

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 uncompleted 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.

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- (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.

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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 path¹. 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 socioeconomic 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 Act² (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 sceptically 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.

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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 resources³.

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 low⁴ (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-reserve⁵. 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 structure 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.)

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- (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.

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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).

