conditions, after receiving an application from the proponent and advice from

35 *Indian and Northern Affairs Canada, Land Management Manual. Directive 07-03 issued January 15, 1997, para. 13.*

36 *Tsartlip, supra at note 4.*

37 *Boyer, supra at note 3, 67.*

> a Zoning Advisory Committee. The by-law provides, *inter alia*, for non-conforming uses: a use of land that was lawful when the by-law came into force could be continued as a non-conforming use….[38]

The locatees did not apply for approval under the by-law for their development. On March 21, 1997, the Band Council wrote to the Department summarizing the reasons why a lease should not be issued for the development. There were servicing concerns and issues arising from the fact that the whole development was the subject of litigation. But, for the purposes of this Chapter, the following reason was the pertinent one:

> "…in considering the requested lease, DIAND should be balancing whatever duty it owes to the [Certificate of Possession] holders with its fiduciary duties to the Band as a whole. This development is contrary to the interests of the Band as a whole:
>
> (1) The development will cause harm to neighboring parts of the reserve, because of sewage and runoff problems.
>
> (2) The proponents have known from the beginning that they were going ahead contrary to the wishes of the community and the Chief and Council.
>
> (3) This development is not consistent with the Band's most recent proposed community plan. That plan is now being reviewed. This development is large, and will have a big impact on other parts of the reserve. It should not be authorized until it is clear that it is consistent with sound planning and management of the reserve as a whole.
>
> (4) DIAND has for years been suggesting that the Band should be involved in planning and land management decisions for our reserve, through by-laws. We now have the Tsartlip Zoning By-law in place, which establishes a way to ensure that proposals like this one will be consistent with the interest of the whole Band. The proponents have not made application or received approval as required by that by-law. We want DIAND to respect and support our by-law.

38 *Tsartlip*, *supra at note 4, 393.*

> (5) These last two matters are of special importance because our reserve was set aside *under Treaty*, as the village for the use of our Band's members.[39]

This put the issue of community interest versus individual interest just about as clearly as could be. The Department responded on April 10, 1997:

> I have difficulty accepting your premise that this development would be detrimental to the band as a whole. Section 58(3) of the *Indian Act* clearly allows the holder of a certificate of possession to lease his land, without the consent of the Council of the band. Recent jurisprudence has upheld this right. However, as a matter of policy, DIAND has sought the input of the Chief and Council to the proposed development on reserve.
>
> Although DIAND does not condone the actions of the locatees in constructing a part of the proposed leasehold without the consent of either the council of the day or the department, we are of the view that the alternatives to this project are untenable. Specifically, the removal of the current development or continued existence of this development without a lease in place are not viable options. It is not the policy of the department to dictate the removal of what is considered to be a "buckshee" arrangement, where those individuals present are there with the consent of the locatees.[40]

The lease was accordingly issued on May 1, 1997 but it was made to operate retroactively from April 1, 1996, thereby coming into effect before the zoning by-law.

Mr. Justice Décary, speaking for the Court, first expressed his view that the conclusion in Boyer that Her Majesty had no fiduciary duty to the Band "…has withstood the passage of time".[41] But he then raised the prospect of applying the approach followed in administrative law whenever competing interests were at issue before a decision maker. He pointed out that the sole question before the Court in Boyer was whether or not the validity of the lease depended on the consent of the Band or its Council. That was a narrow issue, and Décary, J.A. commented:

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39 *Ibid., 394.*

40 *Tsartlip, supra at note 4, 393.*

41 *Ibid., 394.*

> The question of allowing non-Indians to reside on the reserve was not raised. No by-law was in issue. The sole question before the Court was a question of principle: whether the consent of the Band was required by the statute or as an effect of a fiduciary obligation. No mention was made of a possible prejudice to the Band and the idea of an administrative law duty on the Minister to weigh the conflicting interests of the Band and the locatee was not mentioned nor explored.[42]

He determined that the Court in Boyer had merely decided that the Band could not veto a subsection 58(3) lease; it had not ruled out the need for balancing the interests at stake prior to granting a lease. He considered this analysis to be compatible with the Department's policy of referring subsection 58(3) leases to Band Councils but not allowing them a veto. What considerations could emerge from the Band Council referral that would then cause the Minister to deny the lease? Or as Mr. Justice Décary expressed it:

> The Minister, in deciding whether to lease or not, has a double duty, one to the individual holding the Certificate of Possession, the other to the band. There is no basis for the suggestion that one duty should necessarily prevail over the other in case of conflict. The question is to determine what considerations in a given case should lead the Minister to exercise his discretion in favour of one rather than in favour of the other.[43]
>
> (emphasis added)

The Court next reviewed the various provisions of the *Indian Act* that deal with the use of reserve land by non-Indians. It noted that, under subsection 28(1), "…a locatee cannot by lease or otherwise permit a non-band member to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve",[44] and any such permit would be void. If a non-Band member wished to exercise any such rights then, under subsection 28(2), it would require Ministerial authorization if for a period not exceeding one year and, for any period longer than that, the consent of the Band Council as well. Paragraph 46(1)(d) authorizes the Minister to declare the will of an Indian to be void if the Minister was satisfied that "the will purports to dispose of land in a reserve contrary to the interest of the band…".[45] Subsection 60(1)

42 *Ibid., 395.*
43 *Ibid., 398.*
44 *Ibid., 399.*
45 *Ibid., 402.*

empowers the Governor in Council to grant a Band "the right to exercise such control and management over lands in the reserve …as the Governor in Council considers desirable."[46] And, finally, there is paragraph 59(a) which, in Mr. Justice Décary's interpretation, "requires the consent of the band council when the amount of the rent set out in a lease is to be reduced or adjusted".[47] From this review, he concluded:

> [55] The Act is therefore very much band-oriented where use of lands in the reserve is at issue and that is particularly so where lands in the reserve are to be occupied for a period exceeding one year by non-members of the band. The intent of Parliament, clearly, is to require the consent of the band council whenever a non-member of the band, and even more so a non-Indian, is to exercise any right on a reserve for a period longer than one year.
>
> [56] It seems to me that subsection 58(3), which is found in that part of the Act which deals with "management of reserves", has to be read and understood in such a way as not to conflict with the avowed intent of Parliament expressed in those parts of the Act which deal with the substantial rights of the Indians (as opposed to those parts which deal with the managerial rights of the Minister). The mere fact that the Band has originally agreed to let a locatee occupy and use a lot on the reserve cannot mean, in my understanding of the whole of the Act, that the Band has implicitly abandoned the right it has under subsection 28(2) to control the use of the lot by a non-member of the Band. To find otherwise could lead, theoretically, to the Minister granting, for example, a 99-year lease under subsection 58(3) to the benefits of non-Indians, thereby displacing the other provisions of the Act.
>
> [57] While Parliament, as found in *Boyer*, stayed shy of giving a veto power to band councils with respect to leases granted under subsection 58(3), the Minister is bound, in my view, to give more weight to the concerns of a band as one gets closer to the type of lease that would be subject to subsection 28(2). The more a lease operates to the substantial detriment of the band as a whole the more the Minister must pay attention to the concerns expressed by the band.[48]

In this case, Band members had expressed opposition to the entry onto

46 *Ibid., 402.*

47 *Ibid., 402.*

48 *Ibid., 402, 403.*

reserve of non-native residents. The Court pointed out that the Minister had an obligation "…to satisfy himself that the concerns of the Band with respect to that long-term development which, they said, threatened their way of life *qua* Indian on their reserve, were unwarranted or were so minimal as compared to the benefits to the locatees as to warrant a conclusion that the lease should go ahead".[49] The Minister had failed to meet that burden. His Department's letter of April 10, 1997, referred to earlier, had merely stated: "I have difficulty accepting your premise that this development would be detrimental to the band as a whole."[50] Mr. Justice Décary commented:

> Such a general and condescending statement which ignores the basic fact that the proposed development was not for the benefit of the band, but for the benefit of non-Indians, and had both short-and long-term ramifications for the band as a whole, is evidence that the concerns of the Band were discarded without proper consideration. This is a fatal flaw in the decision of the Minister.[51]

The Court also determined that the Minister had dealt unreasonably with the Band's concerns about the development's water, sewer and stormwater systems. Another source of major concern to the Court was the retroactivity of the lease in these particular circumstances. Mr. Justice Décary stated:

> [62] …The Minister knew, when it executed the lease on May 1, 1997 retroactive to April 1, 1996, that a zoning by-law had been passed by the Band Council on December 23, 1996. The Minister not only knew of the by-law, he also had refrained from disallowing it (see subsection 82(2) of the Act). The Minister knew that under the by-law the proposed development would need to be scrutinized by a zoning advisory committee and then approved by the Band Council, which approval was an unlikely event. He had to have known that in making the lease retroactive to a point in time prior to the coming into force of the by-law, the locatees could avail themselves of the non-conforming use clause of the by-law and proceed without the approval of the Band Council. The Minister had a policy, prior to granting a lease, to ask a band council to confirm that a proposed lease does not contravene zoning by-laws …. All the steps described in the documentation filed by the Minister with respect to applica-

49 *Ibid., 403, 404.*

50 *Ibid., 404.*

51 *Ibid., 404.*

> tions for lease point to a prospective approach and counsel for the Minister recognized at the hearing that no reference was made in the documentation to retroactive leases. The lease, furthermore, is written in terms that do not provide for the retroactive compliance by the lessee with its obligations under the lease nor for the retroactive approval by the Minister of any building, structure or other improvement constructed on the premises prior to the execution of the lease on May 1, 1997.
>
> [63] While I need not decide here whether the Minister is legally entitled to grant a retroactive lease, the fact is that in a case such as this one, where the Minister owes a particularly onerous duty to the Band, the very concept of a lease exempted from compliance with a by-law because of its retroactivity simply does not make sense.[52]

The Court concluded that, in all the circumstances, the Minister had not acted reasonably in granting the lease. He had failed to give proper consideration to "the major concerns voiced by the Band".[53] The lease, as a result, was declared void and of no effect.

Although the Court had gone to some lengths to voice its approval of Boyer, we think that the introduction of administrative law considerations does tend to change the direction. There must surely be a restraining effect on the developmental activities of a Certificate holder when he/she knows: "The more a lease operates to the substantial detriment of the band as a whole the more the Minister must pay attention to the concerns expressed by the band".[54] The benefits of certainty are eroded.

Individual Property Rights on Indian Lands Outside the Indian Act

We are aware of the following lands regimes in British Columbia that function outside of the *Indian Act*:

(i) Customary holdings on reserve;
(ii) Under the *Sechelt Indian Band Self-Government Act*;[55]
(iii) Under the proposed Westbank First Nation Self-Government

52 *Ibid., 404, 405.*

53 *Ibid., 405*

54 *Ibid., 403.*

55 *Sechelt Indian Band Self-Government Act, supra at note 5.*

Agreement;[56]

(iv) Under the Nisga'a Treaty;[57]

(v) *First Nations Land Management Act.*[58]

(i) Customary Holdings on Reserve

The Department's Land Management Manual states the following:

> Certain First Nations do not subscribe to the allotment provisions of the *Indian Act*. Instead, these First Nations recognize traditional or customary holdings by individuals and grant "occupational rights at the pleasure of the First Nation council". The department does not administer these interests, which are not "lawful possession" under the Act.[59]

Although this paragraph refers only to "Certain First Nations" as not subscribing to the allotment system of the *Indian Act*, it is our experience that non-compliance is a widespread and growing phenomenon. As the Department's policies increasingly depart from the realities of contemporary life, First Nations are working out their own practical accommodations. Land held individually under Band custom is well-recognized. What are called "buckshee" or "ad hoc" leases are prevalent (even though clearly void under subsection 28(1)). In a 1988 presentation to the Department of Indian Affairs, Professor Sanders had commented:

> "Custom" systems of rights to reserve lands are very common, though they are outside the Indian Act and probably not enforceable in the courts. There are more "property rights" under "custom" systems than under the Indian Act system and more new "rights" are being established under "custom" systems than under the Indian Act system.
>
> The regular courts have not, as yet, commented on "customary" rights. In Joe v. Findlay a judge seemed to accept the Squamish way of handling rights, though it had no basis in the Indian Act. In Campbell v. Cowichan a judge gave procedural rights to the holder of a custom or traditional allotment. So far the courts have not gone further.[60]

56 *Westbank First Nation Self-Government Agreement, supra at note 6.*

57 *The Nisga'a Final Agreement, supra at note 7.*

58 *First Nations Land Management Act, supra at note 8.*

59 *Indian and Northern Affairs Canada, Land Management Manual. Directive 03-02 issued July 9, 1999, para. 10.*

60 *Professor Douglas Sanders, Faculty of Law, University of British Columbia, "Indian Control of Indian Lands". Presented to the Department of Indian Affairs, Ottawa, October 24, 1988: p.2.*

Offering something of a closing editorial on the subject, he had further commented in his Indian Control of Indian Lands paper:

> The legal hostility to the custom systems is a serious fault in the present legislation, for many of these custom systems are stable and accepted. Custom bands will not agree to any legal reforms which require that these systems be abandoned in favour of a new and improved Indian Act or Indian Lands Act.
>
> Local control by custom systems is fully in accord with the stated policies of Indian leaders and federal politicians. The custom systems are signs of life in a body that many thought had become totally dependent on federal life support systems. The basic approach to the custom systems should be "hands off". Government should be concerned with innovations which support such local control, not diminish it.[61]

In the decision of Lower Nicola Indian Band v. Trans-Canada Displays Ltd.[62] "(T)he regular courts" finally got to comment on customary rights. Or, more precisely, it was Mr. Justice Smith of the British Columbia Supreme Court doing so.

The plaintiff Band had sought a declaration that the estate of a Band member had no interest in any lands on the Joeyaska Reserve despite the deceased's claim to two parcels of land on the basis of traditional or customary use by his family. Although the facts were complex, Mr. Justice Smith had no difficulty in reaching the following conclusions:

> The provisions of the (Indian) Act are clear and must be strictly applied. All Joeyaska Reserve lands are held in trust for the Band, for its members, subject to those lands which have been allotted by a BCR and Ministerial approval to individual members of the Band.
> …Ownership of lands based on traditional or customary use of the land does not exist independent of interests created by the Act. Recognition of an individual's traditional occupation of reserve lands does not create a legal interest or entitlement to those lands unless and until the requirements of the Act are met.[63]

61 *"Indian Control of Indian Lands", supra at note 23, 22.*

62 *Lower Nicola Indian Band v. Trans-Canada Displays Ltd., [2002] 4 CNLR 185.*

63 *Ibid., 216.*

He also noted that traditional or customary allocation of reserve lands had historically been for residential or agricultural purposes, not for the commercial purposes that were the subject of this dispute. If a Band Council did choose to acknowledge a traditional or customary allocation of lands to individuals, most probably for these limited purposes, it had "a governance responsibility" to establish a fair process for administering the claim. But this "fair process", as stated above, would have to culminate in meeting the requirements of the *Indian Act.*

The courts certainly appear to be inclined to invoke the *Indian Act* when endeavouring to regularize these factual situations. For example, in Stoney Band v. Poucette[64], Mr. Justice Hutchinson of the Alberta Court of Queen's Bench, whilst commenting, obiter, that an Indian can be in lawful possession without a Certificate of Possession, actually resolved the matter on the basis of section 22 of the *Indian Act* which provides:

> Where an Indian who is in possession of lands at the time they are included in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of such lands at the time they are included.[65]

And in George v. George,[66] the British Columbia Court of Appeal accepted the trial judge's conclusion that the Minister had given approval to the allocation of land on Burrard I.R. No. 3 to the appellant "…although no record of the approval was located and a Certificate of Possession had never been issued".[67] The fact that the appellant had signed an undertaking acknowledging that he was "lawfully entitled to possession of the land"[68] and his transferring this "right, title and interest"[69] to the Burrard Band for so long as his C.M.H.C. loan remained unpaid had led the trial judge to infer that the Band Council must have approved the allotment. Moreover, the trial judge also inferred that, because of the provisions for security contained in the C.M.H.C. loan documentation and the resultant issuance of funds, the

64 *Stoney Band v. Poucette, [1999] 3 CNLR 321.*

65 *Indian Act, supra at note 2, s. 22.*

66 *George v. George, [1997] 2 CNLR 62.*

67 *Ibid., 74.*

68 *Ibid., 65.*

69 *Ibid., 65.*

Minister of Indian Affairs must have similarly approved the allotment. The Court of Appeal agreed, noting that the loan security provisions "…would be pointless unless both the Band Council and the Minister had given approval of the allotment of the property to the appellant".[70] But, with respect, this decision (which seems to rest on fiction) might suggest a different judicial approach. The court is here bending over backwards to effect justice by contriving regularity. It wished to acknowledge the individual's property rights and found a way to do so. Is this a possible direction for the future?

In summary, it is clear from all of the above decisions, including Lower Nicola Indian Band[71], that the courts will be reluctant to support a claim for individual property rights that is outside the *Indian Act* or that cannot be brought within the statutory ambit.

Could a Band member claim possession of reserve land other than under the *Indian Act* (whether in fact or as determined in cases such as George[72]) or by virtue of a customary holding? Probably the best source for this discussion is the four judgments that resulted from a dispute between Band member Robert Findlay and the Squamish Band Council. The first three of these judgments dealt with an attempt by Mr. Findlay to occupy certain Reserve land without Band Council consent.

In Joe v. Findlay,[73] the Squamish Band Council sought an interlocutory injunction restraining the defendant from residing upon one of the Squamish Band Reserves and requiring him to move certain chattels from that Reserve. The defendant argued that possession of reserve lands is in the Crown and, hence, a Band, without possession, could not bring an action for trespass. Mr. Justice Berger had no trouble in disposing of this argument. In his determination, if a Band can allot possession to a Band member, the Band must have possession in the first instance. He stated:

> The scheme of the Act for the management of reserve lands by Indian bands would be impeded if such a fundamental legal remedy as ejectment were not available to the band suing in its own behalf before the ordinary

70 *Ibid., 74.*

71 *Lower Nicola Indian Band, supra at note 62.*

72 *George v. George, supra at note 66.*

73 *Joe v. Findlay, (1978) 87 DLR (3d) 239.*

> Courts of the Province.[74]

The Band Council then sought a mandatory injunction to remove the defendant. In the second Joe v. Findlay,[75] Mr. Justice Wallace held that, since a Band Council has power to allot, it follows that it must have power to eject a person unlawfully attempting to acquire possession of any portion of a Reserve. He further held that the plaintiffs had a sufficient possessory interest in the unallotted lands occupied by the defendant to maintain an action for trespass against him. Although Mr. Findlay was entitled in common with all other Squamish Band members to the use and benefit of their Reserve lands, this did not carry with it the right to possession of any specific portion of the Reserve. That would have required a section 20 allotment and none had been made. Mr. Justice Wallace concluded:

> I reject the submission that the respective rights of the parties should be determined in accord with common law principles applicable to tenants in common. It is my opinion that the respective interests of the parties are created by the Indian Act which is designed to further an overall policy, unique to the relationship of Government, Indian bands, members of such bands, and persons who are not Indians. Resort to authorities dealing with quite different relationships, in quite different circumstances, is of little assistance or relevance in construing and interpreting the provisions of the Indian Act.[76]

He therefore granted the mandatory injunction. This decision was appealed to the British Columbia Court of Appeal. Speaking for the court, Mr. Justice Carrothers held that the use and benefit of reserve lands accrued to and came into existence as an enforceable right, subject to Ministerial consent, vested in the entire Band for which such reserve lands had been set apart. He summarized the position in these words:

> The subsequent provisions of the statute relating to improvements on reserve lands and transfer of possession of reserve lands are consistent only with this right of use and benefit being exercised by the individual band member through an allotment to that individual band member of reserve land on the part of the band council, with the approval of the

74 *Ibid., 242.*

75 *Joe v. Findlay, [1981] 2 CNLR 58 (B.C.S.C.).*

76 *Ibid., 74.*

> Minister. I emphasize that we are considering merely the right to possession or occupation of a particular part of the reserve lands, which right is given by statute to the entire band in common, but which can, with the consent of the Crown, be allotted in part as aforesaid to individual members, thus vesting in the individual member all the incidents of ownership in the allotted part with the exception of legal title to the land itself, which remains with the Crown: Brick Cartage Limited v. The Queen, [1965] Ex.C.R. 102. In the absence of such allotment by the band council, there is no statutory provision enabling the individual band member alone to exercise through possession the right of use and benefit which is held in common for all band members.[77]
>
> (emphasis added)

The fourth and final judgment in this series, Joe v. Findlay and Findlay[78], dealt with a different set of facts. Here, the Band Council had granted its own "allotment" to Robert Findlay's father, being a right of occupation for five years with the right to renew for another five years. The whole ten year term had expired, and the Band Council had given notice to quit. However, the defendants claimed a right to continued occupation by virtue of their membership in the Band. Mr. Justice Taylor found that the Band Council was entitled to a declaration that the defendants were not lawfully in possession of the lands in question but were trespassing on it.

From these four judgments, it would appear that, in the absence of an allotment made under the *Indian Act*, the Band Council is very much in control of the right to possession on-reserve.

(ii) Sechelt Indian Band Self-Government Act

Under this statute, proclaimed into effect on October 9, 1986, title to the 33 reserves held by Her Majesty the Queen for the use and benefit of the Sechelt Indian Band was transferred in fee simple to the successor Band. Section 25 provides that the Band "…holds the lands transferred to it for the use and benefit of the Band and its members".[79] Given Sechelt's traditional adher-

77 *Findlay v. Joe, (1981) 122 DLR (3d) 377, [1981] 3 WWR 60, 21 BCLR 376, [1981] 3 CNLR 58 (C.A.).*

78 *Joe v. Findlay and Findlay 12 BCLR (2d) 166.*

79 *Sechelt Indian Band Self-Government Act, supra at note 5, s. 25.*

ence to communal ownership, it was not surprising that the *Act* made no provision for the granting of individual property rights other than to make the Band's fee simple title subject to

> 24…(c) any rights or interests under a mortgage, lease, occupation permit, certificate of possession or other grant or authorization in respect of the lands that exist on the coming into force of this section.[80]
>
> (emphasis added)

As a practical response to this provision, the Band, prior to the date of proclamation, negotiated for the purchase of the certificates of possession on its reserve lands.

Consistent with the preceding, the Sechelt Constitution, enacted under the authority of sections 7 and 10, provided very specifically the following:

> The Sechelt Lands shall be held by the Band for the use and benefit of the Band and its members and, subject to section 24(c) of the Act, no further Certificates of Possession shall be issued.[81]

So how do Sechelt Band members obtain rights to their own homesites and for business purposes? The former is answered in the immediately succeeding section which provides:

> The rights, and the procedures to protect those rights, of the Band Member to use and occupy the lot upon which his or her house is situated shall be provided for by resolution of the Band Council or Band law. The procedure for the issuance of all residential lots available to Sechelt Indians and the settlement of disputes, if any, shall be decided upon by the Band Council and the lots allocated accordingly.[82]

The latter, rights for business purposes, is not dealt with at all in the Sechelt Constitution but the practice, since 1986, is well-established. A Band Member wishing to acquire property rights within the Sechelt Lands for his/her own business purposes will be able to do so only by the grant of a lease or permit from the Band. Apart from the convention of a nominal rental

80 *Ibid., s. 24(c).*

81 *Sechelt Band Constitution*, *Canada Gazette, Part I, Volume 121, Number 37, page 3248: Part I, Division (2), s. 1.*

82 *Ibid., s. 2.*

payment during the "start-up" years, the Band Member will be undertaking the same type of legal obligation as would anyone else. In short, the communal principle is so recognized at Sechelt as to render individual property rights for Band Members (apart from their homesites) unavailable.

(iii) Under the Proposed Westbank First Nation Self-Government Agreement

The Westbank First Nation Self-Government Agreement[83] was initialled by the negotiators for Westbank and Canada on July 6, 2000. In order to take effect, it will have to be approved in a referendum of the Westbank voters and then be ratified by legislation. Two votes held to date have failed to produce an affirmative vote from the required quorum of Westbank voters.

The Westbank First Nation played a major role in securing the passage of the *First Nations Land Management Act*.[84] Although this activity has been largely superseded by the momentum towards a significant level of self-government, the rationale for Westbank's involvement remains. It was succinctly explained by Dr. Tim Raybould, the Westbank Director of Intergovernmental Affairs:

> The entire regulatory structure established under the *Indian Act* is premised on the assumption that Indian peoples are not capable of managing their own lands. It establishes a paternalistic system where the federal government assumes not only the legal responsibility for the creation of interests in reserve lands but also the day-to-day administration of what off-reserve would be considered private transactions of individual land holders…the inability for an individual Indian or a Band to enter into a lease in the same way as you can if you have a fee simple interest in land arose because the government assumed the Indian or the Band was not capable of making an informed decision as to the merits of the land transaction. This is the root of the paternalism so often associated with the *Indian Act*.
>
> …the existing regulatory structure does not make sufficient distinction between the function of senior government to create legal interest in land and the local government function of managing land use and development. Rather it creates a confusing and potentially conflict ridden set of

83 *Westbank First Nation Self-Government Agreement, supra at note 6.*

84 *First Nations Land Management Act, supra at note 8.*

> administrative practices that needs to be clarified. Furthermore, the system does not allow private individuals to conduct their business in the normally accepted manner without the interference of government and the disclosure of sensitive business information within the political process.[85]

Hence the impetus for Westbank, with approximately 100 businesses located on its lands and over 1340 registered leases, to press for change.

Westbank self-government will maintain Westbank lands as Indian reserve. It will also continue in effect all existing Certificates of Possession except for the modification provided for in the following section:

> Interests in Westbank lands held on the Effective Date by Members pursuant to allotments under subsection 20(1) of the Indian Act are subject to the provisions of Westbank Law governing interests in Westbank Lands and sharing in natural resource revenues.[86]

"Westbank Law" is defined as including the Constitution, Codes and laws of the Westbank First Nation. The Constitution and Lands Code (required pursuant to subsection 44(b)) have been drafted and circulated among the membership. These important documents will need to be ratified simultaneously with the Self-Government Agreement itself if a third vote is ever to be held. If the Westbank voters do approve them, it will have created a lands regime that will afford individual property rights to members significantly in excess of those available under the *Indian Act* or achieved to date under the *First Nations Land Management Act.* For example, section 4.1 of Division (4) of Part IV of the proposed Constitution provides for the issuance of Certificates of Title. Section 4.2 thereof provides:

> The holder of a Certificate of Title shall have the right to:
>
> (a) permanent possession of the land held thereunder;
>
> (b) grant Licences, leases and other interests in that land, and

85 *Dr. Tim Raybould, Director of Intergovernmental Affairs, Westbank First Nation, "Land Management On-Reserve: Westbank First Nation: A Case Study". Presented at Insight Information Co. conference entitled "Land Management and Property Development Strategies for Aboriginal Communities", December 13 – 14, 1999: p.6.*

86 *Westbank First Nation Self-Government Agreement, supra at note 6, s. 90.*

> (c) subject to Westbank Law, exploit, and benefit from, the resources lying in, on and under that land where such resources form part of the land.[87]

The proposed restrictions on a Certificate of Title holder are set forth in section 4.3 as follows:

> Notwithstanding subsection 4.2(b) of this Part, a holder of a Certificate of Title may not:
>
> (a) transfer, devise or otherwise dispose of all or a fraction of his or her interest as a Certificate of Title holder unless such transfer, devise or disposition is to a Member; or
>
> (a) pledge or mortgage the Certificate of Title unless such pledge or mortgage is to another Member or the Westbank First Nation.[88]

The proposed Lands Code makes it clear that the Westbank Council will not consider applications for a Certificate of Title for any purpose other than single family residential unless first reviewed by the specially constituted Lands Advisory Committee. This new Committee will be empowered to make fairly extensive documentary demands of any applicant and, in the end, it can only recommend an application for Westbank Council acceptance if this would "…best serve the interests of the Westbank First Nation".[89] There is good reason for these precautions; once a member holds a Certificate of Title, he/she has rights to develop and lease that land subject only to applicable laws. There are none of the community procedures or other limitations found in the Codes so far enacted under the *First Nations Land Management Act* (see section (v) below).

It will be interesting to see if the Westbank First Nation Self-Government Agreement ever does get enacted.

(iv) Under the Nisga'a Treaty

The Nisga'a Treaty was proclaimed into law on April 13, 2000. It establish-

87 *Draft Westbank Constitution, February 5, 2001, Division (4) of Part IV, s. 4.2.*

88 *Ibid., s. 4.3.*

89 *Draft Westbank First Nation Lands Code, November 27, 2000, s. 5.5(c).*

es various categories of land. The first is Nisga'a Lands which comprises Nisga'a Public Lands, Nisga'a Private Lands and Nisga'a Village Lands. Nisga'a Lands are owned by the Nisga'a Nation in fee simple. Pursuant to Treaty Chapter 3, this estate "is not subject to any condition, proviso, restriction, exception, or reservation set out in the *Land Act*, or any comparable limitation under any federal or provincial law".[90] There are also Nisga'a Fee Simple Lands outside Nisga'a Lands, and these consist of Category A Lands and Category B Lands. Although both categories are held in fee simple, the estate is not quite as extensive as that for Nisga'a Lands because it will be subject to certain rights in the *Land Act*.

On the effective date of the Treaty, May 11, 2000, title to Nisga'a Lands was granted to the Nisga'a Nation free and clear of all interests except those expressly provided for. For our purposes, the provisions of interest are the following:

> 33. On the effective date, the Nisga'a Nation will issue to each person named in Appendix C-5 a certificate of possession for the parcel of Nisga'a Lands ascribed to that person and described in Appendix C-5.
>
> 34. On the effective date, the Nisga'a Nation will issue to each person named in Appendix C-6 a certificate of possession for the parcel of Nisga'a Lands ascribed to that person and described in Appendix C-6.[91]

Appendix C-5 sets forth a list of 129 Certificate of Possession instruments issued by Canada on former Nisga'a Indian Reserves, now on Nisga'a Lands. Appendix C-6 lists 523 "Home Locations" for persons authorized by Band Council Resolution on former Nisga'a Indian Reserves, now Nisga'a Lands. We are unaware of any individual holdings affecting Category A or Category B Lands. The Treaty accordingly contemplated that every person identified in paragraphs 33 and 34 would be issued a certificate of possession by the Nisga'a Nation, as a result of which that person:

> 35. …will have substantially the same right to possess the described parcel of Nisga'a Lands as the person would have had as the holder of

90 *The Nisga'a Final Agreement*, *supra at note 7, Chapter 3, s.3.*

91 *Ibid., Chapter 3, s. 33, 34.*

> a certificate of possession under the *Indian Act* immediately before the effective date, modified to reflect Nisga'a Government jurisdiction over, and Nisga'a Nation ownership of , Nisga'a Lands.[92]

Although it was to us at the time unclear how a certificate of possession could be compatible with the Nisga'a Nation's fee simple title, any consequent difficulty appeared to be resolvable in practice by virtue of paragraph 36:

> 36. After the effective date, the Nisga'a Nation or a Nisga'a Village may, in accordance with Nisga'a law, replace the certificates of possession issued under paragraphs 33 or 34 with estates or interests in, or licences to use or possess, the described parcels of Nisga'a Lands. If the certificates of possession are replaced with licences, the licences will include rights to use and possess the land comparable to, or greater than, those set out in those certificates of possession.[93]
>
> (emphasis added)

In fact, with the enactment of the *Nisga'a Land Act*[94], *Nisga'a Village Entitlement Act*[95] and *Nisga'a Nation Entitlement Act*[96], the Nisga'a Nation appears to be moving forward to a somewhat different land regime than that originally contemplated.

The *Nisga'a Village Entitlement Act* provides for the right to possession of a particular parcel of Nisga'a Village Lands. Only an "eligible recipient"[97] can be granted such a right and, for individuals, this is defined as a Nisga'a citizen who was formerly a member of the Band to which the particular Nisga'a Village is a successor. This holder of the Nisga'a Village entitlement may only transfer his/her interest to another eligible recipient or the particular Nisga'a Village. Any agreement of any kind by which the entitlement holder purports to permit anyone other than an eligible recipient or the particular Nisga'a Village to exercise any rights on the subject parcel is void. Two provisions of particular interest are the following:

92 *Ibid., Chapter 3, s. 35.*

93 *Ibid., Chapter 3, s. 36.*

94 *Nisga'a Land Act, Nisga'a Lisims Government.*

95 *Nisga'a Village Entitlement Act, Nisga'a Lisims Government.*

96 *Nisga'a Nation Entitlement Act, Nisga'a Lisims Government.*

97 *Nisga'a Village Entitlement Act, supra at note 95, s. 2.*

13. If land in which a Nisga'a Village owns the estate in fee simple within its Nisga'a Village Lands is subject to a Nisga'a Village entitlement, the Nisga'a Village may, on application by the registered holder of the Nisga'a Village entitlement, lease the land for the benefit of the registered holder.

14. A Nisga'a Village entitlement is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an eligible recipient or the particular Nisga'a Village.[98]

The *Nisga'a Nation Entitlement Act* is similarly worded except that an eligible recipient only has to be a Nisga'a citizen; there is no requirement with respect to previous Band membership.

The *Nisga'a Land Act* is considerably broader than the *Entitlement Acts*. It deals with the grant of an estate in fee simple to Lisims land, called a "Nisga'a grant".[99] There appears to be no restriction on who can be a grantee except that the individual must be at least 19. The only constraints on the grant are found in section 6 (1), where it has to be considered by the executive "…to be in the interest of the Nisga'a Nation"[100]; and section 7, where the granted parcel cannot have a surface area greater than five hectares except with the prior approval of Wilp Si'ayuukhl Nisga'a (i.e. the Nisga'a legislature). Section 14(1) places restrictions on all dispositions of Lisims land "…other than by a Nisga'a grant".[101] The Nisga'a grant therefore appears to be an individual property interest that is as unqualified as one could possibly require although, as cautioned by counsel for the Nisga'a, it is unlikely to be used except in circumstances of pronounced benefit for the Nation as a whole.

(v) First Nations Land Management Act

The *First Nations Land Management Act*[102] received Royal assent on June 17, 1999. It brought into effect the Framework Agreement on First Nation

98 *Ibid., s. 13, 14.*

99 *Nisga'a Land Act, supra at note 94, s. 6.*

100 *Ibid., s. 6(1).*

101 *Ibid., s. 14(1).*

102 *First Nations Land Management Act, supra at note 8.*

Land Management of February 12, 1996 between the Minister of Indian Affairs and 13 First Nations (the 14th was added as of December 10, 1996). The intent of the Framework Agreement was to provide these 14 signatories with the option of managing their own reserve lands outside the *Indian Act*. There can be little doubt of the importance of this legislation; it represents a significant path forward in the management of reserve land.

Firstly, there is no change in the actual title to the reserve land; it continues to be land set apart for the use and benefit of the particular First Nation and "lands reserved for the Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*. The key event in establishing the new land management regime is the adoption by a signatory First Nation of its own land code. Pursuant to section 6(1), this land code must include the following matters:

> (a) a legal description of the land that will be subject to the land code;
>
> (b) the general rules and procedures applicable to the use and occupancy of first nation land, including use and occupancy under
>
> (vi) licences and leases, and
> (vii) interests in first nation land held pursuant to allotments under subsection 20(1) of the *Indian Act* or pursuant to the custom of the first nation;
>
> (c) the procedures that apply to the transfer, by testamentary disposition or succession, of any interest in first nation land;
>
> (d) the general rules and procedures respecting revenues from natural resources obtained from first nation land;
>
> (e) the requirements for accountability to first nation members for the management of first nation land and moneys derived from first nation land;
>
> (f) a community consultation process for the development of general rules and procedures respecting, in cases of breakdown of marriage, the use, occupation and possession of first nation land and the division of interests in first nation land;
>
> (g) the rules that apply to the enactment and publication of first nation laws;

(h) the rules that apply to conflicts of interest in the management of first nation land;

(i) the establishment or identification of a forum for the resolution of disputes in relation to interests in first nation land;

(j) the general rules and procedures that apply in respect of the granting or expropriation by the first nation of interests in first nation land;

(k) the general rules and procedures for the delegation, by the council of the first nation, of its authority to manage first nation land;

(l) the procedures that apply to an approval of an exchange of first nation land; and

(m) the procedures for amending the land code.[103]

Given our earlier discussion of customary holdings, it is interesting to note the recognition in subparagraph (b)(ii) of interests held "pursuant to the custom of the first nation;".

Section 8(1) requires the Minister and First Nation to jointly appoint a "verifier" whose job it will be, inter alia, to determine that the proposed land code accords with the Framework Agreement and the *Act*. There will then be a vote by all First Nation members over the age of 18, regardless of residency, to provide the necessary community approval to proceed. If so approved, the land code will come into force either on the day it is certified by the verifier or on a later date specified in the code itself.

Section 16 provides that, once the land code is in force, no interest in or licence in relation to the subject reserve land can be acquired or granted except in accordance with the code, but that existing interests and licences will continue in accordance with their terms and conditions. Of particular interest is subsection (4):

> Interests in first nation land held on the coming into force of a land code by first nation members pursuant to allotments under subsection 20(1) of the *Indian Act* or pursuant to the custom of the first nation are subject to

103 *Ibid., s. 6(1).*

> the provisions of the land code governing the transfer and lease of interests in first nation land and sharing in natural resource revenues.[104]

This offers each participating First Nation the prospect of an individually tailored land code that could range from a prohibition of individual leases without Chief and Council consent to an enshrined recognition of Boyer.[105] We are moving a long way from the *Indian Act*.

Section 18 sets forth the various powers to be enjoyed once the land code has come into force: the affected First Nation will be able to exercise the powers, rights and privileges of an owner in relation to the subject reserve land; it will be able to grant interests in and licences in relation to that land; it will have the legal capacity necessary to exercise its powers and perform its duties and functions, including the ability to contract, to borrow, to invest and to be a party to legal proceedings; and its powers shall be exercised by the elected Council or a person or body to whom the Council delegates. Under section 20, the Council of the First Nation will have the power, in accordance with its land code, to enact laws respecting such matters as the creation, acquisition and granting of interests in and licences in relation to the subject reserve land, environmental assessment and protection, and the regulation, control or prohibition of land use and development, including zoning and subdivision control.

Once the land code comes into force, the following sections of the *Indian Act*, those concerned with land management, cease to apply: sections 18 to 20, 22 to 28, 30 to 35, 37 to 41 and 49, subsection 50(4), and sections 53 to 60, 66, 69, 71 and 93. This is a formidable list. Her Majesty will thereupon no longer be liable "in respect of anything done or omitted to be done…by the first nation or any person or body authorized by the first nation to act in relation to first nation land".[106]

Of the 14 signatories to the Framework Agreement, five First Nations have to date voted on their own land codes: Georgina Island and Scugog Island in Ontario, Muskoday in Saskatchewan and, as recently as October 25, 2000,

104 *Ibid., s. 16(4).*

105 *Boyer, supra at note 3.*

106 *First Nations Land Management Act, supra at note 8, s. 34(3).*

Lheidli T'enneh and N'Quatqua in British Columbia (to come into effect once certified by the verifier). Of these, the first four land codes were approved and the N'Quatqua code was not approved. We have reviewed these codes to ascertain the extent to which they provide for individual property rights. Pertinent provisions of each Code are highlighted in Appendix D.

From this highlight of the various provisions affecting individual property rights, it can readily be seen that this *Act* affords participating First Nations a solid opportunity to create their own lands regimes, regimes that will be reflective of their individual values and traditions. We consider the potential to be exciting and encouraging, and we note that section 45 allows the names of other First Nations to be added to the first 14 "…if the Governor in Council is satisfied that the signing of the Framework Agreement on behalf of the band has been duly authorized and that the Framework Agreement has been so signed".[107] It is our understanding that some 30nearly 80 First Nations have already applied to be added, thereby evidencing a successful arrangement. Of these, we understand that 30 are in the process of being approved or expected to be imminently approved by the Minister of Indian Affairs.

Discussion and Conclusion

The purpose of the Think Tank on First Nations Wealth Creation is to define a path to prosperity[108] for First Nation economies in British Columbia. This will entail a growing reliance on achieving the three cornerstones that we have described in Chapter 1. Concerning cornerstone two, that of land rights, we have explained in Chapter 3 what we mean by "masters in our own house" in that context. In that Chapter, we take the position that the ability to make available legally assured property rights on reserve and other Indian lands is a critical test of the extent to which a First Nation will be "master in its own house".

So let us ask the question: Can First Nations be masters in their own house

107 *First Nations Land Management Act*, *supra at note 8, s. 45.*

108 *Introduction, p. 1*

when it comes to the granting of individual property rights? This is the starting-point.

The following chart depicts the present legal framework, moving along the spectrum from a deficient regime under the *Indian Act* to the security of the Nisga'a grant. We draw these conclusions from our earlier analysis:

PRESENT
LEGAL FRAMEWORK
(as at November 2002) for Individual
Property Rights on Reserve and
Under Self-government and Treaty Legislation

Certificate of Possession Section 20,	Nisga'a Village entitlement	Nisga'a Nation Entitlement	Individual Interests pursuant to land codes	Certificate of Title	Nisga'a grant
Indian Act	*Nisga'a Village Entitlement Act*	*Nisga'a Nation Entitlement Act*	*First Nations Land Management Act*	*Westbank Constitution* (if enacted)	*Nisga'a Land Act*

(i) The rules governing Certificates of Possession are not formulated in the *Indian Act*, but left to Ministerial discretion. As a result, this system of individual property rights is governed by the changing policies of the Department of Indian Affairs which, in turn, are affected by changing judicial interpretation. The Tsartlip[109] decision is a textbook example of these deficiencies, its inevitable aftermath being increased uncertainty. In sum, the governing provisions, as they exist, do not appear to establish property rights sufficient to facilitate entrepreneuship.

(ii) The Nisga'a entitlements are superior rights to possession than Certificates of Possession insofar as this system is established by Wilp Si'ayuukhl Nisga'a law and, presumably, can be amended as circumstances warrant change. Its main present disadvantages are that, as with a Certificate, the holder cannot lease the entitlement land directly and neither can he/she mortgage it to any person other

109 *Tsartlip, supra at note 4.*

than another Nisga'a Citizen, the Nisga'a Village or Nation. It is our understanding that, where banks have indicated a willingness to provide mortgages to individual Nisga'a Citizens, they are only doing so based on a guarantee from the Lisims Government.

(iii) It is to the *First Nations Land Management Act*[110] that we primarily look for the establishment of a "masters in our own house" regime at the present time. The ability to create its own binding land code would be a powerful instrument for any First Nation. From the five Codes we have examined, it is obvious that clear rules and procedures can be devised, tailored entirely to each community's view of how property rights should be enabled. For us, this statute is the best mechanism generally available at present for those First Nations anxious to become masters in their own house.

(iv) The proposed Westbank Certificate of Title will be a stronger property right than any enacted to date under the *First Nations Land Management Act.* In particular, it will allow for direct leasing by the Certificate holder with no limit on the term of the lease. The main restrictions would be the inability to transfer title to a non-Band member or to mortgage the Certificate itself to anyone except another Band member or the Westbank First Nation (but, of course, a leasehold interest could still be mortgaged).

(v) Although not reflected on the chart, the *Sechelt Indian Band Self-Government Act*[111] is very much an example of a First Nation achieving mastery of its own house. That the Sechelt people have opted for a collective approach to management and development is by the way. The pertinent fact is that, uniquely among the First Nations of Canada, it could, if it wished, subdivide all 33 of its Band Lands into 1000+ parcels and give each Band member a fee simple title.

(vi) Finally, we come to the most autonomous individual property right yet seen on Indian land: the Nisga'a grant. In our analysis, there appear to be no restrictions on the grantee's ability to transact his/her land. Although it may in practice occur rarely, the mere availability

110 *First Nation Land Management Act, supra at note 8.*

111 *Sechelt Indian Band Self-Government Act, supra at note 5.*

> of an individual property right as powerful as the Nisga'a grant is further acknowledgment of an idea whose time has come.

As we said at the outset, we are trying to ascertain the extent to which these individual property rights are "…akin to those available to other transacting parties within the global economy…"available as a manifestation of being "masters in our own house". This requires, in our view, that these rights be in effect a promise or commitment to, firstly, be capable of being recorded and communicated; secondly, to require accountability from both the First Nations government and the individual concerned; and, thirdly, and most importantly, to be useable as capital. In reviewing the above examples, we hence conclude that the objective of "masters in our own house" is attainable under present legislation (notably via the *First Nations Land Management Act*) insofar as this presupposes the ability to provide for individual property rights. And this fits in with what we are trying to do: we are not presuming to tell First Nations what to do; we are saying, if you want to do it, this is what is available.

Interestingly, in each of the preceding examples of individual property rights there exists recognition of the community interest, perhaps appropriately characterized as "Native culture/tradition". We note:

- the judicial requirement for the Minister to take into account the concerns of the Band when faced with a decision such as that reflected in Tsartlip[112]
- the inability of a Nisga'a entitlement holder to transfer that interest to a non-Nisga'a, thereby maintaining the integrity of the land base
- the requirement to involve the community in prescribed decision-making in each one of the four five Land Codes we have reviewed
- the proposed Westbank Lands Code requirement that the issuance of a Certificate of Title for any purpose other than single family residential would have to "…best serve the interests of the Westbank First Nation"[113]

112 *Tsartlip, supra at note 4.*

113 *Draft Westbank First Nation Lands Code, supra at note 89.*

- the decision of the Sechelt Band to manage and develop its Band Lands communally, in accordance with its collective tradition (even though it has legal power to do otherwise)
- the constraint on a Nisga'a grant that it has to be considered by the executive "…to be in the interest of the Nisga'a Nation."[114]

All of which leads us to the second consideration: what are the stakeholder interests that need to be accommodated and to that what extent can they be?

We have arrived at an extensive list of stakeholders (and we recognize that others may have been missed), listed alphabetically as follows:

- Band Councils
- Canadian people
- Department of Indian Affairs (INAC)
- Disadvantaged groups (e.g. single mothers)
- Elders
- Environmental interests
- Financial institutions
- Future generations
- Government of Canada (CMHC etc.)
- Hereditary system
- First Nations entrepreneurs (on-reserve)
- First Nations fee simple claimants
- First Nations persons (on-reserve)
- Non-First Nations entrepreneurs
- Non-First Nations persons
- First Nations culture/tradition
- Provincial government
- Municipalities and Regional districts.

Each individual property right could accordingly be analyzed to ascertain the extent to which it accommodates the listed interests (see "Assessing Stakeholder Interest" Appendix A). For the purposes of this chapter, however, we will confine ourselves to the more significant observations.

Firstly, there is only one stakeholder interest that emerges as definitive in our analysis of their respective power, urgency and legitimacy. This is the inter-

114 *Nisga'a Land Act, supra at note 94, s. 6(1).*

est that we have called "Native culture/tradition". Moreover, this determination coincides with the preceding analysis in which it was clear that every advance to date from the *Indian Act* system has acknowledged the First Nations cultural context.

Secondly, the cultural adherence to maintaining the integrity of the land base results in a generalized unwillingness to mortgage the title itself. Hence, capital will usually be raised through mortgaging a leasehold interest and, even with this, there are common provisions allowing the First Nation to step in upon default. Is this workable? We know from Hernando De Soto that "The single most important source of funds for new businesses in the United States is a mortgage on the entrepreneur's house".[115] Without this fundamental capability, will the financial institutions continue to avoid providing mortgage funds to First Nation entrepreneurs? In many ways, the ability to mortgage is the litmus test of property rights. To quote De Soto again (page 64):

> To create credit and generate investment what people encumber are not the physical assets themselves, but their property representations – the recorded titles or shares – governed by rules that can be enforced nationwide. Money does not earn money. You need a property right before you can make money.[116]

One possible response is to argue for the continued integrity of the First Nations land base, maintainable by only mortgaging leasehold interests. This is certainly one option, but it does depend on the willingness of financial institutions to accept such security (and there is widespread difficulty with the Department's policy of five year rent reviews). What is needed is a range of options, and this requires not just a land management system but the actual government institutions capable of facilitating the mechanisms. It comes down not only to having the political will to build the necessary property system, but also to having the governance powers and jurisdiction required for the task. Hence, the absolute importance of the governance cornerstone which we have examined in Chapter 2.

115 *Hernando de Soto, "The Mystery of Capital". (New York: Basic Books, 2000), p. 6.*

116 *Ibid., p. 64.*

In summary, we do not see the situation as “grim”. We consider that the mechanisms for a system of individual property rights clearly exist, but they do require strengthening, particularly with respect to the granting of security interests. This, as we see it, is a crucial challenge for First Nations governance.

CHAPTER 4

Economic Model

This carving was also carved by Master Carver, Clifford Bolton, a well-respected Elder Tsimshian from Kitsumkalum. This carving is the carver's depiction and expression of the vast service area that the Skeena Native Development Society provides service to, an area of 176,000 square kilometers. The base, representing a feast box, was carved by Alvin Seymour, a Tsimshian Carver from Kitselas.

DEVELOPING MARKET ECONOMIES: THE ABORIGINAL CASE IN NORTHWEST BRITISH COLUMBIA

Chairmans Note:

The following paper, as written by Dr. R. K. Mitchell and Dr. E. A. Morse is a result of lengthy indepth discussion and debate of the Think Tank on First Nations Wealth Creation. Much credit goes to Dr. Mitchell and the Think Tank for how the ideas were blended and expanded within the context of Transaction Cognition Theory. It is recognized that this paper is written within the context of academic prose for the sole purpose of generating "peer review" at the university setting. The questions and challenges presented in this paper, of course, are not exclusive to an academic setting, but are in fact, the very reasons for needing wholesale change from servitude and dependancy.

I thank Dr. Mitchell and Dr. Morse for translating the deliberations of the Think Tank into this context. In doing so, many previously and seemingly unsurmountable barriers seemed to evaporate under the heat of dialogue and debate.

Reprinted with permission from J.J. Chrisman, J.A.D. Holbrook, and J.H. Chua, Editors Innovation and entrepreneurship in Western Canada: From family businesses to multinationals: 135-166 (Chapter 6). Calgary, AB: University of Calgary Press. (Note: An earlier version of this paper was first presented at the Innocom Conference, University of Calgary, April 27, 2000. Also, while the examples presented herein were current as of 4/27/2000, present circumstances may have altered some details.)

- R. K. Mitchell and E. A. Morse

Abstract

In this paper, we summarize Transaction Cognition Theory and the key propositions that flow from it and apply to the society level of analysis, as the theory bears on economic development – specifically, the creation of high performance economies among the native peoples in northwest British

Columbia. Based on the concepts and analysis presented in this paper, we conclude that two contingencies will influence the likely success of economic development initiatives in northwest B.C. First, the successful negotiation of on-reserve property rights; and second, the acquisition by economic decision makers (leaders, venturers, and even the general members of on- and off-reserve native society) of the levels of planning, promise, and competition entrepreneurial cognitions that are sufficient for their roles in economic development.

Introduction

Understanding how to navigate from hierarchical to market-based economies has been, and remains, an important question for scholars interested in the privatization and entrepreneurial transformation of command economies (Mitchell, Li, Keng, and Seawright 2000). While working on this problem in the Chinese context, we had the privilege of receiving a delegation of native leaders from northwest British Columbia. They were struck by the parallels between the economic development problems experienced during the Chinese transition to a market-based economy, and those presently confronting native communities.

In mainland China, the assumptions of state-sponsored socialism resulted in collectivization of production, with a command economic structure set in place to centrally plan and manage it. In northwest B.C., these native leaders observed that the provisions of the federal Indian Act have, through the reserve system, also resulted in elements of collectivization. Through the band council system and the regulations of Indian and Northern Affairs Canada (INAC), a command economic structure in which the assumptions of central planning and management have a strong influence is also in place. Both situations urgently require guidelines for developing high performance economies.

The command to market issues that presently confront aboriginal populations on reserve in northwest (and on occasion elsewhere in) B.C. are explored in this paper. Herein we will summarize Transaction Cognition Theory[1] and the

[1] *Although related, Transaction Cognition Theory should not be confused with, and is distinct from, Transaction Cost Economic Theory. The principles of Transaction Cost Economic Theory are utilized in Transaction Cognition Theory to help to identify and rigorously derive the thinking patterns (cognitions) that enable transacting at various levels of analysis.*

key propositions that flow from it and apply to the society level of analysis, as it bears upon economic development – the creation of high performance economies. Native focus groups that we have conducted in northwest B.C. (beginning with the Think Tank meetings themselves) has considered a high performance economy – and by extension, a working definition of economic development in the First Nations community – to mean "the processes that lead to prosperity and cultural well-being." As we theoretically develop and justify three key propositions, we provide an example of how both positive and negative outcomes in native economic circumstances can be explained by Transaction Cognition Theory. This paper concludes with discussion and observations that arise from the analysis.

Transaction Cognition Entrepreneurship Theory

Transaction cognitions consist of specialized mental models or scripts (Arthur, 1994a; Mitchell, Smith, Seawright, and Morse 2000; Neisser 1967; Read 1987) that guide individuals' responses to three principal sources of market imperfection: bounded rationality (BR), opportunism (O), and specificity (S) (Williamson 1985).[2] Williamson argues that the contracting processes in the transacting world include: (1) planning, (2) promise, (3) competition, and (4) governance/hierarchy, depending (respectively in each instance) on the presence/absence combination of the foregoing market attributes (BR, O, and S), as shown in Table 1.

Table 1: Some Attributes of the Contracting Process (Williamson 1985: 31)

Bounded Rationality	Behavioral Assumption Opportunism	Asset Specificity	Implied Contracting Process
0	+	+	Planning
+	0	+	Promise
+	+	0	Competition
+	+	+	Governance

0 = absence, + = presence

[2] *The terms bounded rationality, opportunism, and specificity have particular definitions within transaction cost economics (Williamson, 1985) that are adopted and utilized within Transaction Cognition Theory as follows:*

- *Bounded Rationality: The condition that leads to behavior that is intendedly rational, but limitedly so.*
- *Opportunism: Self-interest seeking with guile.*
- *Specificity: Non-redeployability (once time has been expended in the creation of a work, it is impossible to redeploy that same productive time for a different work).*

This framework suggests at least three sets of attribute/process relationships: (1) between bounded rationality and planning, (2) between opportunism and promise, and (3) between specificity and competition. Interestingly, although these relationships are inherently bi-directional, Williamson utilizes only one direction in his analysis of hierarchies vs. markets. He suggests, for example, that the absence of bounded rationality in the presence of asset specificity and opportunism implies planning. However, he underutilizes the complementary idea that planning should also reduce bounded rationality in situations characterized by those same two conditions (Simon 1979) (because better or worse planning affects the level of transaction costs that arise from bounded rationality). The same conclusion follows for market imperfections created by opportunism and asset specificity. Opportunism is expected to be affected by promise processes (e.g.,. trust creation (Barney and Hansen 1994) among stakeholders (Agle, Mitchell, and Sonnenfeld 1999; Mitchell, Agle, and Wood 1997)), and specificity by competition processes (e.g. the adoption of a low-cost generic strategy (Porter 1985)).

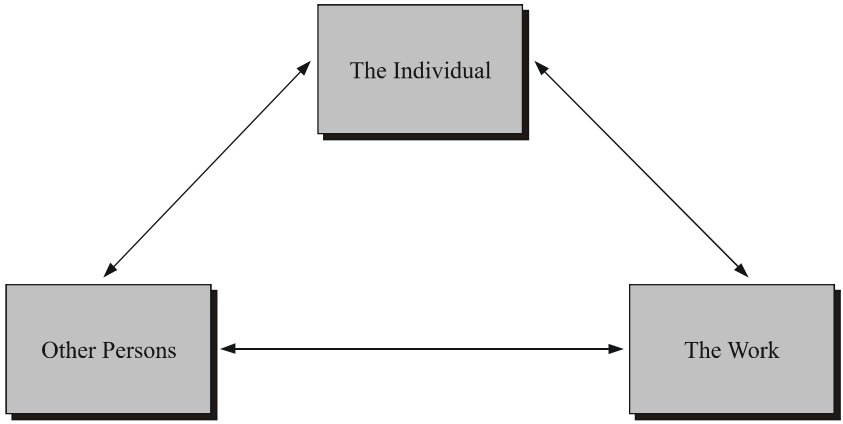
Thus, the cognitions that individuals possess about planning, promise, and competition are expected to impact transaction costs, and therefore the success of transacting, where:

- planning is defined as the mental models that assist in developing analytical structure to solve previously unstructured market problems;
- promise is defined as mental models that help in promoting trustworthiness in economic relationships with, for example, stakeholders (Agle, Mitchell, and Sonnenfeld 1999; Mitchell, Agle, and Wood 1997); and
- competition is defined as mental models that can create sustainable competitive advantage, and are expected to impact transaction costs, and therefore the success of transacting.

Transaction costs are the costs of running the economic system. They are to economic systems what friction is to physical systems (Arrow 1969; Williamson 1985). Entrepreneurial opportunity (Kirzner 1982) occurs when entrepreneurs utilize planning, promise and competition cognitions to enact

transactions that would otherwise fail due to the transaction costs. Entrepreneurship may, in this respect, be conceptualized as an essentially cognitive process (Mitchell, Smith, Seawright, and Morse 2000).

Figure 1: The Elements of a Basic Transaction



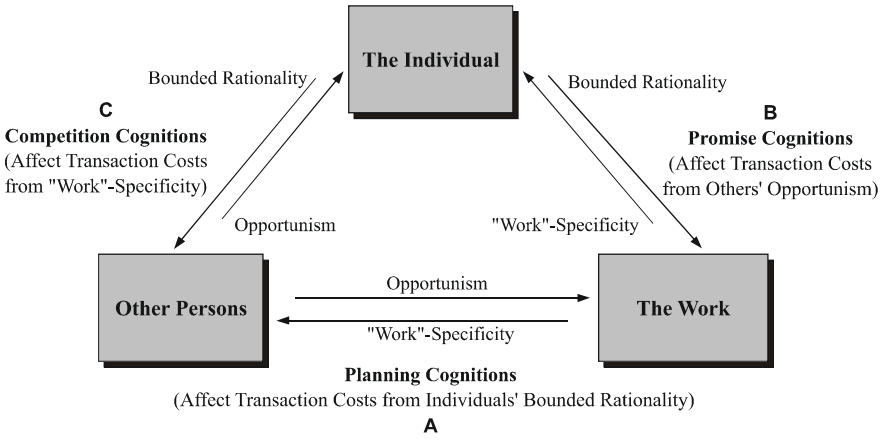
Based on Gardner (1993)

By definition, a transaction occurs when an individual creates a work (some product or service) and then enters into an exchange relationship with other persons for the sale or acceptance of that work (Gardner 1993) as illustrated in Figure 1. Transaction cognitions are the mental models or scripts (Arthur 1994a; Read 1987) that are utilized in this process. Thus, where the objective of entrepreneurship is to discover and enact successful transactions (Kirzner 1982), the job of the entrepreneur is to use market imperfections to advantage. This reasoning produces the Transaction Cognition Theory definition of entrepreneurship.

Under this definition, entrepreneurship is: the use of transaction cognitions (mental models/scripts about planning, promise, and competition) to organize exchange relationships (among the individual, the work, and other persons) that utilize the sources of market imperfections (bounded rationality, opportunism, and specificity) to create value (Arthur 1994b; Csikszentmihalyi 1988; Gardner 1993; Mitchell 1999; Williamson 1985).

This is illustrated in Figure 2. The linkage between this conceptualization of entrepreneurship and native economic development can then be seen through the application of Transaction Cognition Theory at the society level of analysis.

Figure 2. The Transaction Cognition Theory Model at the Individual Level of Analysis



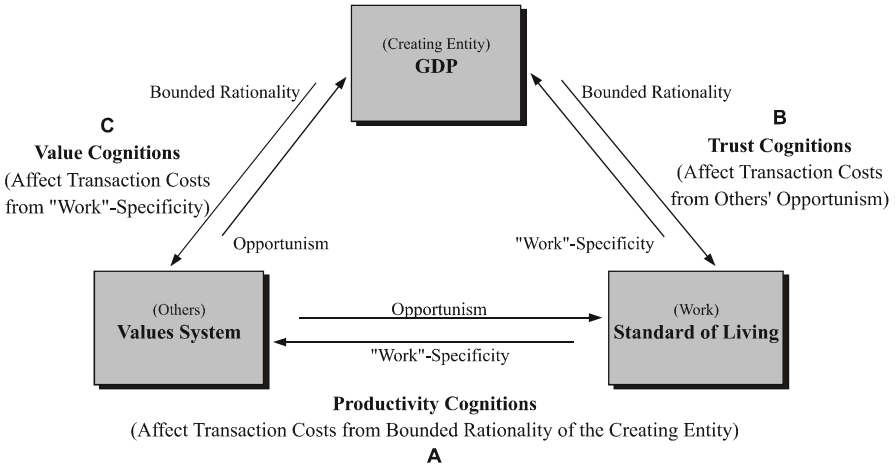
Based on Gardner (1993); Williamson (1985)

The literature suggests that multi-level constructs occur in theories that can be generalized across levels (Rousseau 1985). As such, critical uniformities are required. In the case of Transaction Cognition Theory, three multiple-level sets of constructs represent the individual (as creating entity), others, and the work at multiple levels. As well, three multiple-level sets of cognitions, planning, promise, and competition, suggest specific cognition constructs at corresponding levels.

As illustrated in Figure 3, at the society level of analysis, it is Gross Domestic Product (GDP) (as the creating entity) that, according to the values system of a society (the common attributes of other persons that shape the physical and behavioural artifacts of that society (Schein 1985)), produces the standard of living (Mitchell 2000). Based on prior work (Mitchell 1992), one set of planning, promise, and competition cognitions that operates at the society level of analysis includes productivity cognitions (planning), trust cognitions

(promise), and value cognitions (competition).

Figure 3: The Transaction Cognition Theory Model At the Society Level of Analysis



Based on Gardner (1993); Williamson (1985)

Thus, the general transaction cognition model shown in Figure 2 can be specialized to represent these relationships at the society level of analysis as illustrated in Figure 3. In the next section, the justification for propositions that relate the elements shown in Figure 3 is presented. Cases from the native experience in northwest B.C. are also presented to illustrate the assertions made. The main objective of this analysis is to demonstrate how, at the society level of analysis, the development and fostering of specialized cognitions can, in fact, result in society-level economic development.

Propositions

With help from many individuals who live and/or work in northwest B.C. and are well-informed on native affairs due to their own aboriginal heritage and experiences or extensive work with the native community, several illustrations of the propositions that follow have been identified and are reported in this paper. These cases demonstrate how the theory explains both positive (+) and adverse (-) results of economic decision-making relative to the principles proposed.

Planning Cognitions

Transaction Cognition Theory suggests that economic frictions (transaction costs) are responsible for the grouping of transactions into the transaction bundles (firms, industries, economies, etc.) that result in the multiple levels of analysis previously discussed. Transaction cost economic theory suggests that the grouping process that creates organizational hierarchies is one of "discriminating alignment," and can occur "not only at the level of transactions but also at the level of nation-states" (Williamson 1996b, 332). Once such a transaction cost, economizing grouping, or hierarchy exists, then an additional efficiency-creating process (coordinative alignment) occurs. This process aids the individuals who are bound together within that common transacting group (the individuals within a society) to economize upon transaction costs within that entity (Williamson 1991).

Unfortunately, it has been noted in earlier work that within the command economic systems studied to date, people's attention to the elimination of coordinative transaction costs is limited. As noted by one commentator in connection with the former Soviet Union,

> . . . the problem with Marx's work stems from his political beliefs and not his theoretical system. . . His political sympathies led him to focus on the macro-structures (in the economy) and largely to ignore micro-structures
> (Ritzer 1979, 35).

One danger of collectivization, then, is the "bureaucratization of economic life" (Lange 1938, 109), which leads to waste and inefficiency. For example, the management practices characteristic of the command economic system that the Soviets established and enforced in Hungary, resulted in waste and inefficiency characterized by ". . . excessive bargaining between supervisors and subordinates, pervasive distrust, the delegitimation of managers, and responsibility avoidance" (Pearce 1991, 75). Further, the fear of expropriation bred during an "era of confiscations" (Kornai 1986, 1705) created incentives for craftsmen, shopkeepers, and small business entrepreneurs to focus on "myopic profit maximization" (1986, 1706). As a result, a set of first order

economizing costs (Williamson 1991) due to waste of all types operates within command economic systems to sabotage economic performance.

We can therefore expect to see, as a part of economic life under command economic assumptions, a set of transactional practices that increases the costs of running the economic system *within hierarchies* and exhibits no related benefit, either within the hierarchy, or at the societal level. Thus, when considering what might be done to facilitate economic development through the enhancement of market economies in northwest B.C. native society, attention to first order economizing of a coordinative nature is essential.

An additional implication of coordinative economizing is that *reversals* of the fundamental transformation (Williamson 1985) are also possible. Thus, assets maladaptively internalized (wasted in employment under hierarchy) might be returned to market governance. The possibility of fundamental transformation reversal suggests that tuning or adjustment type activities might be possible for economic agents which, through the elimination of waste, endow society with the redeployment benefit of underutilized assets, and reduce the likelihood that thus unburdened firms will fail. Hence, in the aboriginal case in northwest B.C., the following is proposed:

Planning Cognitions Proposition: Economic development is associated with the planning cognitions that foster productivity.

Thus, it is expected that, where action is taken by economic actors to eliminate waste or inefficiency within existing economic structures (e.g., firms, society), privatization (the move from hierarchy to market) should be stimulated through reversals of the fundamental transformation while the prospect of firm failure is attenuated and material well-being is enhanced. Where attention is focused instead on bargaining over the allocation of resources within a command economic system, a lower GDP is to be expected, resulting in a lower standard of living. Both positive and negative illustrations of this proposition follow.

(+) The case of Northern Native Broadcasting Corporation (NNBC). The case of NNBC illustrates the veracity of the aforementioned planning princi-

ple. Several years ago there was a change in management at the NNBC. Prior to the change, the NNBC was operated much like a government department (depending entirely on a yearly subsidy, and operating with few planning cognitions: few, if any, financial targets and little accountability). Under the new management, waste and inefficiency were steadily reduced as effective planning, supported by a coordinated human resource approach, produced financial and market share targets that have been met or exceeded. As a result, the broadcast quality and innovation at the NNBC has risen; the advertising revenues have increased dramatically; and the viability of NNBC as a fully capable market participant has been enhanced. As predicted by theory, these reductions in waste and inefficiency have stimulated the potential for privatization (the move from hierarchy to market), while the prospect of firm failure has been attenuated, and the material well-being of the organization and its stakeholders has been enhanced.

(-) The case of Nisga'a halibut licenses. The case of a halibut fishing license owned by the Nisga'a Nation Corporation illustrates the deleterious effects of command economic assumptions, and the resulting distrust, delegitimization of community members, and responsibility avoidance that ensue in an oversocialized command economic system. In this case, an entity controlled by four band councils (the Nisga'a Nation Corporation) held a valuable (five-figure value) halibut fishing license that it decided to put up for sale. When a member of the Nisga'a nation came forward with an offer to buy, it created an internal debate. One key sentiment, which might be expressed as: "we don't want one Nisga'a individual to get ahead of another," resulted in the matter being shelved for at least a year. According to the individual recounting this incident, the situation created a lot of animosity within the community. Eventually, the license was sold through a broker to a non-Nisga'a native corporation. This sale incurred the additional expense of a broker's fee, and a loss in potential prosperity: the revenue-generating and culture-preserving capacity of the community.

According to the respondent, "there are plenty of individuals who have the potential to create jobs; but on reserve there is a crab syndrome where others don't want to see their fellow members of society get ahead" (Anonymous interview April, 2000). The preference for tolerating waste and inefficiency

within a society at the expense of the development of individuals' economic independence demonstrates a planning disability within the reserve system. In such circumstances, it appears that political considerations supersede economic ones. In this case, the political considerations fostered waste and lost opportunity for a member of the society. This suggests the decoupling of political and economic micro decision making within a market, since allowing transaction-by-transaction decision making to fall within the political arena (the command planning model) results in transaction costs from waste and inefficiency.

Where players in the economic arena use political means to influence the rules of the game, e.g., influence governments to create and sustain market imperfections that give profit to these powerful players *whether or not* they add the value of discovery to the system (Etzioni 1988), all members of that society lose. Outside the reserve system, governments that regulate market system economies act to preserve system integrity by removing the unproductive market imperfections that restrain trade. Actions such as the enactment and enforcement of antitrust laws are examples of approaches that are geared to leveling the playing field.

Therefore, to attain the benefits envisioned by adherence to the Planning Cognitions Proposition, Transaction Cognition Theory suggests that it is necessary for the plans within the governance of native society to abjure the involvement of political entities (such as band councils) in running businesses. The job of government should be to keep the game fair and to resist the temptation to misuse governance authority to obtain a share of game winnings, rather than to play within the game.

Promise Cognitions

Transaction Cognition Theory also suggests that promise cognitions are necessary for economic development in a society. This is because one of the market imperfection-creating attributes of humanity is opportunism: self-interest seeking with guile (Williamson, 1985: 30). Opportunism fosters cognitions that produce social friction, which increases transaction costs due to moral hazard and distrust. Cognitions that reduce social friction through the

promotion of trust can therefore be very helpful in creating a society with high levels of economic development, because they increase the promise that the expected benefits will be delivered.

Fundamental to a discussion of the freedom to make and keep economic promises, is the existence of property rights. John Adams, one of the framers of the U.S. Constitution, is reputed to have asserted that "property must be secured, or liberty cannot exist." Property rights represent commonly agreed upon standards that convey the rights of ownership. When they are clear and well defined, trust in transacting is enhanced.

Transaction cost economics usually assumes that property rights in a society are well defined and easy to enforce (Williamson 1975; Williamson 1985). However, for native individuals who live on reserve, individual land ownership, a key property right, does not exist. Under section 20 of the Indian Act, a certificate of possession (CP), the closest thing to a right to own real property, may only be granted with the consent of: (1) the Minister of Indian and Northern Affairs (INAC) representing the Queen as the holder of title, and (2) the band council governing the reserve in question. This provision directly impairs the capability of individuals in on-reserve society to enter into credible economic promise relationships.

This missing capability to promise has pervasive implications for economic development. Lack of the right to own land on the reserve leads to a situation where the transactions that depend on the right to own real property (such as the financing of business premises or individual homes) fail due to definition and enforcement problems. Therefore, it seems useful to consider the application of the transaction cognition model to circumstances where property rights are neither well defined nor supported by a societal tradition of credible commitment to their enforcement (Williamson 1991).

Transaction cost economics suggests that under a weak property rights regime the fundamental transformation of market to hierarchy is induced at a lower level of asset specificity (e.g., markets fail), since inducements exist for transactions to be integrated (forward, backward, laterally) to mitigate expropriation hazards (Teece 1986). Alternatively, where governance struc-

[3] *1984 decision by the Supreme Court of Canada, opinion by Mr. Justice Pratt.*

tures are not readily alterable to safeguard transacting, it should be expected that "farsighted agents . . . recognize that their market development efforts will be expropriated . . . unless they are able to develop ties . . . which preclude the [expropriation] scenario from materializing" (Williamson 1991, 84). In essence, transacting agents must take a hostage (invoke a force-based promise) to raise the level of asset specificity for which a safeguard is mandated. It should be emphasized that the cost of such safeguards is an increase in transaction costs; the friction in running the economy goes *up*, contributing to dislocations, chaos, and other such drains on the societal well being that hinder economic development. In the aboriginal case in northwest B.C., such increased friction implies the following proposition:

> **Promise Cognition Proposition:** Economic development is associated with the promise cognitions that foster trust by strengthening property rights.

Thus, to the extent that property rights are strengthened, opportunism-based transaction costs such as economic hostage-taking, the dislocation of productive economic resources, and the chaos within society are expected to decrease. To the extent that on-reserve property rights remain weak, political processes are expected to dominate in place of economic processes (Poelzer 1998), because of the need to reconcile uncertainties about control before trust can be expected to flourish. In the following cases, the efficacy of this proposition is demonstrated.

(+) The Sechelt Band Negotiates its Own Real Property Rights. As noted above, in Canada, Her Majesty the Queen, represented by the supervising federal cabinet minister in the government party, has title to all reserve lands. Under section 91(24), federal jurisdiction is intended to preserve Indian reserves intact. Over the years, however, the Sechelt Band in British Columbia, being led by particularly farsighted individuals, has moved out of the traditional reserve system into a system of communal fee simple title for its former reserve lands.

In 1977, Sechelt completed the delegation of all available powers under the Indian Act through negotiations with the federal government. This gave it the

right to exercise all the ministerial powers with respect to the lands on its 33 reserves. It went on to secure full self-government in 1986 as a result of Canada's Sechelt Indian Band Self-Government Act. Thus, when, for example, prior to self-government, INAC refused (under section 53(1) of the Indian Act) to allow Sechelt to give an option on 300 acres of gravel land, the band gave the option anyway and, after self-government was affirmed, was able to honor the lease. Thus, Sechelt property rights under self-government (even though held communally and not individually) facilitated economic development.

(-) The Case of Building On Reserve. As noted above, by virtue of the provisions of section 20 no CP can be obtained, except by permission of the minister and the band council. Once a CP has been obtained, the courts have held that it may be transferred[3] with the approval of the minister as a part of section 91(24) (federal jurisdiction) lands. However, because of the lack of fee simple title, the band council – being susceptible to the political influence that inures in this governance process – can still increase the transaction costs, and cause transactions to fail. In several instances described to us by respondents, band councils have invoked mechanisms such as zoning to frustrate the intentions of a band member in the transfer of a valid CP.

Further, according to the experience of one of the persons we interviewed during our field work, native individuals whose economic earning power easily qualified them for home mortgages when buying a house off-reserve could not qualify for a home loan to build a house on reserve because the bank was unable to collateralize the loan with the home built due to the lack of fee simple title.

In these situations, the lack of clear and clearly enforceable property rights severely compromises transacting both on- and off-reserve. As with the case of planning cognitions, and as predicted, on-reserve promise cognitions tend to be highly developed, but are utilized primarily for political as opposed to economic purposes, which poses a unique impediment to the level economic playing field envisioned by most leaders and planners within and surrounding native society.

Competition Cognitions

Competition cognitions comprise the third set of mental models specified by Transaction Cognition Theory essential to economic development. As defined previously, competition cognitions are the mental models that create sustainable competitive advantage in market-based transacting. Competition cognitions are expected to impact the efficiency of transacting, and therefore the level of economic development, through their ability to help individuals within a society to align expectations about the work produced with the most effective market mechanisms.

As also previously mentioned, transaction costs are considered to be the "costs of running the economic system" (Arrow 1969, 48), and may be viewed as "the economic equivalent of friction in physical systems" (Williamson 1985, 19). Transaction costs hinge particularly on the level of specificity related to the work component of a transaction. These friction/transaction costs are minimized by autonomous adaptations: the adjustments in human transacting procedures effected by strategic choices that influence the operation of the price mechanism and are made automatically as individuals transact with others in a market economy. Transaction cost economists suggest that high specificity implies high transaction costs, thereby implying a hierarchy (Williamson 1975). Correspondingly, low asset specificity implies low transaction costs, thereby implying market governance.

Where, due to the political reality (such as the existence and enforcement of the Indian Act), command-type decision-making is utilized (e.g., on-reserve governance), two types of maladaptations (conditions that result in higher than necessary specificity and therefore transaction costs) can occur as a result of the impediments to the operation of the price mechanism that command decisions cause. These errors prevent the efficient governance of transactions, as illustrated in Figure 4.

Where low specificity, as an attribute of transactions, implies market governance due to autonomous economizing, attempts to govern such transactions within a hierarchy (e.g., by exercising INAC, or band council control or

influence) constitute the Type I, or "collectivization" error illustrated in Figure 4. To compare this to the case of the command economy of the former Soviet Union, the Type I collectivization error appears primarily to be the kind of error committed during the era of state-sponsored socialism, causing failures in large centralized units of production (e.g., agricultural communes that failed to feed the U.S.S.R. on the richest farmland in the world). In the case of the on-reserve economy, we can expect to see the Type I error in situations where business ventures have insufficient market support but are still attempted on reserve.

Conversely, where a high level of site, resource, or physical specificity would normally, under autonomous economizing, lead to hierarchy as the most efficient form of governance, attempts to govern transactions related to these assets via market mechanisms (e.g., forced marketization) are also predicted to be problematic. In this instance, a Type II, or "privatization" error could also be made. The key to efficiency, then, appears to be the unencumbered autonomous operation of the market mechanism. According to Transaction Cognition Theory, the key to the unencumbered autonomous operation of the market mechanism is that the market actors possess adequate competition cognitions; otherwise, maladaptations occur. Accordingly, in the aboriginal case in northwest B.C., the following proposition appears likely:

Competition Proposition: Economic development is associated with the competition cognitions that foster value creation through market alignment.

Thus, to the extent that competition cognitions enable a smoothly functioning marketplace, low specificity transactions should be managed with minimum friction, thus avoiding "Type I collectivization errors." And, to the extent that physical site or resource specificity exists as a consequence of a preexisting command economic structure, the existence of competition cognitions is expected to ensure that transaction costs are minimized with hierarchies left intact, thus avoiding "Type II privatization errors." In the following four cases, illustrations of positive and negative examples that have occurred in both low and high specificity situations are provided in the order specified in Figure 4.

Figure 4: Predicted Results of Interventions on Market Alignment, as Influenced by Level of Specificity

		Level of Specificity	
		LOW SPECIFICITY	**HIGH SPECIFICITY**
Command Economy Intervention	**HIERARCHY ATTEMPTED**	**1.** Type I Collectivization Error (hierarchy attempted where a market should be)	**3.** Efficiency: (Hierarchy alignment: autonomous economizing)
	MARKET ATTEMPTED	**2.** Efficiency: (Market alignment: autonomous economizing)	**4.** Type II Privatization Error (market attempted where a hierarchy should be)

Low Specificity Examples

(-) Box 1 – Type I (Collectivization) Error: On-Reserve Business Failures in the Nass River Valley. For the past several years both a gas station and a supply store have operated on reserve in the Nass River Valley of northwest B.C. The band council has officially and unofficially encouraged these businesses as good for that native community. However, both businesses have failed. According to the individuals familiar with the circumstances, these operations have failed due to insufficient business. Rather than spending their money at these establishments, members of the native community drive by them on the way to larger communities. When we inquired into the reasons for inadequate support, most responses suggested that community members used shopping trips as a form or entertainment and to get out of the relatively isolated community. More specifically, none of the native individuals interviewed felt any loyalty to the success of these business establishments. Here, in a low specificity circumstance (many alternatives to the on-reserve gas or supply store), the result was a collectivization error by both the band council and the business venturers. The error occurred due to inadequate competition cognitions (lack of understanding of market realities, or a lack

of the capability to create business strategies that could make the work of the business competitive).

Further, for on-reserve businesses in isolated communities to succeed using collectivization as opposed to competition cognitions, the businesses require the support of the whole community; collectivization must be a total community decision. However, under the present band council system, the council as the central planning authority does not have a consensus-based economic mandate. Rather, it is a majority-vote system (more akin to a market) that consistently produces disaffected minorities who do not necessarily feel bound by council decisions (such as encouraging patronage of private on-reserve businesses). Accordingly, collectivization in market-like (low specificity) settings is predicted to fail. Market alignment, through the effective use of competition cognitions, is predicted to be the key to economic development.

Interestingly, collectivization errors were less likely under the traditional hereditary chief system (as contrasted with the INAC "elected Chief-in-council" system). In our investigation of recorded oral traditions that form the cultural foundation for the peoples of northwest B.C. (Robinson and Wright 1962), the cultural institution that supported effective collective economic activity was "the feast." To ensure that the entire community was in support of collective action in low-specificity circumstances (e.g., where many alternative courses of economic action were present), a feast or a series of feasts was given by the chief, during which consensus for collective action (the requisite competition cognitions) was built. In this manner the hereditary chief system, while still a command economy, was able to ensure that attempts at collective economic action in low specificity circumstances were successful, and thus avoid the Type I (Collectivization) errors encountered in the Nass Valley.

(+) Box 2 – Market Alignment: The Heavy Equipment Operations of Kitamaat Village are Privatized. Low specificity circumstances are characterized by the availability of market alternatives (Mitchell 1992; Williamson 1985). Market alignment in low specificity circumstances means that markets are predicted to succeed. Privatization, the movement of non-specific

assets from hierarchy to market, is one possibility.

In the case of Kitamaat Village, the Band Council had jurisdiction over heavy equipment operations, road maintenance equipment, hauling trucks, excavation equipment, etc. Over the past several years, the Band Council staff, using its continually developing competition cognitions, has begun to systematically contract out these services, gradually transferring the ownership of the equipment, the responsibility, and the related cash flows into the private marketplace.

In this situation specificity is low. Demand for these services is relatively constant. The skills necessary to run these businesses are possessed by a number of individuals who have been trained to effectively and efficiently operate and maintain the needed equipment. Thus, as predicted by Transaction Cognition Theory, for such a market, the transactions related to heavy equipment operations have been successfully externalized from government operations (privatized). The Band Council selected a course of action that was consistent with the autonomous economizations of the market. The only drawback reported in our field work was the need to go slowly due to the unfamiliarity of decision-makers with this new approach to governance and the inevitable wariness that is created when the outcome is at risk in a new marketplace and is not (as much) under political control.

High Specificity Examples

(+) Box 3 – Hierarchy Alignment: The Case of the B.C. First Citizens Fund. In high specificity situations, alignment occurs when governments utilize hierarchy to govern the transaction set in question. In the case of the B.C. First Citizens Fund, this approach has met with success.

In 1969, B.C. Premier W.A.C. Bennett set aside $25 million to be used to fund First Nations' culture, language, and economic development. The fund has grown to over $40 million, according to interviewees familiar with the circumstances. Over the years, the fund has been used as a catalyst for native friendship centres, to provide transportation for native elders to enable the continuation of important cultural institutions, and for student bursaries relat-

ed to culture, language, and economic development.

According to the predictions of Transaction Cognition Theory, the effective and efficient management of the fund over the years is the result of appropriate competition cognitions. That is, in this high specificity situation (the allocation of funds based on unique projects and judgments about the projects) the existing hierarchy has been essential to the preservation and growth of the fund.

Unfortunately, there are voices in the B.C. political arena who, unaware of the potential for deleterious consequences, suggest that these operations should be privatized. Transaction Cognition Theory suggests privatization of the fund would be unwise, due to the Type II (Privatization) Error that looms if such attempts were to proceed. An example of this error follows.

(-) Box 4 – Type II (Privatization) Error: INAC Dismantles Existing Programs in Anticipation of the Nisga'a Treaty Signing. On May 11, 2000, the Nisga'a Treaty took effect. Among other things, the treaty provides lands and money to the Nisga'a Tribe. Although many future decisions of the Nisga'a Tribal Council (now referred to as LISMS Government) may be susceptible to interpretation by Transaction Cognition Theory, it is in the INAC decision framework *prior to the effective date of the treaty* that we see an example of the Type II (Privatization) Error.

During the months and years leading up to the signing of the Treaty, the relationship between the four Nisga'a bands and INAC was less than stable. According to individuals involved in the band governance process, as the treaty process proceeded, the programs on which the bands depended for smooth operations in economic development, health, and education were dismantled well before the need for them expired. If the return of lands and money to the NTC (now referred to as Lisims Government) can be considered privatization, then the premature dismantling and atrophy of existing systems can be described as a Type II (Privatization) Error.

According to our research data, transaction costs have increased due to:

- the postponement of capital projects (e.g., subdivision development);

- the inaccessibility of funds for Community Grant Branch Joint Projects (e.g., for recreation centres);
- the refusal to continue Capacity Building (e.g., native leadership development) in an otherwise (to other bands) well-funded program; and
- the curtailment of "off-reserve" services (e.g., community futures).

The comment that summarizes our interviews on these matters during the period leading up to treaty signing is: "if you are Nisga'a, you're shut out of INAC."[4] As a result, economic development, and even broader social development, has been compromised due to the inadequate competition cognitions within INAC that were caused by a privatization error with its roots in the inadequate competition cognitions.

Analysis and Conclusion

In this section, the cases and theory are further analyzed and interpreted to suggest generalizable explanations and concepts for the creation of market economies in northwest B.C. Suggestions for policy and practice are developed. This section is composed of two parts: (1) an analysis of the transaction cognitions currently present and influencing the northwest B.C. situation; and (2) the likely impacts on economic development of the presence or absence of the requisite transaction cognitions.

Analysis of Current Transaction Cognitions

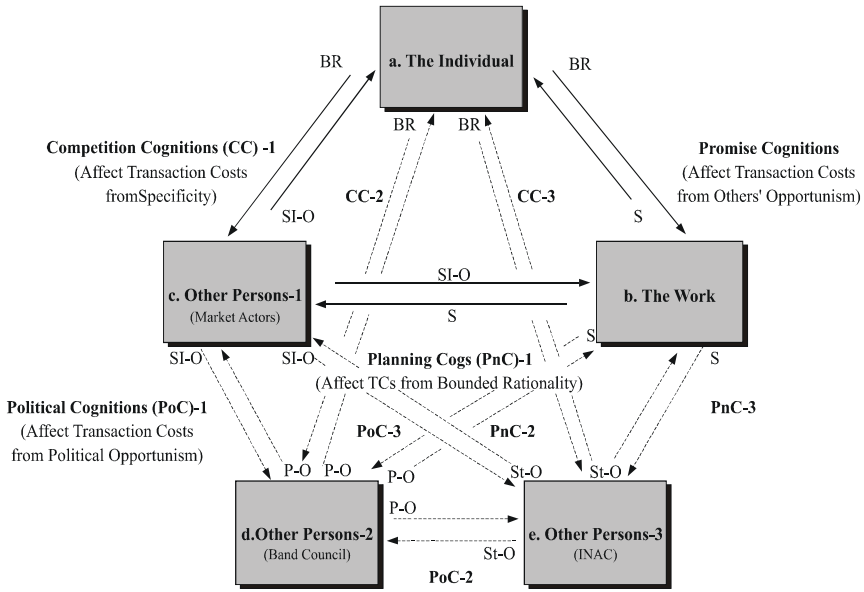
In our meetings with band economic development officers (EDO's) on reserve, and with other groups of native leaders, we have continually been confronted with the probing question: Why do most private enterprise initiatives on reserve fail? This article has developed an application of Transaction Cognition Theory that can contribute to answering this question. Transaction Cognition Theory suggests that three sets of effective economic cognitions (planning, promise, and competition cognitions) working together are sufficient for successful economic transacting. In the paragraphs that

4 *This, despite the general provisions of the Nisga'a Final Agreement which provide that no programs, Federal or Provincial to which a Nisga'a citizen is entitles will be curtailed.*

follow, our analysis of the presence or absence of these three effective cognition sets in the aboriginal case provides some insights.

Under section 20 of the Indian Act of Canada, most transacting must by law[5] involve the Band Council and the Minister of Indian and Northern Affairs (the INAC civil servant bureaucracy), in addition to the individual transaction creator, the work, and other persons. Thus, instead of having to master the three cognition sets suggested by Transaction Cognition Theory to be sufficient for market transacting, economic actors in the current on-reserve native economic development arena must master the 10 cognition sets illustrated in Figure 5.

Figure 5: The Planning, Promise, Competition, and Political Cognitions Required in Native Transacting



To facilitate an explanation of the relationships shown in Figure 5, a discus-

5 *This aspect—the legally mandated inclusion of other parties to a transaction—is critical. Stakeholder theory provides for the systematic identification and explanation of the role of other persons who may or may not become involved in a transaction, depending on the relative incentive or disincentive offered within the marketplace. However, when inclusion of certain parties in a transaction is mandated under law, then the model must be altered accordingly to accommodate and explain the cognitions that are required to manage the relationships with mandated parties.*

sion of the various components in the diagram follows.

As illustrated in Figure 5, the addition of two "other" parties to the transaction mix greatly complicates the transacting process, and increases the level of cognitive skill needed to succeed within the transacting environment created by the Indian Act. As suggested by previously developed theory, each of the "other" parties to the transacting relationship brings opportunism: types of self-interest seeking with guile. To fully interpret the implications of this higher-complexity transaction relationship, it is useful to first examine the exact nature of the opportunism that each party introduces into the transaction calculus and to explore more deeply the additional transaction cognitions that are implied; and second, to examine in more detail each of the 10 cognition sets required for successful on-reserve transacting.

Implications of Multiple Aditional Types of Opportunism

The general transaction cognition model suggests that promise cognitions are requisite for dealing effectively with opportunism. Because the on-reserve transacting environment has two additional "other" parties to the transacting process, the problem becomes the identification of the specialized promise models that are needed to support transaction completion. Thus, the introduction of additional theory to support such an explanation is necessary.

The nature of the problem (the evaluation of opportunistic relationships among various groups of others within a transaction) suggests an appeal to political cognition theory, which defines the association of cognitive processes with political (multiple others) behavior (Barner-Barry and Rosenwein 1985, 141). Political cognition theory suggests that political decision-makers also utilize mental models (referred to as operational codes) that are shaped by decision-maker values and political objectives (George 1969; Leites 1951). Thus, political cognition theory suggests a strong relationship between cognition and political behaviours.

However, the political cognition literature appears to be underdeveloped in its explanation of transacting relationships, being "almost deadeningly silent on the issue of leader-follower relationships" (Barner-Barry and Rosenwein

1985, 138). It therefore appears that there is a need for additional theory development in the area of transaction-based political cognitions, especially as these cognitions apply to the dimensionalization of the types and effects of opportunism within the on-reserve transacting system. The analysis proceeds to address this issue next.

The three previously noted "other" parties to the on-reserve transaction are: market actors, the Band Council, and the Minister/INAC. As expected, market actors (the original other persons in the basic transaction cognition model) bring material (or dollar) opportunism to the transaction. This type of self-interest seeking of goods and services described within the TCE literature (Williamson, 1985, 1991, 1996b) that results in self-protection/hazard minimization behaviors in the face of intrusions (social, political, etc.) into the transacting process. Self-protection cognitions might therefore be considered to be the first political cognition subcategory (PoC-1) of promise cognitions.

With respect to the opportunism introduced by the Band Council, political cognition theory suggests that the type of opportunism brought into the transacting relationship by elected officials will be based in the acquisition and maintenance of power (Barner-Barry and Rosenwein 1985, 238-239). That is, decision making by the Band Council is likely to be shaped (at least partially, but materially) by the desire of elected leaders to retain office (power) and exercise authority (Etzioni 1988). Accordingly, the cognitions that are required to manage power opportunism might be characterized as authoritarian cognitions (Barner-Barry and Rosenwein 1985; Stanford 1973, 144), the second political cognition (PoC-2) subcategory of promise cognitions.

The opportunism introduced by INAC involvement is again different. Political cognition theory suggests that the operational codes of a government bureaucracy that is responsible for administering the law (the Indian Act) will center around stewardship – ensuring adherence to the rules inherent in the sociopolitical environment (e.g., the Act) (Rosenberg, Ward, and Chilton 1988, 12) to avoid criticism. Thus, it might be expected that the cognitions that are necessary to manage the stewardship-based interventions of INAC will be compliance-based (PoC-3).

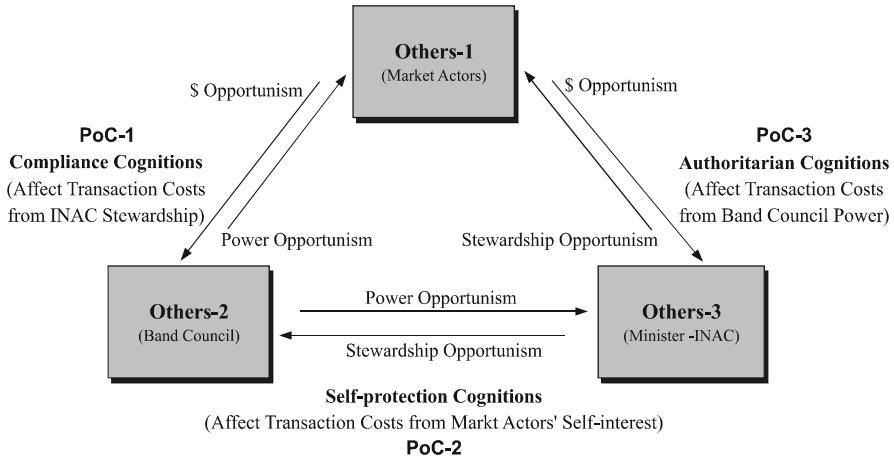
Table 2 presents these relationships in an analytical format similar to that originally utilized to dimensionalize the TCE model (Williamson 1985), and suggests the basic cognition sets necessary for successful transacting. Noteworthy in Table 2 are the systematic relationships among components of the model. Interestingly, the discussion focuses on only one direction of this bi-directional model, as did Williamson's in the case of TCE. For ease of bi-directional reference, Table 2 shows both of the drivers of political relationship promise behaviors (e.g., Altruism ↔ Self-protection) implied by the presence or absence of the various types of opportunism that exist within the on-reserve transacting environment. In Figure 6, the political cognition area (containing the specialized native promise models) of the overall model of Figure 5, is illustrated to facilitate theoretical consistency.

Table 2: Some Attributes of Native Political Processes

Source of Potential Conflicts			
(Market Actors) Self-Interest opportunism	**(Band Council) Power Opportunism**	**(INAC) Stewardship Opportunism**	**Implied Promise: (Type of political relationship behaviour**
0	+	+	Altruism ↔ Self-protection
+	0	+	Laissez-fair ↔ Authoritarian
+	+	0	Service ↔ Compliance

0 = absence, + = presence

Figure 6: Specialized Native Promise Models: Due to Transaction Costs Resulting from section 20 of the Indian Act



The 10 Types of On-reserve Transaction Cognitions

As shown in Figure 5, there exist 10 sets of cognitions that, according to the logic of Transaction Cognition Theory, are necessary to accomplish on-reserve economic transactions. Figure 5 utilizes abbreviations to map each type of cognition and the circumstances under which each set is required. In Table 3, each of the 10 types of on-reserve cognition is described in more detail. Given the vastly larger quantity of cognitive maps required to successfully transact in the native economy, each requiring substantial development (Arthur, 1994a; Lord and Maher 1990; Walsh 1995), it is little wonder that few private businesses succeed there. In fact, our analysis suggests that transacting with customers (e.g., the development of private enterprise on reserve) is the least likely to occur for the reasons that follow.

First, as shown in the case studies and analysis, individual planning cognitions on reserve are not focused on the customer as the source of economic well-being. Rather, the transaction cognitions of natives on reserve appear to be focused on the Band Council as the relevant “other” in the transacting process. The (-) results, such as in the Nisga’a halibut license case, are more

prevalent than the uncommon (+) results of the business privatization case of NNBC. Second, as also shown in the case studies, native promise cognitions appear to be stakeholder-based, and quite sophisticated in development; but due to the property rights anomalies created by the Indian Act, the promise cognitions on reserve are focused away from market transacting and toward band councils and INAC. The (-) situations such as the building on-reserve case are pervasive, while the (+) case of the Sechelt Band property rights is virtually unique. Third, the case studies illustrate the relative absence of market competition cognitions in the aboriginal community in northwest B.C.

Table 3: Transaction Cognitions Required Due to section 20 of the Indian Act

Transaction Cognitions	Description
Planning Cognitions-1 (PnC)-1	Mental models that assist in developing analytical structure to solve previously unstructured market problems in the provision of the work to those other persons who consume it (e.g., the business plan, which answers the question: What plan is necessary to deliver the work to customers?) (Stevenson, Roberts, and Grousbeck 1994)
(PnC)-2	Mental models that are necessary to ensure band council support of work produced.
(PnC)-3	Mental models that are necessary to ensure that work is approved by/not opposed by, the Minister-INAC.
Promise Cognitions	Mental models that help in promoting trustworthiness in economic relationships with, e.g., stakeholders (Agle, Mitchell, and Sonnenfeld 1999; Mitchell, Agle, and Wood 1997). Stakeholder identification and

	salience cognitions (Mitchell and Agle 1997) are essential in market relationships. But see political cognitions (below) for the additional promise cognitions required due to section 20 of the Indian Act.
Competition Cognitions-1	
(CC)-1	Mental models that can create sustainable competitive advantage in creator-customer interactions about the work (e.g., I/O strategy: differentiation or cost competitiveness (Porter 1980)).
(CC)-2	Mental models needed to manage creator ↔ band council interactions where there is external power exercised with respect to the work (e.g., Resource Dependence strategy (Pfeffer and Salancik 1978)).
(CC)-3	Mental models needed to manage creator ↔ Minister/INAC interactions about the legitimacy of the work (e.g., Institutional theory-based strategy (DiMaggio and Powell 1983)).
Political Cognitions-1	
(PoC)-1	Compliance Cognitions: Mental models needed to manage the relationship between market actors (such as customers) and the Band Council, in light of the statutory duties of INAC.
(PoC)-2	Self-protection Cognitions: Mental models needed to manage the relationship between the band council and INAC, in light of the self-interest concerns of market actors (such

	as customers).
(PoC)-3	Authoritarian Cognitions: Mental models needed to manage the relationship between market actors (such as customers) and INAC, in light of the power concerns of the band council.

The cognitions that form the foundation of sophisticated market strategic thinking are, in practical terms, missing: the cases of market alignment are rare, while the cases of collectivization and privatization errors are prevalent. Further analysis of the aboriginal case reveals at least five factors that are likely to contribute to this deficit in on reserve competition cognitions.

It has long been thought that the absence of a competitive social framework in subsistence-tradition cultures was caused by scarcity, which creates an image of limited goods within the minds of the members of these societies (Foster, 1962). In the native case in northwest B.C., however, the argument is not as clear-cut. Until the time of first contact with Europeans, native histories chronicle that, apart from the infrequent natural disaster, the society was endowed with plenty (fish, timber, fruits, game, etc.) (Robinson and Wright 1962). Why, then, would competition cognitions be virtually nonexistent in such a society? First, it appears that in the native case in northwest B.C., the image of limited goods was less about competition than it was about obedience to the laws of nature. The “law of the land of Ksan” (Robinson and Wright 1962, 5-14), for example, forbids individuals to take more than is needed from nature. Native oral histories are replete with examples of the calamities that befall those who violate this law, such as the morality tale of the Little Goat, and the resulting retribution at “L – La – Matte” (Robinson and Wright 1962, 5-14). Competition cognitions that require the production of surplus for resale may thus be dampened by cultural norms.

Second, the system of government under hereditary chiefs was a command economy that corresponded to its feudal system counterparts found in Western Europe. As suggested in earlier comparisons to the former U.S.S.R., and related work in the small business arena (Mitchell and O’Neil 1998)

business conducted under a feudal order is more about politics than about competitive markets. Market competition cognitions are unlikely to be developed or refined under systems that insert politics into transactions.

Third, as indicated in the analysis earlier in this paper (Table 3), the primary source of competition cognitions in modern market transacting is the strategy (Porter 1980). Strategy scholars often note (Thompson and Strickland 1995) that competitive strategy has its roots in military strategy, for example in Sun Tzu's *The Art of War*, from 300 B.C. (trans. Griffith 1984). However, during the years following first contact, the cognitions of warfare were systematically suppressed among native populations to minimize the risk of physical danger to the colonizers. The arts of war – the roots of strategic (competitive strategy) thinking – were thus viewed with great suspicion and repression during the imperialist years (Boldt 1993, 3).

Fourth, within trade-based economies such as those historically present in northwest B.C., most transacting was accomplished using spot markets. As in other more primitive economies, the more sophisticated market mechanisms that involve contracting over space and time, and the supporting competition cognitions, are missing (Olson 1998).

Fifth, the traditional competition cognitions in northwest B.C. that are expected to persist to some degree have been trade and/or tariff-based. Oral histories explain that for vast periods of time the economic framework consisted of the control of territory by clans. The Grizzly Bear clan, for example, exercised its rights of control over territory by control of the Skeena River. Other peoples who desired to utilize the waterway paid tribute to Grizzly Bear chief Neas Hiwas (Robinson and Wright 1962), and by this tariff mechanism, markets such as they existed, were able to operate.

Summary

Thus it appears to us that private enterprise is less likely to occur on reserve because the focus of native society is not, and has not been, on the market transaction cognition triangle (a b c) depicted in Figure 5. Instead, the focus is on the political cognition triangle (c d e). Thus, on-reserve planning cog-

nitions appear to be misdirected and underdeveloped in the market case. On-reserve promise cognitions also appear to be misdirected and underdeveloped in the market case due to the lack of property rights and the associated presence of an added set of rival promise cognitions, political cognitions. Competition cognitions are essentially missing. This differential is, we believe, the primary reason that on-reserve private business has such difficulty. In the final section of this article we examine the likely impacts on economic development of the present levels and emphasis of transaction cognitions among native peoples in northwest B.C.

Likely Impacts on Economic Development

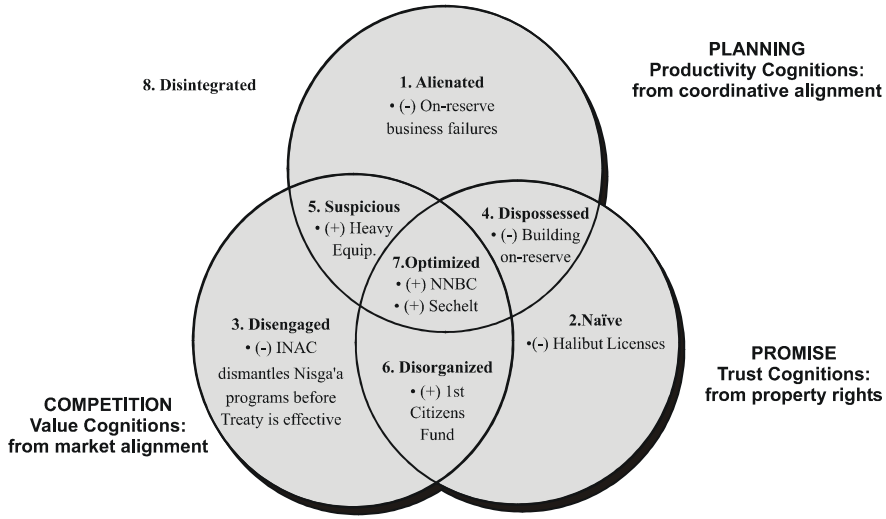
The presence or absence of the requisite cognitions figures heavily in the actual outcomes that we observe within the native communities of northwest B.C. If William James' assertion that "we become what we think about" is true (1890), and if poverty and economic underdevelopment are about inadequate understanding, as suggested by Grameen Bank founder Muhammad Yunus (1998), and not about land, labour, or capital, then economic development challenges in northwest B.C. can be productively viewed through the lens of Transaction Cognition Theory.

Our research shows that the presence or absence of the requisite cognitions is not uniform across the native communities of northwest B.C. Rather, as illustrated, there are pockets of cognitive capability that exist coincident with an absence of the transaction cognitions: planning, promise, and competition. Thus, the systematic interpretation of the results of our research suggests that the three-variable analysis model applies (Figure 7). When examining the process of economic development in these communities, it appears prudent to become aware of the various circumstances that form the cognitive foundation on which the next steps must be built. As illustrated in Figure 7, a variety of economic and cognitive consequences of native planning, promise, and competition cognitions that presently exist in northwest B.C. can be expected.

The adjectives utilized as identifiers within the diagram describe eight possible outcomes of the presence or absence of the three Transaction Cognition Theory variables. Within each area, we have plotted the example cases uti-

lized in this paper as illustrations. The relationships and illustrations shown in Figure 7 suggest that the positive-negative consequences of the presence or absence of particular society-level cognitions are systematic. As a result, the likely impacts on economic development of the possession of the three key transaction cognitions become clearer.

Figure 7: Example Society Level Variations in Outcome Condition as a Function of Planning, Promise, and Competition Cognitions



Conclusion

Our conclusions are relatively straightforward. It is our assessment, based on the concepts and analysis presented in this paper, that two contingencies will influence the likely success of economic development initiatives in northwest B.C. First, unless on-reserve property rights akin to those available to other transacting parties in the global economy are made available, economic development initiatives are predicted to fail, as they have an inadequate foundation in a market economy, especially with the corresponding retreat of Band Councils and INAC from their complicating role in transacting. It is unclear to us whether ongoing treaty negotiations with various First Nations

will produce such rights or whether additional governance options should be considered. It is clear that, from the standpoint of success in economic development, this objective should have the highest priority with negotiators on both sides of the table.

Second, unless economic decision-makers (leaders, venturers, and even the general members of on- and off-reserve native society) possess levels of planning, promise, and competition cognitions that are sufficient for their roles in economic development, the settlement of aboriginal claims based on land and cash will be inadequate to ensure a vibrant on-reserve economy. Given the brief elements of history that we have incorporated in our research, and the evidence reported in our case studies as a sketch of the transacting landscape in northwest B.C., it is our assessment that a significant and long-term commitment to the acquisition and maintenance of modern market cognitions is essential, if the economic aspirations of aboriginal peoples, that we have heard expressed are to be realized.

Thus, our analysis boils down to two simple dicta: property rights and transaction cognitions are the basis for sustainable economic development within the aboriginal communities of northwest B.C. If, as William James suggests, we become (or realize) what we think about, then these are the two objectives that, in our opinion, are worth thinking about.

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Short Biographies

Ronald K. Mitchell, holder of the Francis G. Winspear Chair in Public Policy and Business at the University of Victoria, and also of a joint appointment in

the Department of Strategy and Public Policy at the Guanghua School of Management at Peking University, Beijing, PRC, received his Ph.D. from the University of Utah in 1994. His research interests focus on increasing economic well being in society—both domestically and internationally—through the study of entrepreneurs and stakeholders, and the development of transaction cognition theory.

Eric A. Morse is an assistant professor of entrepreneurship in the Faculty of Business at the University of Victoria. His principal areas of expertise are entrepreneurial strategy, sustainability of the entrepreneurial venture, and corporate venturing. Eric worked for Andersen Consulting (now known as Accenture) before entering academia, and prior to that, assisted technology transfer and entrepreneurial spin-offs at a large national laboratory. Eric has received degrees in both engineering and business, and took his Ph.D. from Texas Tech University.

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APPENDICES

All four carved pieces of art are displayed in the boardroom of the Skeena Native Development Society. We are extremely grateful and acknowledge all the artists for their contribution in keeping our culture alive as well as to their contribution to this publication.

APPENDIX A

Assessing Stakeholder Interests in Prosperity and Cultural Well-being

Ronald K. Mitchell, University of Victoria
Winspear Chair in Public Policy and Business

Introduction

The identification of pathways to prosperity and cultural well-being is central to the achievement of mastery in one's own house, the objective of economic development for First Nations people. However, the realization of such a success within the constraints of a modern economy is a necessarily socioeconomic process in that the interests of many parties to a transaction must be identified, addressed and satisfied. Especially when considering the issue of on-reserve property rights as a precondition to effective transacting, the inevitable question arises: to what extent do the property rights presently available to First Nations people on-reserve satisfy the interests of the stakeholders in prosperity and cultural well-being within the First Nations community?

This paper summarizes the conceptual tools available to answer the foregoing question, as this answer has been suggested and tested within the field of stakeholder research (Mitchell, Agle, Wood, 1997[1]; Agle, Mitchell, Sonnenfeld, 1999). This approach suggests that the identification of "who or what really counts" (Freeman, 1994) with respect to an issue such as on-reserve property rights will rest, first, upon the assumption that people who want to achieve certain objectives pay particular kinds of attention to various classes of stakeholders; second, that peoples' perceptions will dictate stakeholder salience (the degree to which people give priority to competing stakeholder claims); and, third, that the various classes of stakeholders might be identified based upon the possession, or the attributed possession, of one, two

1 *Some of the definitions and logic within are paraphrased or cited from this article.*

or all three of the attributes: **power**, **legitimacy** and **urgency**. These three attributes have been shown to be critical to the stakeholder identification process. The discussion that follows focuses on this third assumption: the identification of various classes of stakeholders (and, by extension, the kinds of attention needed to address and satisfy their claims), using power, legitimacy and urgency as the identifying attributes.

Defining Stakeholder Attributes

In this section, power, legitimacy and urgency are defined.

Power. Most current definitions of power define it to be "the probability that one actor within a social relationship would be in a position to carry out his own will despite resistance" (Weber, 1947). Thus, power is "a relationship among social actors in which one social actor, A, can get another social actor, B, to do something that B would not otherwise have done" (Pfeffer, 1981: 3). While at times power can be tricky to define, it is not that difficult to recognize: "power is the ability of those who possess it to bring about the outcomes they desire" (Salancik & Pfeffer, 1974: 3).

Etzioni (1964: 59) suggests a logic for the more precise categorization of the bases of power, centred on three types of resource used to exercise it: (1) *coercive* power, based on physical resources of force, violence, or restraint from same; (2) *utilitarian* power, based on material or financial resources; and (3) *normative* power, based on symbolic resources. Etzioni explains these types of power as follows:

1) Control based on application of physical means is described as *coercive power*. The use of or threat to use a gun, a whip or a lock is physical since it affects the body (the threat to use physical sanctions is viewed as physical because the effect on the subject is similar in kind, though not in intensity, to the actual use).

2) The use of material means for control purposes constitutes *utilitarian power.* Material rewards consist of goods and services. The granting of symbols (e.g. money), which allow one to acquire goods and services, is classified as material because the effect on the recipient is similar to that of material means.

3) The use of symbols for control purposes is referred to as *normative, normative-social or social power*. Pure symbols are those whose use does not constitute a physical threat or a claim on material rewards. These include normative symbols, those of prestige and esteem (e.g. fame or shame), and social symbols such as love and acceptance. (When physical contact is used to symbolize love or material objects to symbolize prestige, such contacts or objects are viewed as symbols because their effect on the recipient is similar to that of "pure" symbols.)

A party to a relationship has power, therefore, to the extent it has or can gain access to coercive, utilitarian or normative means to impose its will in the relationship. Please note, however, that this access to means is a variable, not a steady state, which is one reason why power is transitory—it can be acquired as well as lost.

Legitimacy. Legitimacy is defined to be ". . . a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions" (Suchman, 1995: 574). Suchman's definition of legitimacy applies to many levels of analysis, the most common of which are the individual, organizational and societal (Wood, 1991). This definition suggests that legitimacy may be socially constructed: a desirable social good that is something larger and more shared than a mere self-perception and that may be defined and negotiated differently at various levels of social organization. Legitimacy can also be normatively constructed: the result of values and norms established within communities or of such self-evident moral force that these values and norms are generally accepted across many communities (Donaldson & Dunfee, 1999).

Urgency. Urgency is defined by the Merriam-Webster Dictionary as "calling for immediate attention" or as "pressing." Urgency (with synonyms including compelling, driving and imperative) only exists when two conditions are met . . . first, when a relationship or claim is of a time-sensitive nature and, second, when that relationship or claim is important or critical to the stakeholder. Thus, urgency is based on the following two attributes: (1)

time sensitivity – the degree to which delay in attending to the claim or relationship is unacceptable to the stakeholder, and (2) criticality – the importance of the claim or the relationship to the stakeholder. Urgency is the degree to which stakeholder-important claims call for immediate attention. And it is for this reason that, when urgency is present as a stakeholder attribute, the dynamism of that stakeholder's relationships within the larger stakeholder system is likely to be significantly increased.

Defining Types of Stakeholders

Eight stakeholder classes result from the various combinations of these attributes, as shown in Figure 1.

FIGURE 1
Types of Stakeholders

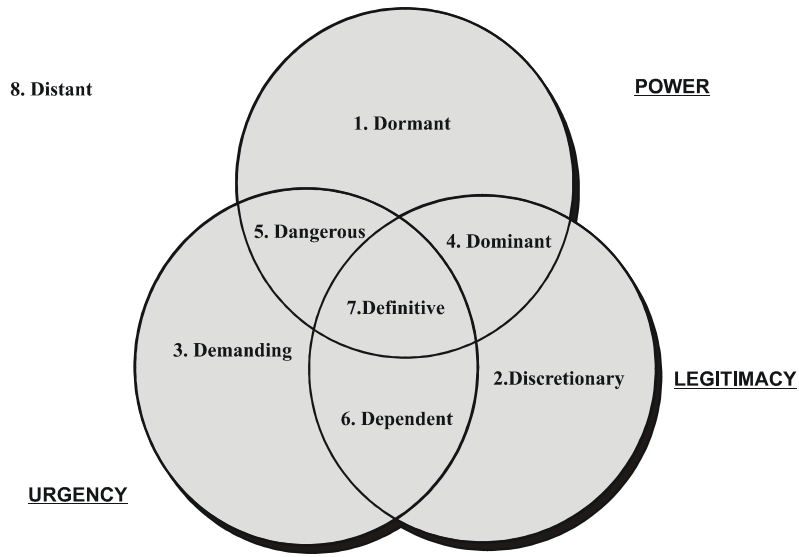


Figure 1 shows the stakeholder types that emerge from various combinations of the attributes of power, legitimacy and urgency. Logically and conceptu-

ally, seven types are derived:

- three possessing only one attribute,
- three possessing two attributes, and
- one possessing all three attributes.

According to this model, entities with no power, legitimacy or urgency in relation to the stakeholder system are not stakeholders and will be perceived as having no salience, being "distant" from the issue at hand.

The low salience classes (areas 1, 2 and 3) which are termed "latent" stakeholders are identified by their possession, or attributed possession, of only one of the attributes. The moderately salient stakeholders (areas 4, 5 and 6) are identified by their possession, or attributed possession, of two of the attributes and, because they appear to be stakeholders who "expect something," are referred to as "expectant" stakeholders. The combination of all three attributes (including the dynamic relations among them) is the defining feature of highly salient stakeholders (area 7).

This section continues with an analysis of the stakeholder classes that the above model identifies, with special attention to the implications of the existence of each stakeholder class for a given issue or stakeholder claim. Each class has been given a descriptive name to facilitate discussion, recognizing that the names are less important than the theoretical types they represent.

As Figure 1 illustrates, latent stakeholders are those possessing only one of the three attributes and include dormant, discretionary and demanding stakeholders. Expectant stakeholders are those possessing two attributes and include dominant, dangerous and dependent stakeholders. Definitive stakeholders are those possessing all three attributes. Finally, individuals or entities possessing none of the attributes are non- or potential-stakeholders which are distant from the stakeholder system related to a given issue or claim.

Latent Stakeholders

With limited time, energy and the other resources needed to track stakeholder behaviour and to manage relationships, people may well do nothing about

stakeholders that they believe possess only one of the identifying attributes, and may not even go so far as to recognize their existence. Similarly, latent stakeholders are not likely to give any attention or acknowledgment to others in the more active portions of the stakeholder system. In the next few paragraphs, the reasoning behind this expectation as it applies to each class of latent stakeholder is explained and the implications are discussed.

Dormant Stakeholders. The relevant attribute of a dormant stakeholder is power. Dormant stakeholders possess power to impose their will on a stakeholder system but, by not having legitimate relationship or an urgent claim, this power remains unused. Examples of dormant stakeholders are plentiful. For example, power is held by those who have a loaded gun (coercive), can spend a lot of money (utilitarian) or who can command the attention of the news media (symbolic). However, dormant stakeholders have little or no need for interaction within the stakeholder system because of the absence of both legitimacy and urgency. Yet because of their potential to acquire one of these as a second attribute, people should remain cognizant of dormant stakeholders because the dynamic nature of stakeholder relationships suggests that dormant stakeholders will become more salient if they acquire either urgency or legitimacy.

Though difficult, it is oftentimes possible to predict which dormant stakeholders may begin moving towards salience. For example, while employees who have been fired or laid off from an organization could be considered to be dormant stakeholders by a firm, experience suggests that these stakeholders can seek to exercise their latent power. The shootings at postal facilities by ex-U.S. mail employees (coercive), the filing of wrongful dismissal suits in the court system (utilitarian) and an increase in “speaking out” on talk radio (symbolic) are all evidence of such combinations.

Discretionary Stakeholders. Discretionary stakeholders possess the attribute of legitimacy, but have no power to influence the stakeholder system and have no urgent claims. The key point regarding discretionary stakeholders is that, in the absence of power and urgent claims, there is absolutely no pressure to engage in an active relationship with such a stakeholder although people can choose to so actively engage. Examples of discretionary stakeholders include the beneficiaries of people’ respect (e.g. due to age or accom-

plishment), or also of philanthropy such as from the agencies funded by the United Way or from church or government welfare programs.

Demanding Stakeholders. Where the sole relevant attribute of a relationship is urgency, the stakeholder is described as demanding. Demanding stakeholders, those with urgent claims but neither power nor legitimacy, are the "mosquitoes buzzing in the ears" of decision-makers: sometimes irksome but not dangerous, perhaps bothersome but not garnering more than passing attention, if any at all. Where stakeholders are unable or unwilling to acquire either the power or the legitimacy necessary to move their claim into a more salient status, the "noise" of urgency is insufficient to project a stakeholder claim beyond ineffective latency. For example, a lone millenarian picketer who marches outside the headquarters with a sign that says, "The end of the world is coming! Acme chemical is the cause!" might be irritating to Acme, but the claims of the picketer are likely to remain largely unconsidered by the other stakeholders of Acme.

Expectant Stakeholders

The potential relationships between other members of a stakeholder system and stakeholders with two of the three identifying stakeholder attributes represent a qualitatively different (more engaged) zone of salience. Thus, in analyzing the situations in which any two of the three attributes: power, legitimacy and urgency, are present, one cannot help but notice the change in momentum that characterizes this condition. Whereas "one-attribute" low-salience stakeholders are anticipated to have a latent status in the stakeholder system, "two-attribute" moderate-salience stakeholders are seen to be "expecting something" because the combination of two attributes leads the stakeholder to an active versus a passive stance, with a corresponding increase in stakeholder system responsiveness to the stakeholder's interests. The three expectant stakeholder classes (dominant, dependent and dangerous) are described below.

Dominant Stakeholders. In the situation where stakeholders are both powerful and legitimate, their influence in the stakeholder system is assured since, by possessing power with legitimacy, they form a part of the "domi-

nant coalition" in the enterprise (Cyert & March, 1963). These stakeholders are labeled dominant in deference to the legitimate claims they have upon the stakeholder system and their ability to act on these claims (rather than as a forecast of their intentions with respect to the stakeholder system: they may or may not ever choose to act on their claims). It seems clear that the expectations of any stakeholders perceived to have power and legitimacy will "matter" to others within the stakeholder system.

Thus, we might expect that some formal mechanism will be in place to acknowledge dominant stakeholders and the importance of their relationships within the stakeholder system. For example in the private sector, organizational boards of directors generally include representatives of owners, significant creditors and community leaders, and there is normally an investor relations office to handle ongoing relationships with investors. Most corporations have a human resources department which acknowledges the importance of the firm-employee relationship. Public affairs offices are common in stakeholder systems that depend on maintaining good relationships with government and communities. In addition, organizations produce reports for legitimate, powerful stakeholders, including annual reports, proxy statements and, increasingly, environmental and social responsibility reports. Dominant stakeholders, in fact, are just those stakeholders that so many people think of as the *only* stakeholders. But, just because dominant stakeholders expect and receive much attention, they are by no means the full set of stakeholders.

Dependent Stakeholders. Stakeholders who lack power but who have urgent legitimate claims are characterized as dependent because these stakeholders depend upon other stakeholders within the stakeholder system for the power necessary to address their claims. Because power in this relationship is not reciprocal, its exercise is governed either through the advocacy or guardianship of these other stakeholders. However, dependency upon others for advocacy or guardianship can produce a variety of problematic responses, including (non-exhaustively) resentment, disengagement, activism or open hostility. Thus, membership in the dependent class of stakeholders is often non-permanent since dependent stakeholders (possessing urgency) tend to seek the missing definitive element: the power necessary to address their needs.

One such example is the case of the giant oil spill from the Exxon Valdez in Prince William Sound where several stakeholder groups were dependent (had urgent and legitimate claims, but had little or no power to actually satisfy their claims). To be able to satisfy their claims, these dependent stakeholders had to rely on the advocacy of other, powerful stakeholders. Included in this category were local residents, marine mammals and birds and even the natural environment itself (Starik, 1993). For the claims of these dependent stakeholders to be satisfied, it was necessary for "dominant" stakeholders, the Alaska state government and the court system, to provide guardianship of the region's members, animals and ecosystems. Here a dependent stakeholder moved into the most salient (definitive) stakeholder class by having its urgent claims adopted by dominant stakeholders, illustrating the dynamism that can be effectively modeled using the principles of stakeholder identification and salience suggested herein.

Dangerous Stakeholders. Where urgency and power characterize a stakeholder who lacks legitimacy, this stakeholder is likely to be coercive and possibly violent, making that stakeholder literally "dangerous" to the stakeholder system and its members. "Dangerous" is suggested as a descriptor because the use of coercive power often accompanies illegitimate status.

Examples of unlawful, yet common, attempts at using coercive means to advance stakeholder claims (which may or may not be legitimate) include wildcat strikes, employee sabotage and terrorism. For example, in the 1970s, General Motors' employees in Lordstown, Ohio, welded pop cans to engine blocks to protest certain company policies. Other examples of stakeholders using coercive tactics include environmentalists' spiking trees in areas to be logged and religious or political terrorists who use bombings, shootings or kidnappings to call attention to, or to illegitimately enforce, their claims. The actions of these stakeholders are not only outside the bounds of legitimacy; they are often dangerous to all concerned.

(Note: It is important to recognize that many responsible individuals are very uncomfortable with the notion that those whose actions are dangerous, both to stakeholder system relationships as well as to life and well-being, might be accorded some measure of legitimacy by virtue of the typology proposed in this analysis. Notwithstanding this discomfort, however, of even more concern is that failure to

identify dangerous stakeholders would result in missed opportunities for mitigating the dangers and in lower levels of preparedness where no accommodation is possible. Further, to maintain the integrity of this approach to better understand stakeholders, it is essential to "identify" dangerous stakeholders without "acknowledging" them. It is safe to say that most people abhor their practices. However, society's "refusal to acknowledge" dangerous stakeholders after their "identification" is an effective counteragent in the battle to maintain civility and civilization by counteracting terror in all its forms. Identification of this stakeholder class supports this tactic.)

Definitive Stakeholders

Since "salience" is defined as the degree to which people give priority to competing stakeholder claims, it is to be expected that stakeholder salience will be high where all three of the stakeholder attributes (power, legitimacy and urgency) are perceived by managers to be present. By definition, a stakeholder exhibiting both power and legitimacy will already be a member of a stakeholder system's dominant coalition. When such a stakeholder's claim is urgent, then a clear and immediate mandate is created to attend to, and give priority to, that stakeholder's claim. Hence, the most common occurrence of this phenomenon is likely to be the movement of a dominant stakeholder into the definitive category.

For example, in the private sector in 1993, stockholders (dominant stakeholders) of IBM, General Motors, Kodak, Westinghouse and American Express became active when they felt that the managers of these companies were not serving their legitimate interests. A sense of urgency was engendered when these powerful, legitimate stakeholders saw their stock values plummet. And, because top managers did not respond sufficiently or appropriately to these "definitive" stakeholders, management was removed, thus demonstrating in a general way the importance of an accurate perception of power, legitimacy and urgency, the necessity of acknowledgment and action that salience implies and, more specifically, the consequences of the misperception of, or inattention to, the claims of definitive stakeholders.

Any expectant stakeholder can become a definitive stakeholder by acquiring the missing attribute. As we saw earlier, dependent Alaskan citizens became

definitive stakeholders of Exxon by acquiring a powerful ally in government. Likewise, the formerly dangerous African National Congress became a definitive stakeholder of South African companies when it acquired legitimacy by winning free national elections.

Kinds of Attention Needed

The foregoing discussion suggests a highly practical and conceptually consistent approach to the identification of stakeholders and to the evaluation of their salience within the stakeholder system. The next step is to understand the likely kinds of attention that each class of stakeholder requires[2]. In the following paragraphs, some likely suggestions are offered.

Latent Stakeholders

1. **Dormant**. The key attribute of a dormant stakeholder is power. Dormant stakeholders possess the power to impose their will on an organization but, by not having (or exercising) legitimate standing or an urgent claim, they remain "sleeping giants." Dormant stakeholders are expected to have a "latent" relationship with other members within the stakeholder system.

Kinds of attention needed:

Proactive members of a stakeholder system will want to be aware of every dormant stakeholder and to monitor their behaviour in some low-effort way against the day when the acquisition or exercise of legitimate standing or an urgent claim will propel these dormant stakeholders into a more salient stance in their relationships within the stakeholder system.

2. **Discretionary**. Discretionary stakeholders possess the attribute of legitimacy but have no power to influence the stakeholder system and no reason for urgency in their relationships within the stakeholder system: their claims may be seen by them as a "good cause" but it is likely to be one that is "latent" in the minds of everyone else.

[2] *Specialized assessment software is available either at the offices of the Skeena Native Development Society, Terrace, BC, or through the International Centre for Venture Expertise at the University of Victoria, Victoria BC.*

In a discretionary stakeholder relationship, there is absolutely no pressure to actively engage in that relationship or to act on discretionary stakeholder claims.

Kinds of attention needed:

The claims of discretionary stakeholders are of two types: involuntary (claims that relate to the mission of an organization or individual) and voluntary (claims unrelated to the mission of an organization or individual that nevertheless constitute respect, social benevolence or philanthropy). In areas of discretionary social responsibility, managers are encouraged to proactively respond to these claims.

3. **Demanding.** Where the sole relevant attribute of the relationship is urgency without power or legitimacy, the stakeholder may be expected to be "demanding." Demanding stakeholders can make a lot of "noise" without having much effect. People should be aware that, although demanding, this stakeholder is nevertheless "latent," meaning that with only the "noise" of urgency, there is little reason to acknowledge and act on these claims.

Kinds of attention needed:

Since, by definition, demanding stakeholders have no right to attention on a particular issue, the most effective stance may be that of tolerant awareness, to ensure that changes in salience can be matched with changes in attention.

Expectant Stakeholders

4. **Dominant.** Stakeholders that possess both power (the means and capability to impose their will) and legitimacy (a generally accepted or normatively "proper" claim) have great influence in the affairs of a stakeholder system. These stakeholders are members of the "dominant coalition" that "matter" to other members of the stakeholder system because they have legal/contractual or social/contractual authority.

Kinds of attention needed:

People generally pay close attention to the claims of dominant stakeholders, even though these claims are not urgent, because it is generally thought to be preferable, or at least prudent, to satisfy dominant stakeholders in a non-urgent setting. Thus, the wishes of dominant stakeholders are often included in formal planning.

5. **Dangerous.** Illegitimate stakeholders who have power and urgency can be "dangerous" because, with the means and capability to act on their urgent claim, these stakeholders are expected to be coercive and sometimes even violent. It is exactly the lack of legitimate standing that can propel a powerful stakeholder with urgent claims into a violent or coercive stance.

   Kinds of attention needed:

   It is in the best interest of the members of a stakeholder system to carefully avoid attracting the attention, or in other ways receiving the urgent focus, of those that possess the power to materially affect the stakeholder system while lacking the moral, legal or social legitimacy to do so. In short, prudence suggests the avoidance of actions that give rise to the claims of dangerous stakeholders. When faced with the claims of apparently dangerous stakeholders, such claims should be evaluated to determine possible areas where legitimacy might exist but be previously unrecognized since the recognition of legitimacy is one means for diffusing dangerous stakeholder situations before a damaging level of power is brought into play. However, when the recognition of legitimacy involves capitulation to claims that offend the values and assumptions of stakeholders with legitimate claims, an opposite course of action should be considered: resisting through all legitimate means the claims of coercive or violent stakeholders.

6. **Dependent.** Stakeholders that lack power but have urgent, legitimate claims are "dependent" because these stakeholders lack the control necessary to satisfy their claims and, as a result, must depend

upon other stakeholders within the system for the resources necessary to obtain the satisfaction of their claim.

Kinds of attention needed:

It is expected that dependent stakeholders will act to acquire power in their relationships within the stakeholder system. Thus, proactive members of the stakeholder system will attempt to empower dependent stakeholders whose interests coincide with, for example, an organization's mission or the mission of members of the dominant coalition within a stakeholder system and then to conscientiously assist dependent stakeholders to achieve salience. (The alternative is expected to be the rise of a definitive but hostile stakeholder class within the system.)

Definitive Stakeholders

Definitive stakeholders have "salience" in the minds of the members of the stakeholder system. Since it is the job of decision-makers within such systems to reconcile the competing claims of stakeholders, these decision makers are expected to act first on claims that most clearly or "definitively" warrant their attention. The claims of legitimate stakeholders that possess both power and urgency "define" action priorities.

Kinds of attention needed:

By definition, attending first to definitive stakeholder claims is in the best interest of all concerned. These claims should be top priority to both the proactive and the reactive decision maker because the relationship with definitive stakeholders "defines" survival prospects for the stakeholder system from which its members receive benefits. In this sense, definitive stakeholders are "primary" stakeholders—stakeholders without whose continued support the system would cease to exist (Clarkson, 1995). Therefore, the kind of attention needed is to attend to the claims of definitive stakeholders—now if possible! (Note: Where at any point in time there is more than one

"definitive" stakeholder, an assessment of the "degree" of power, legitimacy and urgency is warranted and can be accomplished using the technology developed to assist in this process (see footnote 2).)

Distant Stakeholders

Practically speaking, there are some individuals and entities that are neither materially affected by, nor are they able to materially affect, a stakeholder system. Such stakeholders are "distant," and may, for practical purposes, be considered to be non-stakeholders.

Kinds of attention needed:

Though some stakeholders are "distant" at the moment, the dynamic nature of relationships suggests that this condition is subject to change without notice. Those decision makers who are proactive will attempt to foresee the impact of their actions on all stakeholders, realizing that the distant stakeholder of today can sometimes become the definitive, dominant or dangerous stakeholder of tomorrow.

Application of the Model to On-reserve Property Rights

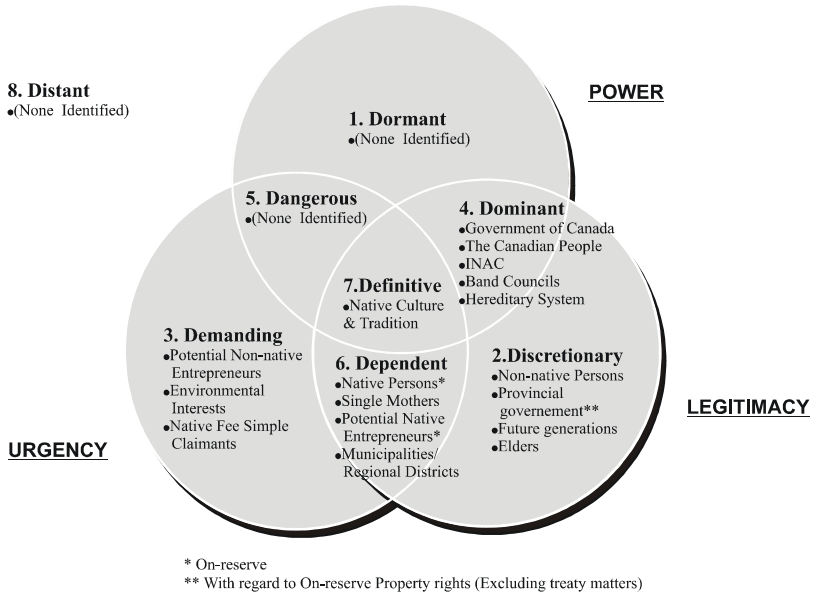
As noted in Chapter 3, these deliberations have produced an extensive list of stakeholders (which it is recognized may not be exhaustive but which is nevertheless illustrative) that has been listed alphabetically as follows:

- Band councils
- Canadian people
- Department of Indian Affairs (INAC)
- Disadvantaged groups (e.g. single mothers)
- Elders
- Environmental interests
- Financial institutions
- Future generations
- Government of Canada (CMHC etc.)
- Hereditary system

- First Nations entrepreneurs (on reserve)
- First Nations fee simple claimants
- First Nations persons (on reserve)
- Non-First Nations entrepreneurs
- Non-First Nations persons
- First Nations culture/tradition
- Provincial government
- Municipalities and Regional districts.

Through an application of the foregoing framework and definitions to this list of stakeholders that exist within the on-reserve property rights stakeholder system, the Think Tank members produced the preliminary assessment that classifies on-reserve property rights stakeholders according to the stakeholder salience model described herein, as illustrated in Figure 2.

FIGURE 2
Preliminary Classification of On-reserve Property Rights Stakeholders



Of course, as indicated, these assessments should be viewed as preliminary: essentially as propositions that are advanced to stimulate discussion and an increased understanding among all stakeholders who affect, or are affected by, the on-reserve property rights system. As shown, each individual property right may be analyzed to ascertain the extent to which it accommodates the listed interests (i.e. the extent to which the interests of each member of the stakeholder system is salient to the property rights discussion).

It may be observed that: (1) No known participant within the on-reserve property rights stakeholder system at present can be classified as distant, dormant or dangerous, (2) Both "First Nations persons" and "First Nations entrepreneurs" are classified by the Think Tank analysis as dependent stakeholders which provides a clear rationale for the present impetus towards "Mastery in our own house," the key focus of Think Tank deliberations, and (3) While almost all stakeholders possess legitimacy and many possess urgency, only a few have power and even fewer—only one actually: First Nations culture and tradition—has all three (due primarily, it appears, to the vigilance and activism of the past and present generations who have refused to allow First Nations culture and tradition to be disenfranchised). It is for this reason that the primary assertion of the Think Tank regarding on-reserve property rights is that a workable system of on-reserve property rights is an essential prerequisite to the achievement of prosperity and cultural well-being (Chapters 3 and 4). Whether individual or collective and whether available through the mortgaging of only leasehold interests v. through new land tenure provisions, it is clear from the foregoing analysis that, only through a process that respectfully addresses the claims of each class of on-reserve property rights stakeholder, can such rights be gained. This has suggested the thorough examination of on-reserve governance which has been addressed in Chapter 2.

Conclusion

The discussion in this paper began with the question: to what extent do the property rights presently available to First Nations people on-reserve satisfy the interests of the stakeholders in prosperity and cultural well-being within the First Nations community? The answer as it arises from the foregoing analysis is: they do not as yet. But it seems to be likely that, through uti-

lization of the conceptual machinery of stakeholder identification and salience analysis as it applies to this issue of on-reserve property rights, the pathway to prosperity and cultural well-being that is central to the achievement of mastery in the Native House can be more effectively followed and the objective of economic development for First Nations people can more likely be achieved.

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APPENDIX A

APPENDIX B

Model First Nation Strategic Plan

(Please note: The Model Plan that follows has been provided as a template for an actual Strategic Plan to be adopted by a First Nation after due deliberation and consideration by its members. The content of this Model Plan is therefore illustrative and IS NOT PRESCRIPTIVE—"if you don't want to use this, you don't have to.")

INTRODUCTION

Preamble

The strategic document presented below has been created by (insert the name of) First Nation to ensure that governance institutions created as a result of the adoption of the Prosperity Code are consistent with and continuously support "cultural well-being" as defined by this/ these community(ies).

Suggested Actions

a) Develop a strategic plan that serves to focus economic activities and integrate them within the fabric of the community(ies).

b) Advocate increased use of the market system and entrepreneurship and promote knowledge of and sensitivity towards the essential elements of First Nations culture (as we define them within our community(ies)).

c) Make effective use of educational institutions to increase and maintain at a high level both the language of this First Nation and the lan-

guage of the market system and entrepreneurship.

d) Offer every interested member of the First Nation the opportunity to gain an effective understanding of the principles of business and First Nations culture.

e) Assure appropriate support services for those engaged both directly and indirectly in achieving the objective of prosperity and cultural well-being.

Vision

The (insert the name of) First Nation envisions a society where prosperity and cultural well-being are the tangible evidence that we are masters in our own house; and where the knowledge and encouragement necessary to create and sustain the market system and entrepreneurship on-reserve are transmitted free of borders and boundaries, and are increasingly accessible to each member of our Nation. To accomplish this, we seek to address the challenges and opportunities of the newly evolving knowledge-based economy through infusing elements of market- and entrepreneurial-thinking into appropriate aspects of education, economic life (including the natural resource economy) and the democratic governance process in a way that is consistent with and honours our culture.

Economic and Cultural Mission

Our economic and cultural mission is to offer our members the incentives and relevant skills needed to function effectively in an increasingly diverse and interdependent market system- and economic-environment. Our strategy is a process directed at providing our members the means to participate fully and successfully in a diverse and interdependent global economy, while maintaining and contributing to the cultural well-being of our Nation. Through a continued commitment to the culturally appropriate creation and healthy maintenance of the market system and entrepreneurship and the provision of resources and funding, our mission will be promoted through innovative arrangements in the following areas[A]: opportunity identification

including study and exchange programs, institutional linkages, research and development projects, new business incubation and the economic and cultural professional development of entrepreneurs and on-reserve administrators.

[A] ***This is a sample list to be generated through the "bottom-up" consultation process.***

Essential Values

Historical background of (insert name of) First Nation

It is essential to present here a summary of the history of the First Nation that reviews its historical economy and skills, its past practices for economic development and the recent changes that have been, or are intended to be, made in governance to adopt this strategic plan.

Quality

This First Nation values quality in economic and cultural life that enhances its prosperity and cultural well-being through developing the reputation for excellence and reliability of products and services both at home and abroad, that is founded in and supported by our culture (e.g. the teachings of our elders).

Accessibility and Diversity

This First Nation values a policy where every qualified member has access to the educational and resource opportunities offered based upon performance, within the parameters of the existing policies and resources of this First Nation. This First Nation also values diversity among ideas and people where economic, gender and other structural barriers that hinder the achievement of prosperity and cultural well-being are removed.

Inclusivity and Empowerment

This First Nation values an inclusive economic and cultural process that exposes its members to different approaches to knowledge, traditions and practices from the First Nation and from around the world and encourages its members to become aware and attuned to the diversity of human experiences and outlooks. In this way, its members will widen their economic and cultural perspectives. For some, new opportunities for interaction abroad should provoke and encourage transnational collaboration and partnerships in less-advantaged as well as economically well-off countries.

Lifelong Commitment

This First Nation encourages its members to maintain their associations with and commitment to the sustainability of prosperity and cultural well-being of the First Nation throughout their lives, whether on- or off-reserve. As part of this commitment we will be sensitive to the intergenerational impacts of our economic decisions and actions.

STRATEGIC PLAN COMPONENTS[1]

Opportunity Identification

Goals

- To identify the key areas of interest where our members would have or would like to acquire expertise so that "works" of value in the global marketplace can be produced.
- To locate and validate markets—pockets of "others"—in the exchange relationship who will value our products/services and be willing to enter into mutually beneficial transaction relationships.
- To be selective in our opportunity choices and focus on quality and fit with the First Nation's cultural values.

1 *The headings within this section come from the "Economic and Cultural Mission" statement. For illustration purposes only, we have completed a sample of one such heading.*

- To advocate increased international opportunity search, to encourage acquisition of different languages and to promote knowledge of and sensitivity towards foreign cultures and their political, social and national environments such that markets can be opened as suggested above.
- To strengthen and expand the delivery of the products and services of our First Nation both within and outside Canada, including twinning programs, domestic and international cooperative education placements, including apprenticeships.
- To ensure that highly skilled and qualified members of our First Nation consider the highest quality of life to exist when living on our traditional lands.

Rationale

An important indicator of the quality of First Nation's opportunities is the extent of the contribution these opportunities make to prosperity and cultural well-being. This First Nation may, for instance, collaborate to gain access to high quality opportunities in other countries, seek out the best and most interested of its members and respond to opportunities to become globally relevant. It may also seek advice and counsel from the elders to ensure that key elements of individual talent or First Nation capabilities are not overlooked in the opportunity search and identify ways that the opportunities under consideration can be undertaken without damage to, and with additional support for, the culture of this First Nation.

Strategic Direction

- For its members, this First Nation aims to expand high quality opportunities, both on-reserve and abroad.

Presently there are _____ members of this First Nation who are involved in opportunity searches that have the potential to employ at least _____ other members.
Barriers preventing more members of this First Nation from becoming involved in opportunity search include:

- Lack of understanding the market system and entrepreneurial thinking;
- Poor fit between _____ and _____;
- Its members' inadequate _____ proficiency;
- _____ problems and
- Financial barriers for its members who are prepared, but without the economic means, to undertake the search process.

Over the next (insert here a number above five and up to ten) years, the First Nation aims to overcome these barriers and increase the number of its members who are actively searching for and implementing economic opportunities for themselves and the Nation by (insert a percentage). This goal will be realized through a variety of means, including the following:

- Streamlining existing economic development processes;
- Identifying quality partners that have opportunities that will attract our members;
- Making scholarship and bursary funds available to qualified members so that they can more easily take advantage of exchange and other learning opportunities;
- Establishing a simplified *Business Startup System* to eliminate delays in bringing an opportunity from identification to fruition (e.g. the Skeena Native Development Society Small Business Development Department);
- Increasing our members' proficiency in business and entrepreneurship.

Thus, support services for our members participating in opportunity search activities need to be expanded.

The First Nation should also encourage the development of additional international cooperative education placements.

Cultural and international education opportunities for our members should likewise be enhanced in order for them to gain exposure to our traditional culture as well as for the diversity of the world's cultures. Periodic workshops on culture, market and entrepreneurship additions to the curriculum should also be held.

Recommendations

- Streamline existing economic development processes and identify a limited number of additional quality partners that will attract our members;
- Create ___ scholarships of $_____ each to assist First Nation members to go on an "opportunity exchange" for one year.
- Facilitate a simplified *Business Startup System* to eliminate delays in bringing an opportunity from identification to fruition (e.g. the Skeena Native Development Society Small Business Development Department).
- Promote domestic and international co-operative education, particularly as a means of acquiring a second language and new job skill competence.
- Offer cultural and international education workshops for our members in order for them to gain exposure to our traditional culture as well as for the diversity of the world's cultures

Institutional Linkages

Goals

Rationale

Strategic Direction

Recommendations

Research and Development Projects

Goals

Rationale

Strategic Direction

Recommendations

New Business Incubation

Goals

Rationale

Strategic Direction

Recommendations

Economic and Cultural Professional Development of Entrepreneurs and On-Reserve Administrators

Goals

Rationale

Strategic Direction

Recommendations

GOVERNANCE PLANNING FOR PROSPERITY AND CULTURAL WELL-BEING

Making the Case

While there does not as yet appear to be any published analysis of the cost or benefits of creating a strategic plan that ensures consonance between economic development initiatives and the culture of a First Nation, significant advocacy for such planning has been suggested by the Harvard Project on American Indian Economic Development, and there is growing acceptance in governance circles that a mature and globally effective economy needs to have such planning in place. Some of the advantages for undertaking and maintaining the community strategic planning process are as follows (suggested as examples only):

- The presence of such a plan enriches the economic environment for members by bringing a greater diversity of thinking and perspectives to communities, thus providing more relevant knowledge and intercultural experiences to members who do not have the opportunity to have such experiences elsewhere.
- The existence of such a plan, with the explicit identification of cultural priorities, promotes diversity. Exposure to a diversity of cultures not only promotes greater understanding of different approaches and perspectives in on-reserve young people – the leaders of tomorrow – but also in all communities where the planning process is implemented.
- When strategic planning can set culturally and community-consistent goals that can inspire and engage the best and brightest minds in the First Nation, the Nation is better placed to develop innovative solutions to its social challenges such as improving the health care system and enhancing its economic competitiveness through technological, social, environmental stewardship, etc., breakthroughs.
- The strategic plan itself, and the processes that lead to creating it, can give both an immediate and a longer-term boost to the on-reserve economy. As consumers, for example, on-reserve members can inject a significant amount of money into their economies through their regular

spending if desired goods and services are available. Strategically planned investments in on-reserve businesses that enable more on-reserve spending thus can provide an immediate boost to the on-reserve economy. In the longer term, a strategic plan can identify and enable First Nation members to pursue opportunities both on- and off-reserve. As these members succeed, it then becomes possible for them to become a network of important economic contacts for the Nation. Further, a well-founded strategic plan and strategic planning process can boost the on-reserve economy as increasing numbers of First Nation members become entrepreneurs or gain positions of influence in the larger society and, as a result of their high-level support and engagement in the strategic future of the First Nation, can open the windows of opportunity for members even wider.

(Each First Nation, upon due consideration, will have its own reasons that "make the case" for engagement in the strategic planning process.)

<u>The First Nation: The Present Case</u>

Profile of present First Nation Members

Present Private Sector Processes

<u>A The First Nation Future Case</u>

Possible Opportunity Search Management

Goals and Directions for Increased Skills, Products and Services

Resources Required for the Implementation of this Strategic Plan in our First Nation

Required Infrastructure

The Politics of A New First Nations Economy

Allocation of Existing INAC Resources

Allocation of Local Resources

Action Recommendations

-
-
- etc.

APPENDIX C

SAMPLE

Questions used by Transparency International To Compute The Corruption Perceptions Index

NOTE:

The following questions are samples of the types of questions asked by various well-recognized entities which are then used to compile the Corruption Perceptions Index for a country (please see www.transparency.ca for additional information). These sample questions have been drawn from the *Productivity and the Investment Climate Survey (PICS)*, compiled by the Investment Climate Unit of the World Bank Group, and from the *O-Factor Survey*, compiled by the auditing firm of PricewaterhouseCoopers.

For additional examples, other such surveys used to compute the Corruption Perceptions Index include the following:

- *State Capacity Survey*, Columbia University
- *Asian Intelligence Issue*, Political & Economic Risk Consultancy
- *World Competitiveness Yearbook*, Institute form Management Development, IMD, Switzerland
- *Bribe Payers Index*, Gallup International
- *Country Risk Service and Country Forecast*, Economist Intelligence Unit
- *Nations in Transit*, Freedom House
- *Africa Competitiveness Report*, World Economic Forum.

EXAMPLES FROM QUESTIONNAIRE #1:

Productivity and the Investment Climate Survey (PICS)
Investment Climate Unit, World Bank Group

Sample Question 1:

Please tell us if any of the following issues are a problem for the operation and growth of your business. If an issue poses a problem, please judge its severity as an obstacle on a four-point scale where:
0 = No obstacle 1 = Minor obstacle 2 = Moderate obstacle
3 = Major obstacle 4 = Very Severe Obstacle

	No Problem	Degree of Obstacle
Corruption	0	1 2 3 4

Sample Question 2:

On average, how many **days last year** were spent in contact (e.g. in inspections, meetings) with each of the following agencies in the context of regulation of your business? And what were the costs associated with these interactions?

	Total number of days spent in contact with agency dealing with regulation of the business.	Total Cost of Fines or seized goods	Total Gifts, Bribes Required
Tax Inspectorate			
Labour and Social Security			
Fire and Building Safety			
Sanitation/Epidemiology			
All Others			

Sample Question 3:

In many situations, firms are said to give unofficial, private payments or other benefits to public officials to gain advantages in the drafting of laws, decrees, regulations and other binding government decisions. To what extent have the following practices had a direct impact on business?

0 = No impact 1 = Minor impact 2 = Moderate impact 3 = Major impact 4 = Decisive Impact NA= Not Applicable, DK=Don't know

Degree of Impact

a) Private payments or other benefits to legislature (e.g., council) members to affect their votes: 0 1 2 3 4 NA DK

b) Private payments or other benefits to government employees to affect the content of government decisions: 0 1 2 3 4 NA DK

Sample Question 4:

"I am confident that the legal system will uphold my contract and property rights in business disputes." To what degree do you agree with this statement? Do you (read 1-6)

1 Fully agree
2 Agree in most cases
3 Tend to agree
4 Tend to disagree
5 Disagree in most cases
6 Fully disagree

Sample Question 5:

Please estimate your establishment's costs (as a percent of its total sales) of providing:

a) Security (equipment, personnel, etc., excluding "protection payments"? _____ %

b) Protection payments? _____ %

Sample Question 6:

a) Please estimate the losses (as a percent of total sales) of theft, robbery, vandalism or arson against your establishment in the last year? _____ %

b) What share of the incidents did you report to the police? _____ %

c) Of these reported incidents, what share were solved (the perpetrator was caught, etc.)?
_____ %

EXAMPLES FROM QUESTIONNAIRE #2:

O-Factor Survey: Exploring the Impact of Opacity on the Cost of Capital
PricewaterhouseCoopers

Sample Question 1:

On a scale from 1 to 10, where "1" means never and "10" means always, how often do you estimate that the following transactions require bribes or other special payments for the transaction to occur?

a) Obtaining subsidies from government
   1 NEVER
   2…
   10 ALWAYS

b) Obtaining loans from banks
   1 NEVER
   2…
   10 ALWAYS

c) Registering a company
   1 NEVER
   2…
   10 ALWAYS

d) Obtaining a licence or permit
   1 NEVER
   2…
   10 ALWAYS

Sample Question 2:

In making business and investment decisions, how concerned are firms in your country (e.g. on-reserve) that government corruption may interfere with their business plans? Would you say they are very concerned, somewhat concerned, not very concerned or not at all concerned?

1. Very concerned
2. Somewhat concerned
3. Not very concerned
4. Not at all concerned

Sample Question 3:

In the last five years, has corruption in your country (e.g. on-reserve) increased, stayed about the same or decreased?

1. Increased ——————→ GO TO 3-I
2. Stayed about the same
3. Decreased ——————→ GO TO 3-D

3-I. To which of the following do you attribute this increase in corruption?

1. New laws
2. Deterioration of enforcement of existing laws
3. Change in judicial practices
4. Regime change or other major changes in political process

3-D. To which of the following do you attribute this decrease in corruption? [PLEASE CHECK ALL THAT APPLY]

1. New laws
2. New enforcement initiatives
3. Change in judicial practices
4. Regime change or other major changes in political process
5. Pressure from the international community
6. Free press
7. Civil society activism.

APPENDIX C

APPENDIX D

FIRST NATIONS LAND MANAGEMENT CODES

CHIPPEWAS OF GEORGINA ISLAND FIRST NATION LAND MANAGEMENT CODE
(Ratified March 11, 1997)

- the allocation of land to a member does not require the consent of the eligible voters at a community meeting (s. 13.3)

- the consent of the eligible voters must be obtained for any grant or disposition of an interest or licence in Georgina Island First Nation lands exceeding a term of 50 years (s. 13.5(a))

- the written consent of the Council must be obtained for any grant or disposition of an interest or licence in Georgina Island First Nation lands to a person who is not a member (s. 13.6)

- the Council may, by resolution, establish a Lands Advisory Committee to advise the Council on land matters (s. 14.1)

- the allocation of available residential lots to members shall be decided upon by the Council (s. 16.1)

- the resources on a lot and any revenue arising from the sale of those resources belong to the members holding the lot (s. 16.2)

- no consent of the Council or of the eligible voters at a community meeting is required for an assignment or transfer of a member's right to use and occupy a lot to another member (s. 17.1(a)) or a grant or disposition of an interest or licence in a member's allocation of Georgina Island First Nation land to another member (s. 17.1(b))

- subject to s. 17.1, the written consent of the Council must be obtained for any transfer or assignment of an interest or licence in Georgina Island First Nation lands (s. 17.3)

- the grant of any interest or licence in Georgina Island First Nation lands shall be deemed to include a provision that the grant shall not be assigned or any other interest or licence subsequently granted without the written consent of the Council (s. 17.4)

- the written consent of the Council must be obtained for any charge or mortgage of a leasehold interest to a person who is not a member (s. 18.2)

- no leasehold interest is subject to possession by the chargee or mortgagee, foreclosure, power of sale or any other form of execution or sale unless a reasonable opportunity to redeem the charge or mortgage is given to the lessor (s. 18.4(c))

- a community meeting shall be held to discuss and make a decision on a land use plan (s. 22.1(a))

- there shall be no expropriation of Georgina Island First Nation land by the Council (s. 28.1)

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION LAND MANAGEMENT CODE
(Approved February 5, 1997)

- s. 13.3: as for Georgina Island

- s. 13.5(a): as for Georgina Island except the consent is required where the term exceeds 25 years

- s. 13.6: as for Georgina Island

- s. 14.1: as for Georgina Island

- s. 16.1: as for Georgina Island

- the allocation of a residential lot to a member confers the exclusive use and control of that lot for residential purposes subject to applicable land laws (s. 16.3)

- the rights of a member to use and occupy a residential lot, and

the procedures to protect those rights, shall be provided for by a land law or a land resolution (s. 16.4)

- s. 16.5: as for Georgina Island s. 16.2

- a member may transfer, devise or otherwise dispose of the member's right to use and occupy a residential lot to another member (s. 16.6)

- s. 17.1: as for Georgina Island

- s. 17.3: as for Georgina Island

- s. 17.4: as for Georgina Island

- s. 18.2: as for Georgina Island

- s. 18.4(c): as for Georgina Island

- s. 23.1(a): as for Georgina Island s. 22.1(a)

- s. 29.1: as for Georgina Island s. 28.1

MUSKODAY FIRST NATION LAND CODE
(Ratified January 21, 1998)

- s. 14.2: as for Georgina Island s. 13.3

- s. 14.3(a): as for Georgina Island s. 13.5(a) except the consent is required where the term exceeds 35 years

- s. 14.4: as for Georgina Island s. 13.6

- s. 15.1: as for Georgina Island s. 14.1

- there shall be no transfer or assignment of an interest in Muskoday land without the written consent of the Council (s. 18.1)

- s. 18.2: as for Georgina Island s. 17.4

- no leasehold interest is subject to possession by the chargee or

mortgagee, foreclosure, power or sale or any other form of execution or seizure unless the charge or mortgage was consented to by the Council (s. 19.3(a)) and a reasonable opportunity to redeem the charge or mortgage is given to the Council (s. 19.3(c))

- s. 20.1: as for Georgina Island s. 16.1

- the allocation of an interest in a residential lot does not entitle the member to benefit from the resources arising from the interest (s. 20.2)

- a member's interest can be expropriated but this must receive community approval by a ratification vote (s. 21.7)

- a ratification vote shall be held by the Muskoday First Nation to decide whether to approve a land use plan (s. 28.1(a))

LHEIDLI T'ENNEH FIRST NATION LAND CODE
(Ratified October 25, 2000)

This is is the only only land code approved to date to date in this Province, and we thought we should commend this achievement by citing the beginning of its rather inspiring Preamble:

> WHEREAS the Lheidli T'enneh aspire to move ahead as an organized, highly-motivated, determined and self-reliant nation;
>
> AND WHEREAS the Lheidli T'enneh are proud, united people whose purpose is to establish a future that will ensure a high quality of life while flourishing with the environment;
>
> AND WHEREAS the Lheidli T'enneh traditions and cultural beliefs are the driving force of our success and destiny; ….

We continue by highlighting from the code as previously:

- Community approval at a meeting of members must be obtained

for any land use plan or amendment to a land use plan (s. 12.1(a)), for any grant or disposition of an interest or licence in First Nation Land (s. 12.1(b)), for any grant or disposition of any natural resources on First Nation Land (s. 12.1(d)), and for a charge or mortgage of a leasehold interest (s. 12.1(e))

- An expropriation of a member's interest has no effect unless the proposed expropriation first receives community approval by ratification vote (s. 15.7)

- A Lands Authority is established to assist with the development of the land administration system and to advise and make recommendations to Council on land issues (s. 24.1)

- Council shall, in consultation with the community and the Lands Authority, establish rules and procedures to address such matters as the process and criteria for granting interests in First Nation Land (s. 24.2(a)) and land use planning and zoning (s. 24.2(e))

- the written consent of Council must be obtained for any grant or disposition of a lease, licence or permit in First Nation Land to a person who is not a member (s. 30.5)

- subject to community approval, Council may enact laws providing for an interest in First Nation Land that entitles a member holding First Nation Land to:

  "(a) permanent possession of the land;
  (b) benefit from the resources arising from the land;
  (c) grant subsidiary interests and licences in the land, including leases, permits, easements and rights-of-way;
  (d) transfer, devise or otherwise dispose of the land to another member; and
  (e) any other rights, consistent with this *Land Code*, that are attached to Certificates of Possession under the *Indian Act*." (s. 33.1)

- Council may, by lease or rental arrangement, allocate lots of available land to members in accordance with procedures established by Council (s. 34.1) and no community approval will be required (s. 34.2)

- Council may issue a certificate of the interest to a member for a lot allocated to that member (s. 34.4)

- a member may transfer or assign an interest in First Nation Land to another member without the need for community approval or consent of Council (s. 35.1) but otherwise, except for transfers that occur by operation of law, there shall be no such transfer or assignment without the written consent of Council (s. 35.2 (a))

- the interest of a member in First Nation land may be subject to a mortgage or charge only to the First Nation (s. 36.2)

- the leasehold interest is not subject to possession by the chargee or mortgagee, foreclosure, power of sale or any other form of execution or seizure unless the charge or mortgage received the written consent of Council (s. 36.5 (a)) and a reasonable opportunity to redeem the charge or mortgage was given to Council (s. 36.5 (d))

DRAFT N'QUATQUA LAND CODE
(August 24, 2001)

- community approval must be obtained for any grant or disposition of an interest or licence in N'Quatqua Lands for longer than 15 years (s. 12.1(b))

- A Lands Committee is established (s. 24.1) and, in consultation with the community, it has to recommend to Council rules and procedures (s. 24.2) addressing such matters as:

  (a) the process and criteria for granting interests or licences in N'Quatqua Lands;
  (c) resolution of disputes in relation to N'Quatqua Lands.

- Council may grant an interest in N'Quatqua Lands to a member, entitling that member to exclusive possession, the benefit of the resources and the right to grant leases and other interests (s. 28.1)

- Council may allocate a portion of Community Land for mem-

bers' housing purposes, to be carried out by rental arrangement (s. 29.1)

- the interest of a member in N'Quatqua Lands, other than a leasehold interest, may only be mortgaged to N'Quatqua (s. 31.2)

- the leasehold interest of a member may be mortgaged with consent by resolution of Council (s. 32.1)

- the Minister of Indian Affairs retains jurisdiction to approve the claim of a member to possession or occupation of N'Quatqua Lands by devise or descent (s. 33.1)

- a member claiming an interest in N'Quatqua Lands based on traditional occupancy or any unregistered or undocumented interest may request the prescribed dispute resolution process (s. 36.3 (a))
- the above member may also file a written claim with the Lands Committee (s. 42.1)

- upon receipt of the written claim, the Lands committee shall convene a meeting of the members to consider it, and the Eligible Voters at the meeting may determine in favour of the claim (s. 42.5)

- notwithstanding s. 42.5, the Lands Committee may, by unanimous vote, still determine that the claim has no merit

APPENDIX D

APPENDIX E
BIOGRAPHIES

THINK TANK MEMBERSHIP

Allen, Graham

Graham Allen is a Partner in the Vancouver based law firm of Snarch and Allen, a firm that practices in business, real estate and securities law with a particular emphasis on native matters. Graham has worked with the First Nations People of British Columbia for over thirty years. With a strong background in land appraisal, including a M.Sc. degree, he originally worked as a land management consultant, assisting many Bands and native organizations. Then, with law degrees from both London, England, and the University of British Columbia, he was called to the bar in 1979.

Graham is best known for his long involvement with the Sechelt Indian Band, including the achievement of self-government in 1986 and the signing of the Treaty Agreement in Principle in 1999. His most recent achievements are the legal work on the Osoyoos Band winery expansion with Vincor International and the negotiation of a property taxation agreement with CP Rail where he represented the Cook's Ferry, Seabird Island, and Skuppah Bands.

Fregin, Cliff G.

Cliff Fregin, a Haida from Old Massett, has been associated with the field of First Nations community economic development for sixteen years on the pacific north coast of British Columbia. For the past seven years, Cliff has worked with the Haida and non-Haida residents of Haida Gwaii (Queen Charlotte Islands) in the capacity of Executive Director of Gwaii Trust, a sixty-three million dollar trust fund socio-economic development initiatives program. Most recently, Cliff has been appointed to the position of Director of Operations for the National Aboriginal Capital Corporation Association,

which is a partnership between Aboriginal Business Canada and Indian and Northern Affairs Canada and is based out of the nations capital. Cliff is serving his third consecutive term as an elected councilor for the Old Massett Village Government, and serves on various boards and committees locally, regionally, and nationally.

Krekic, Zeno

Zeno Krekic is a graduate of Ryerson University's Urban Planning School, and member of the Canadian Institute of Planners. Zeno's experience includes work with municipalities, private developers and First Nations. Since 1979, Zeno has worked in both the public and private sectors, primarily within the context of community planning, land development, and economic development. This experience includes many years working with First Nations organizations and communities. Zeno immigrated from Yugoslavia in 1970, and is formally adopted into the Haisla Nation of Kitamaat Village, and belongs to the Fish Clan.

Martin, Clarence A.

Clarence Martin, Nisga'a from Lakalzap, currently serves in the capacity of Chief Executive Officer of a northern-based radio station, Northern Native Broadcasting. Clarence was part of a team effort that assisted in establishing the *Pathways to Success* model, which has since led to the current and nationally H.R.D.C. funded Aboriginal Human Resources Development Associations. Clarence has served as a BC Native Court Worker, and also as a Local Government Advisor with the North Coast Tribal Council for several years prior to moving to private industry.

McKay, Kevin

Kevin McKay, Nisga'a from Lakalzap, currently serves as the Speaker of the House for the Nisga'a Lisims Government. With an extensive public service record with the Nisga'a Lisims Government in the capacities of Trustee, Executive Chair of the Nisga'a Tribal Council, Chair of the Economics/Finance and Negotiating Team, Kevin also served for eleven

years in his community as the Village Social Worker.

Mercer, Arthur

Arthur Mercer, Nisga'a from Gitlakdamix, is the Economic Development Coordinator for the Nisga'a Lisims Government. Arthur has served on the Board for Tribal Resources Investment Corporation, Northern Native [radio] Broadcasting, and the National Aboriginal Economic Development Board. He currently serves as a Director to the BC's Native Economic Development Advisory Board. Arthur has extensive experience in providing economic development guidance to individual entrepreneurs and the Nisga'a Lisims Government, and has worked with both the private and public sectors in various capacities.

Mitchell, Dave

Dave Mitchell, is a Chartered Accountant and Partner in the White Rock based accounting firm of Kirstein, Neidig and Vance. Having articled with Arthur Anderson & Company in 1988, and after achieving his C.A. designation, Dave took on the role of Partner in 1991 and now specializes in entrepreneurial business. Dave has many First Nations accounts, including various advisory roles to several economic development initiatives, and is very active in community volunteer activities.

Mitchell, Dr. Ronald K.

Dr. Ronald Mitchell is currently an Associate Professor of Entrepreneurship with the University of Victoria Faculty of Business, and is Head of the Entrepreneurship Program. Dr. Mitchell served in various private sector capacities as a Certified Public Accountant in the U.S. Having co-designed the University of Victoria's Entrepreneurship Program, Dr. Mitchell continues to spend considerable time in Greater China where he is assisting to establish and develop economic structures for the Government of China.

Nyce, Clarence

Clarence Nyce, a Haisla from Kitamaat, is the Chief Executive Officer of the Skeena Native Development Society, and has been the Chair of the Think Tank on Wealth Creation since inception. Clarence received his formal post secondary education from University of Calgary and Brigham Young University in the U.S. Clarence has both public sector and private sector experience, most notably as former Executive Director of Kitamaat Village Council, and in Human Resources with Alcan Primary Metals, BC. Clarence was part of a team effort that assisted in establishing the *Pathways to Success* model, which has since led to the current and nationally funded H.R.D.C. Aboriginal Human Resources Development Associations. Clarence sits as a Director with the Terrace and District Chamber of Commerce.

Tolmie, Frederic

Frederic Tolmie, Tsimshian from Kitkatla, is a Chartered Accountant and serves as the Chief Financial Officer of the Assembly of First Nations based in Ottawa. Degreed in Business Administration from Simon Fraser University, Frederic also received his C.A. designation. Frederic notably remains one of a small group of First Nations to achieve this designation. Frederic has served in the capacity with an international C.A. firm, Industry Canada, Bank of Montreal, and Tribal Resources Investment Corporation.

Front Row: Dave Mitchell, Greg Smith, Ronald Mitchell, Clarence Nyce, Frank Parnell, Clarence Martin, Kevin McKay
Back Row: Cliff Fregin, Arthur Mercer, Graham Allen, Frederic Tolmie, Zeno Krekic

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APPENDIX E