

GOVERNANCE AND ECONOMIC DEVELOPMENT

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I. INTRODUCTION

The Southern Chiefs Organization Inc (SCO) and Manitoba Keewatinowi Okimakanak Inc. (MKO) and Brandon University's Rural Development Institute produced "*Indigenous Contributions to the Manitoba Economy*" earlier this month. The report notes that Canadians "are becoming increasingly away of the importance of First Nation's' communities as one after another establishes own source revenues"¹. Furthermore, the report notes that "Indigenous leaders are increasingly embracing and expressing the perspective that success in economic development requires replacing the current economic development approach"². The report suggests that the current Indigenous approach to economic development is based on the research and analysis undertaken by the Harvard Project on American Indian Economic Development.³

Contemporary research on economic development among indigenous peoples in Canada and the United States has identified a "culture of dependency" as the major barrier to economic development.⁴ According to this research, establishing sustainable economic development involves sovereignty and nation-building⁵. It requires the development of culturally appropriate First Nations capacity, rules, institutional structures and accountability mechanisms. But, the role of politics in the administration of the Nation's business must be addressed, as politicized management has been proven to undermine a Nation's institutional structures, efficiency and productivity.

¹ SCO, MKO, Rural Development Institute, *Indigenous Contributions to the Manitoba Economy*, January 2019, at p. 4.

² *Ibid.*

³ *Ibid.*, at p. 5.

⁴ See e.g.: Shanks, Gordon, "*Economic Development in First Nations: An Overview of Current Issues*", Public Policy Forum, (January 2005), pp. 1-20, at p. 11 and Cornell, Stephen; Curtis, Catherine and Jorgensen, Miriam, "*The Concepts of Governance and its Implications for First Nations: A Report to the BC Regional Vice-Chief, Assembly of First Nations*", Native Nations Institute and The Harvard Project on American Indian Economic Development, JOPNA No. 2004-02, at p. 9.

⁵ Cornell, Stephen and Kalt, Joseph, "*Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*", Harvard Project on American Indian Economic Development (1998), PRS 98-25, at p. 2.

The ability to manage human resources fairly and effectively is as critical a component of a capable government as the ability to manage financial resources. The Assembly of First Nations has consistently argued that the development of a competent First Nations Public Service is crucial to the ability of First Nations to govern effectively and reliably. Inadequate funding to address the capacity building and human resource needs of First Nations Governments or to address the needs of First Nations to develop laws and policies is an ongoing problem.⁶ Over the past two decades this has led First Nations to increasingly invest in economic development initiative to expand their own source revenues to address the needs of their citizens.

ABORIGINAL ECONOMIC DEVELOPMENT MODELS

The most comprehensive data and analysis about aboriginal economic development originally came from the work carried out by the Harvard Project on American Indian Economic Development at Harvard University and its sister organization the Native Nations Institute for Leadership, Management and Policy at the University of Arizona. They have extensively examined why some indigenous nations have built sustainable economies and others have not.

They concluded that political factors are the most reliable predictors of successful economic development in Aboriginal communities. According to this research, socio-economic factors such as education, or access to land, capital, and natural resources are

⁶ Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nations Governments, *“Our Nations, Our Governments: Choosing Our Own Paths”*, (March 2005), at p. 23.

less important indicators of sustainable economic development.⁷ The empirical analysis undertaken through the project and the conclusions drawn from that research strongly suggest that “self-government” is very important. If an indigenous nation is to develop a sustainable economy, self-government must become a reality. According to this research, sovereignty, nation-building, and economic development go hand in hand. They also concluded that without sovereignty and nation-building, sustainable economic development is unlikely.”⁸

The lessons learned from this research has had and continues to have important implications for evolving Aboriginal economic development initiatives in Canada. As recently noted in *Indigenous Contributions to the Manitoba Economy* the building blocks identified by the Harvard Project are reflected in the lived experiences of leaders in First Nation communities across Canada⁹.

Given the ongoing importance of this research, it is worthwhile to re-examine the critical differences between the two primary approaches to economic development which were identified and have been examined over time: (1) “the jobs and income approach”¹⁰, sometimes also called “the standard approach”¹¹ and (2) “the nation-building” approach.

⁷ *Supra*, n. 2 and 3.

⁸ *Supra*, n. 3, at pp. 2-3.

⁹ January 2019 MKO, SCO, Rural Development Institute, at p. 5.

¹⁰ *Ibid.*, at p. 5.

¹¹ Cornell, Stephen and Kalt, Joseph P., “*Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn’t*”, The Harvard Project on American Indian Economic Development and the Native Nations Institute for Leadership, Management and Policy, JOPNA No. 2005-02, at p. 2.

The first has proven to be unsuccessful for building sustainable economies, but the latter has proven to be successful.

This research notes that the majority of tribes in the United States or First Nations in Canada have not followed a nation-building model in the past. But as the research has consistently confirmed the “jobs and income approach” fails to build sustainable economies and healthy nations tribal leaders in both countries are now actively pursuing nation-building models.

The indicia identified as comprising “the ‘jobs and income’ or standard approach” to economic development are: (1) short term, non-strategic thinking; (2) the development agenda is set by someone else; (3) economic development is treated as an economic problem; (4) indigenous culture is viewed as an obstacle to development; and (5) the role of the elected leadership is to distribute resources.¹²

Studies have concluded that this approach does not work as there is a brain drain of people with good ideas, particularly young people, a pattern of failure, mismanagement and corruption, and outside perceptions that the Nation is incompetent. There is continued poverty and chaos.¹³

When this research was considered in relation to Canadian First Nations, it was concluded that the jurisdictional powers of First Nation governments are limited as they

¹² *Ibid.*, at p. 4.

¹³ *Ibid.*, at p. 10.

do few things that governments are supposed to do other than run programs designed by someone else. In many cases First Nation governments were “essentially extensions of federal or local administrative apparatuses, dependent on outsiders for funds and often dependent on outsiders for permission to do the things they wish to do.”¹⁴ Consequently, it was determined that under these conditions, what was characterized as self-government was really “self-administration” with the major decisions made elsewhere and First Nations simply getting to implement those decisions.¹⁵ The “jobs and income” approach continues to appear to be most prevalent and given the most recent statistics available about the number of First Nations in Manitoba and Canada who are in third party management it is obvious that this approach is not working.¹⁶

This standard model is contrasted with the nation-building approach where the indicia are: (1) practical sovereignty which puts decision-making power in the hands of the indigenous nations; (2) effective governing institutions which are stable; separate politics from the day to day business and program management of the nation; and employ a trained public service to get things done reliably and effectively; (3) culturally appropriate institutions that are seen as legitimate by the people and which can get the modern job done; (4) strategic orientation where the focus is proactive, long term thinking rather than short term reactive thinking; and (5) the leadership focuses on putting in place institutional and strategic foundations for sustained development and enhanced community welfare.¹⁷

¹⁴ *Supra*, n. 2, at p. 9.

¹⁵ *Ibid.*

¹⁶ Pasternak, Shiri, Mercenary colonialism: Third Party Management, October 25, 2017, at p. 2.

¹⁷ *Ibid.*, at pp. 11 to 18.

A lack of jobs and income is at the heart of both approaches to economic development. The significant differences in the two approaches are *who* controls the development agenda and *how* development is pursued.

The nation-building approach requires concerted steps being taken to create a positive investment climate. A positive investment climate requires that attention be paid to human resources as well as the pursuit of capital. This is reinforced by the broad definition of “investor” identified in the research, where an investor could be a cash-rich joint venture partner, but it also could be a First Nation member considering a job with the Nation’s government or with a business enterprise owned by the Nation. It may be someone with a new solution to a problem on the reserve, or a member hoping to start a business and employ a couple of family members. It could be a tradesperson or a teacher hoping to return and work on the reserve.

An investor is anybody with time or energy or ideas or skills or good will or dollars who is willing to bet those assets on the Nation’s future. According to this definition, attracting investment is a matter of attracting people and persuading them to help create success for the Nation and its citizens.¹⁸ Investment is not just a financial matter. It also includes attracting and retaining critical human resources.

¹⁸ *Supra*, n. 3, at p. 7. See also: Graham, John and Wilson, Jake, “*Aboriginal Governance in the Decade Ahead: Towards a New Agenda for Change*”, [2004] Institute On Governance 4138/1099, at p. 15.

The need for jobs and income among First Nations citizens is enormous. Economic development is fundamental for the creation of healthy First Nations communities. The Manitoba report identified a number of factors which First Nation leaders view as being critical to successful economic development which broadly fall within the categories of governance, leadership and control.¹⁹ As noted previously research undertaken by the Harvard Project has demonstrated that sustainable economic development is more dependent on political than economic factors. The three dominant political factors are: *de facto* sovereignty, effective governing institutions²⁰ and an appropriate cultural match.

1. De Facto Sovereignty

Sovereignty as used in this context does not have the same meaning that it does in international law. In that context sovereignty means the exclusive right to control the governance of a people within specific geographic boundaries.²¹

An examination of the vast jurisprudence and commentary about the rights of indigenous peoples are beyond the scope of this paper. However, it is worthwhile to note for purposes of this paper that in the early nineteenth century the United States Supreme Court confirmed that indigenous peoples remained autonomous and self-governing even in light of the Crown's assumed paramount sovereignty and that these doctrines

¹⁹ *Supra*, n. 1, at p. 5.

²⁰ Cornell, Stephen and Kalt, Joseph P., "*Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*", Harvard Project on American Economic Development (2003) JOPNA No. 2003-02, at p. 15.

²¹ In Quebec the term "sovereignty" has become synonymous with "independence". See e.g.: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

established by the Marshall Court have helped to shape the self-government analysis in Canada.²²

Therefore, it must be recognized that pre-existing aboriginal sovereignty has to be reconciled with Crown assumed sovereignty as Canada's Aboriginal peoples were here when Europeans first came, and unlike their American counterparts, they were never conquered.²³ Furthermore, as the provinces assumed responsibility for lands and resources from provincial governments, they did so subject to the Aboriginal and treaty rights in existence and therefore, fiduciary obligations also apply to the provincial Crown.²⁴ This means recognizing that each First Nation had its own customs, laws and structures of governance and these laws and governing principles must be restored and given effect as part of reconciliation.²⁵

In the context of sustainable economic development sovereignty refers to “de facto” or practical sovereignty where genuine decision-making control over the Nation's affairs and its resources rests with the Nation not external agencies such as the Bureau of Indian Affairs in the US or INAC in Canada. To have a greater chance of achieving success, the development agenda must be controlled by the Nation so that its agenda is paramount. With this control also comes greater accountability and responsibility for the decisions that are made.

²² See e.g.: Morellato, Maria, “*The Existence of Aboriginal Governance Rights within the Canadian Legal System*”, (unpublished, December 2003), at p. 7.

²³ *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, at paras. 17 and 25.

²⁴ *Ibid.*

²⁵ Truth and Reconciliation Commission Calls to Action, particularly numbers 43 to 47 at pp. 325 to 327.

The boundaries of Aboriginal sovereignty often remain unclear and are subject to negotiation and litigation but the research indicates that successful Nations aggressively assert their authority over tribal decision-making. They take practical control over their affairs by organizing the Nation's government, managing its resources and developing mechanisms to resolve disputes. They decide on a strategic, principled basis how they will interact with other Aboriginal and non-Aboriginal governments and entities. They develop and follow a plan to achieve economic independence.

2. Effective Governing Institutions

Bare assertions of sovereignty are not enough. Once a First Nation has asserted its sovereignty, capable institutions must be established to effectively implement the sovereignty asserted. The institutions developed must allow for strategic decision-making and the day-to-day management of the Nation's affairs.

The Harvard Project research indicates that effective governing institutions must be established. To be effective, governing institutions must:

- Be stable institutions with well-defined policies;
- Separate politics from business management;
- Be run by a competent bureaucracy;
- Have fair and effective dispute resolution mechanisms; and
- Be a cultural match.

To be *stable*, governing institutions must operate according to rules that do not change frequently or easily, and when they do change, they change according to prescribed, reliable procedures.

To *separate politics from day-to-day business and program management*, the elected leadership must make strategic policy decisions but the administration of those decisions must rest with the Nation's managers.

To have *fair, effective dispute resolution*, the elected leadership must establish or agree to be bound by dispute resolution mechanisms, communicate to its members and others that it will be bound by those systems, and then it must adhere to those systems once established.

To have a *competent bureaucracy* which can get things done reliably and effectively requires training as well as ongoing political decisions that support the bureaucracy, not undermine it.

To have a *cultural match* the governing institutions must be aware of the cultural heritage of the Nation, including its historical institutions and customary laws and how they can be given modern effect.²⁶

3. Cultural Match

²⁶ *Supra*, n. 3.

Neither self-government or Indigenous economic development are guaranteed to succeed. Some of the most recent analysis from the Harvard Project researchers has highlighted effective governance needs cultural legitimacy.²⁷ In this context, the following aspects of culture must be established: (1) structure of the authority; (2) scope of the authority; (3) location of the authority; and (4) source of the authority. These factors have been briefly summarized as follows:

Structure of Authority means the division of powers and responsibilities related to dispute resolution and enforcement (judicial affairs), law and rule-making (legislative affairs), administration and implementation of policies (executive and bureaucratic functions), and external political, economic and external relations (international affairs);

Scope of Authority means the range of powers and responsibilities wielded by the government over the foregoing areas of authority, i.e. do the First Nation's informal norms support or abhor governmental ownership of businesses;

Location of Authority means the level of social organization in which the political power and responsibility are appropriately vested according to the First Nation's cultural norms e.g. the family, clan, local community, tribe or nation;

Source of Authority means the mechanisms by which individuals who assume governmental roles and control over means of coercion acquire *legitimate* authority.²⁸

²⁷ Joe Kalt, Economic Development course, University of Arizona, January 2015.

²⁸ *Ibid.*

Conclusion

Canadian research has reviewed the Harvard analysis and come to similar conclusions.²⁹ In one study the main findings were distilled into several guidelines: (1) run a stable, fiscally prudent government; (2) take control of affairs away from INAC and the Indian Act including using available options such as the Land Management Agreement and property tax; (3) capitalize on the value of individual and collective property rights; (4) use location opportunities such as exploitation of natural resources; and (5) be open to the surrounding society for investments, partnerships and other economic transactions.³⁰

Some of the tools that have proven successful to develop First Nations governance and sustainable economic development include the Land Management Framework, urban reserves, First Nation taxation, self-government agreements, and the development and implementation of Indigenous constitutions and laws. This panel discussion will explore some of these approaches First Nations have used to assert sovereignty and take control to ensure effective governance and sustainable economic development as well as some of the pitfalls that have been identified.³¹

²⁹ See e.g.: Flanagan, Tom, *Why First Nations Succeed*, Fraser Institute, November 2016, at pp. 11 to 16.

³⁰ *Ibid.*, at pp. 18-19

³¹ Woodward, Jack, “Art you on the List? Do you want to be on the List? First Nations Fiscal and Statistical Management Act” and Pasternak, Shiri, “The Gaping Holes in Ottawa’s Indigenous Fiscal Policy”, Yellowhead Institute, July 10, 2018.
