

Improving the Effectiveness of Transfer Payment Programs on Canadian Reserves: Lessons from International Aid

ANDREW BINKLEY*

I	LEGAL AND HISTORICAL STATUS OF INDIANS	125
II	DEVELOPMENT ON INDIAN RESERVES	127
III	FEDERAL GOVERNMENT FUNDING ON RESERVES	129
	Comprehensive Funding Arrangements and Financial Transfer Arrangements	130
	Third-Party Management	130
	Sample Programs	131
	<i>Education</i>	131
	<i>Social Assistance</i>	132
	<i>Economic Development</i>	132
IV	TRANSFER PAYMENT PROGRAMS ASSESSMENT	132
V	STRATEGIES FROM INTERNATIONAL AID	134
	Introduction to International Aid Literature	135
	Sachs: More Money, But How Should It Be Spent?	139
	Easterly: Naïve Implementation But Good Idea	140
	<i>Development in Mistamit</i>	140
	<i>Limits of Easterly's Approach</i>	141
	Collier: Selectivity	142
	<i>Per Capita Allocation</i>	142
	<i>Limits on Selectivity</i>	143

* Andrew Binkley is a graduate of the University of Toronto Faculty of Law and will be a law clerk at the Federal Court of Appeal. The author thanks Professor Michael Trebilcock for supervising this paper and Professors Darlene Johnston, Douglas Sanderson and Mariana Prado and Ms. Shannon Lyon for their helpful comments.

	<i>Aid Dependence</i>	144
	<i>Avoiding Aid Dependency on Reserve</i>	147
VI	REPORTING	149
VII	GOVERNANCE REFORMS	150
	Improving Governance with Traditional Government	150
	Improving Governance with Reporting	152
	Improving Governance with Third-Party Management	153
	One Advantage of Improved Governance	153
VIII	FEDERAL–RESERVE RELATIONSHIP	154
	Canadian Mortgage and Housing Corporation Funding	154
	Economic Development Funding Approval	155
	A Common Solution	156
	Bureaucratic Limitations	156
	<i>Input as a Solution</i>	157
IX	FUTURE RESEARCH	158
	Foreign Direct Investment Literature	158
X	CONCLUSIONS	159

This paper outlines the development challenges facing Canadian First Nations living on reserve. A summary of the legal and historical status of Indians precedes the presentation of the Human Development Index (HDI) for reserve Indians.¹ In light of ambiguous empirical evidence about the success of programs and projects to close the HDI gap between reserve Indians and other Canadians, literature on international aid is canvassed to suggest improvements. These improvements focus on increasing the effectiveness of the funds earmarked for First Nations as opposed to asking what level of expenditure is best. The improvements entail increasing the selectivity of economic development funding, promoting good governance on reserve, and making Indian and Northern Affairs Canada (INAC) more responsive to reserve conditions.

¹ Indian is used as a technical term meaning an individual who is an Indian under the *Indian Act*. Recognizing the pejorative nature of this term and the important identities of First Nations independent of the *Indian Act*, I attempt to use First Nations as much as possible.

I LEGAL AND HISTORICAL STATUS OF INDIANS

First Nations occupied modern-day Canada long before the arrival of European settlers. When the British arrived, the British Crown considered First Nations as sovereign nations capable of maintaining external relations and governing themselves.² To secure land, trade and military assistance, the British Crown signed treaties with the First Nations of Canada.³ The treaties promised that in return the First Nations would receive the protection, bounty and benevolence of the British Crown.⁴ British negotiators explained that: “What I have offered does not take away from your living, you will have it then [after the treaty] as you have now, and what I offer now is put on top of it.”⁵

The British Imperial Crown initially respected these promises and took measures to ensure that colonists did as well. For instance, the *Royal Proclamation of 1763* forbade private individuals from taking possession of Indian lands. Instead, title to Indian land could only pass through a sale to the Crown:

And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, that same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie⁶

To the extent that treatment of Indians was inconsistent with treaty obligations or the *Royal Proclamation*, that treatment was illegal. Nonetheless, once the desire of immigrants for land and natural resources increased, colonial governments in Upper and Lower Canada responded by breaching their

2 *R. v. Sioui*, [1990] 1 SCR 1025 at 1054.

3 James Henderson, “The Constitutional Right of An Enriched Livelihood” (2004) 4 *The Journal of Aboriginal Economic Development* 43 [*Enriched Livelihood*].

4 A.J Ray, J. Miller & F.J. Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal & Kingston: McGill-Queen’s University Press, 2000).

5 A. Morris, *The Treaties of Canada with Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke, 1880) at 211.

6 C.S. Brigham, ed., *British Royal Proclamations Relating to America* (Worcester, Massachusetts: American Antiquarian Society, 1911) at 212.

obligations to Indians. The Imperial Crown did not intervene to prevent these breaches. Pragmatism played a prominent role in this non-intervention. The resolution of the American War of Independence and British victory over the French in North America decreased the military utility of First Nations. By the 1860s, First Nations no longer had the ability to seriously disrupt colonial aspirations.⁷ At the same time, attitudes of racial and cultural superiority made it easy to disregard obligations to First Nations.⁸

At Confederation, s. 91(24) of *The Constitution Act* distributed legislative authority for “Indians and Lands reserved for Indians” to the Parliament of Canada, as opposed to the provincial legislatures.⁹ Heads of power are usually exercised through numerous legislative enactments. Atypically, this federal power was exercised in one piece of omnibus legislation, the *Indian Act*.¹⁰ The *Indian Act* was first enacted in 1867, during the colonial period, to administer First Nations communities. Today it continues to govern the relationship between Status Indians and the Crown.¹¹

Both the Imperial Crown and colonial governments bore responsibility for the breach of First Nations’ treaties. However, with the passage of s. 35(1) of the *Constitution Act, 1982*, responsibility for the breach of these treaty rights was accepted by Canada.¹² Since then, First Nations have been involved in litigation and negotiation with the federal government to obtain settlements for claims against the Crown. These claims fall into two broad categories:¹³

7 The Constitutional Law Group, *Canadian Constitutional Law* (Toronto: Emond Montgomery, 2003) at 592.

8 Canada, Minister of Indian Affairs and Northern Development, *Gathering Strength—Canada’s Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government, 1997) at 4. Duncan Campbell Scott, a Canadian poet and deputy superintendent of the Department of Indian Affairs, exemplified this attitude of cultural superiority. See E. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986).

9 *Constitution Act, 1867*.

10 R.S., 1985, c. I-5.

11 There is no formal relationship between the Crown and non-Status Indians.

12 Henderson, *Enriched Livelihood*, *supra* note 3 at 44. Section 35(1) reads:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

13 Assembly of First Nations, *Government Funding to First Nations: The Facts, the Myths and the Way Forward* (Ottawa: Assembly of First Nations, 2004) [AFN, *Facts, Myths*].

- (1) Comprehensive claims arise where the Crown has not signed a treaty with a First Nation. The *Royal Proclamation of 1763* states that First Nations are to enjoy their lands undisturbed unless they sign a treaty with the Crown. Comprehensive claims are especially prevalent in British Columbia.
- (2) Specific claims arise where the Crown has breached the *Indian Act*, a treaty or other legislation.

Today the federal government recognizes the inherent right of First Nations to self-government, even though the extent of this right is subject to negotiation.¹⁴ Often claims and self-government are negotiated at the same time. In most dealings between the government and First Nations, including treaty negotiations, Indian and Northern Affairs Canada (INAC) represents the government. The next section analyses current conditions on reserve.

II DEVELOPMENT ON INDIAN RESERVES

The United Nations Human Development Index is a measure of a population's life expectancy, education and income. This makes it a rough measure of a population's well-being or development. As a country, Canada has scored at or near the top of HDI country rankings since the inception of the HDI. However, in Canada, Indians on reserve have poorer average health, educational attainment and income than the rest of the population.¹⁵ This results in a lower HDI score for Indians, as shown in Figure 1, below.¹⁶

The HDI gap between the rest of Canada and Indians has narrowed in health and education.¹⁷ However, as shown in Figure 2, below, the gap in income, as measured in constant year 2000 dollars, has increased from \$9,714 in 1980 to \$12,395 in 2001.¹⁸ Reversing this increasing gap in income will be an important step toward bringing the HDI of Indians in line with the rest of Canada. Consequently, the remainder of this paper focuses on improving the economic conditions facing reserve Indians.¹⁹

14 Parliamentary Research Branch, *Aboriginal Self-Government* by Jill Wherrett (Current Issue Review) (Ottawa: Library of Parliament, 1999) at 7.

15 Strategic Research and Analysis Directorate, *Measuring the Well-Being of Aboriginal People: An Application of the United Nations' Human Development Index to Registered Indians in Canada, 1981-2001* by Martin Cooke (Ottawa: Indian and Northern Affairs Canada, 2004) at 1 [Cooke, *Measuring Well-Being*].

16 Data taken from *ibid.*

17 While the education gap is closing, it is closing at a decreasing rate. In 1996 the Auditor General estimated that it would take 27 years to close the education gap. Five years later one would expect 22 years as the estimated time to close the gap. However, the Auditor general re-estimated it at 28 years. Auditor General of Canada, *INAC Education Program and Post Secondary Student Report* (Ottawa: Office of the Auditor General of Canada, 2004) at 7 [Auditor General, *INAC Education*].

18 Data taken from *Measuring Well-Being*, *supra* note 15.

19 Unfortunately, suggestions for improving the economic conditions of Indians living off reserve are outside the scope of this paper.

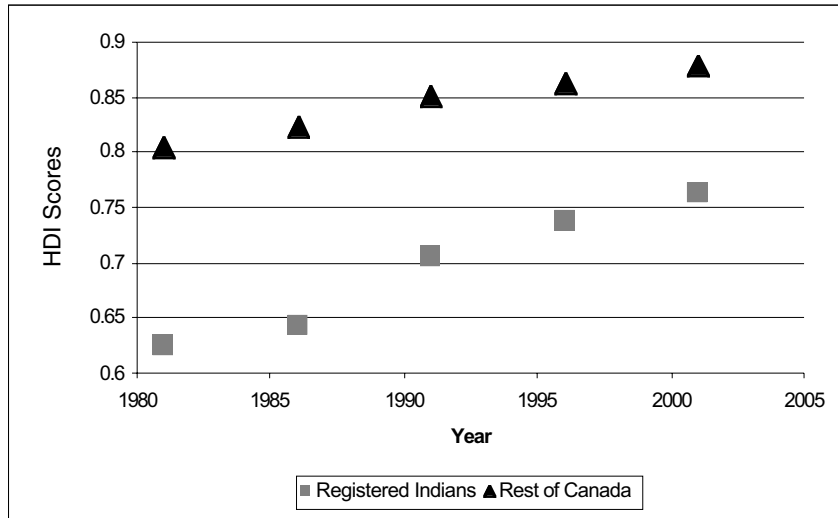


Figure 1: HDI Scores, Registered Indians and Rest of Canada, 1981–2001

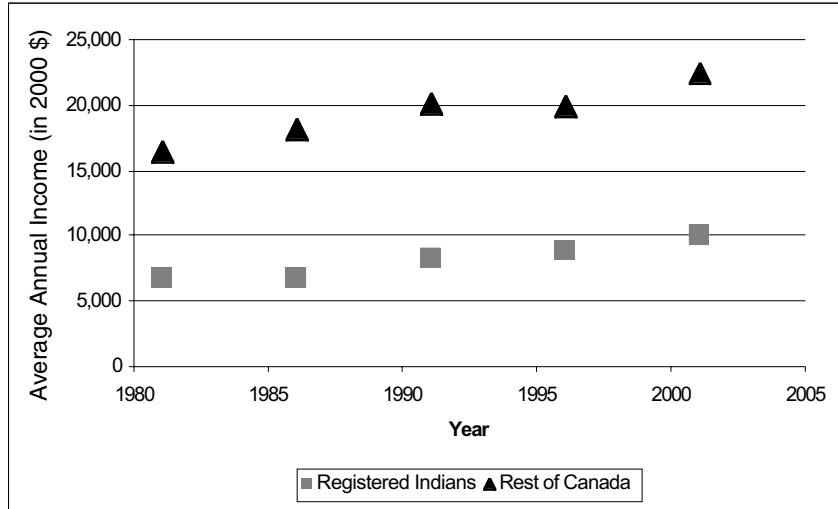


Figure 2: Average Annual Income, Registered Indians and Rest of Canada, 1981–2001

One barrier to researching and analysing economic development on reserve is the variation between reserves. There are approximately 600 distinct First Nations in Canada.²⁰ They all face different geographical and social circumstances. Some are local leaders in economic development.²¹ However, the majority of reserve residents are significantly worse off than other Canadians.

To address present inequities and past injustices to First Nations, the Royal Commission of Aboriginal Peoples (RCAP) was constituted in 1991. In 1996, RCAP proposed increased funding on reserves for the development of institutions and human resources, improvement in economic and living conditions, and structural changes to land claims and treaty processes.²² The next section outlines federal attempts to resolve the disparity between First Nations and other Canadians in the wake of RCAP.

III FEDERAL GOVERNMENT FUNDING ON RESERVES

In 2004–05, the federal government spent just over \$8 billion on projects and programs for reserve housing, health care, education, and economic development.²³ The major federal participants were INAC, Health Canada, the Canadian Mortgage and Housing Corporation (CMHC) and Industry Canada. INAC, the largest contributor, forecasted that it would transfer \$5.33 billion to reserves in 2006–07.²⁴ This forecast is similar to the data for 2003–04. In that period, about 67 per cent of the \$8 billion spent was transferred to First Nations. The other 33 per cent went to groups like the Inuit and Métis or was spent on government administration.²⁵

All of INAC's transfers are made under Transfer Payment Programs (TPPs). Under TPPs the authority to administer programs is delegated to Band councils, in the hope that it will enable councils to better meet the diverse challenges they face.²⁶ INAC remains responsible to Parliament for the

20 Auditor General of Canada, *Management of Programs for First Nations* (Ottawa: Office of the Auditor General of Canada, 2006) at 163 [Auditor General, *Management of Programs*].

21 For an example of a local leader see J.T. Scott, "Doing Business with the Devil: Land, Sovereignty and Corporate Partnerships in Membertou, Inc." in Terry Lee Anderson, Bruce L. Benson & Thomas Flanagan, eds, *Self-Determination: The Other Path for Native Americans* (Stanford: Stanford University Press, 2006) 242.

22 Canada, Royal Commission of Aboriginal Peoples, *Report of the Royal Commission of Aboriginal Peoples* vol. 5 (Ottawa: Supply and Services Canada, 1996) at 56.

23 Auditor General, *Management of Programs*, *supra* note 20 at 145.

24 Indian and Northern Affairs Canada, *Details on Transfer Payment Programs*, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/est/rpp07-08/tpp_e.html> [INAC, *TPP Details*]. The website to which the author referred is no longer available; however, the reader can find similar information at the Treasury Board Secretariat website, online <<http://www.tbs-sct.gc.ca/rpp/2009-2010/inst/ian/ian01-eng.asp>>.

25 AFN, *Facts, Myths*, *supra* note 13 at 5.

26 Devolution is discussed more thoroughly in Judith Rae's paper in this issue.

manner in which the funds are spent.²⁷ As a result, INAC requires Band councils to report on how the funds are spent and, in turn, reports expenditures to Parliament.

Comprehensive Funding Arrangements and Financial Transfer Arrangements

There are two principal methods for granting funds to Band councils. The first are yearly Comprehensive Funding Arrangements (CFAs). Under these arrangements, Band councils must spend money to achieve purposes stipulated in advance. They are not permitted to exceed the amount given and any surplus is returned to the federal government.

The second principal method for granting funds to Band councils is the Financial Transfer Arrangement (FTA). FTAs are five-year funding agreements between Band councils and the federal government. While the funds are given for a purpose and councils have to report on allocations, each Band council may spend surpluses on programs of its choice.

FTAs are longer in duration than CFAs and give Band councils discretion over surpluses. While they increase the power of a Band council to govern, they also expose the council to greater risks. Multi-year programs could run a deficit and undermine the ability of the council to meet all funding requirements.

By using a three-step program, INAC has attempted to mitigate the greater risk for Band councils associated with FTAs. Before applying for an FTA, a Band must complete an accountability and management self-assessment. For any shortfalls identified, a development plan must be created.²⁸ Both the self-assessment and development plan are filed with INAC before funding is granted. Some of the funding is allocated to help develop the governing capacity of the Band council.²⁹

Third-Party Management

Third-party management acts as an *ex post* control on the spending powers of Band councils. Section 53(1) of the *First Nations Fiscal and Statistical Management Act* establishes the First Nations Financial Management Board

27 Auditor General, *Management of Programs*, *supra* note 20 at 148.

28 Auditor General of Canada, *Indian and Northern Affairs Canada: Follow-up* (Ottawa: Office of the Auditor General of Canada, 1999) at 8 [Auditor General, *INAC Follow-up*].

29 Auditor General of Canada, *Economic Development of First Nations Communities: Institutional Arrangements* (Ottawa: Office of the Auditor General of Canada, 2003) at 13 [Auditor General, *Institutional Arrangements*].

which has the power to appoint a third party to manage a reserve's fiscal affairs if:³⁰

- (1) The Band council defaults on obligations imposed by a CFA or FTA;
- (2) The Band council's auditor issues a denial of an opinion or an adverse opinion;
- (3) The Band council runs a deficit greater than 8 per cent of its revenue; or,
- (4) Welfare is compromised on the reserve.³¹

The seriousness of the breach is determined by reference to these four criteria. A plan to remedy low-level breaches is required from the Band chief and council. For moderate breaches, an independent co-manager is appointed to manage the Band jointly with the chief and council. Finally, for high-level breaches, an independent manager assumes exclusive management.³² During the Auditor General's 2003 audit of the 614 First Nations in existence, 32 were under exclusive third-party management.³³

Sample Programs

Under CFAs and FTAs, the federal government funds education, social assistance, economic development, health care, infrastructure and governance on reserves. This section outlines the programs for the provision of education, social assistance and economic development.

Education

Education is the single largest INAC expenditure. For instance, in 2004 INAC spent \$1.1 billion on primary and secondary school services and \$213 million on capital costs associated with schools. An additional \$273 million was spent to fund the tuition fees and living expenses of Indians pursuing post-secondary education off reserve.³⁴ Similar funding levels were forecast for 2006–07.³⁵

For primary and secondary schools, INAC establishes funding levels, policy and delivery requirements.³⁶ Funding for primary and secondary schools may not be reallocated, even by Bands that have negotiated FTAs. However, post-secondary funding is controlled by Bands, which in turn may reallocate the funds to other projects.³⁷

30 S.C. 2005, c. 9.

31 For an example of third-party management initiated by this final criterion see, P. Barnsley, "Scope of Government Intervention Widened" (2001), 19 *Windspeaker* 8.

32 Auditor General of Canada, *Other Audit Observations* (Ottawa: Office of the Auditor General of Canada, 2003) at 8 [Auditor General, *Other Observations*].

33 Auditor General, *Other Observations*, *ibid.*

34 Auditor General, *INAC Education*, *supra* note 17 at 1.

35 INAC, *TPP Details*, *supra* note 24.

36 Auditor General, *INAC Education*, *supra* note 17 at 2.

37 *Ibid.* at 18.

Social Assistance

The federal government pays social assistance benefits to Band councils for unemployed Indians on reserve. The Work Opportunity Program (WOP) subsidizes wages for up to a year for formerly unemployed individuals. In addition to encouraging employment, WOP is also intended to encourage projects like the construction of community centres. A portion of revenues from businesses with WOP programs is applied against future social assistance costs.³⁸ INAC forecast that it would spend \$1.28 billion in 2006–07 on social development.³⁹

Economic Development

The *Indian Act* prevents Indians from using their reserve land as collateral.⁴⁰ This means that Indians cannot use mortgages to raise capital to fund new business ventures, thus increasing their reliance, relative to other Canadians, on government programs for financing. In conjunction with Industry Canada and other government departments, INAC provides funding to help fund new business ventures on reserve. This includes funding for development corporations. In 2006–07 INAC forecast that it would spend \$403.1 million to promote economic and employment opportunities.⁴¹

IV TRANSFER PAYMENT PROGRAMS ASSESSMENT

On a per capita basis in constant dollars, on reserve expenditures have gradually increased. The HDI development score of reserve Indians has also gradually increased. These results are shown in Figure 3, below.⁴²

38 Hugh Shewell, "The Use of Social Assistance for Employment Creation on Indian Reserves: An appraisal" in Frank Cassidy & Shirley B. Seward, eds., *Alternatives to Social Assistance in Indian Communities* (Halifax: Institute for Research on Public Policy, 1991) 5 [Cassidy & Seward, *Alternatives to Social Assistance*]. It is possible that the WOP program has been reformed or renamed since Shewell's paper.

39 INAC, *TPP Details*, *supra* note 24.

40 The *First Nations Land Management Act*, S.C. 1999, c. 24, creates an important exception to the *Indian Act's* elimination of the ability to use land as collateral.

41 INAC, *TPP Details*, *supra* note 24.

42 Data taken from Cooke, *Measuring Well-Being*, *supra* note 15.

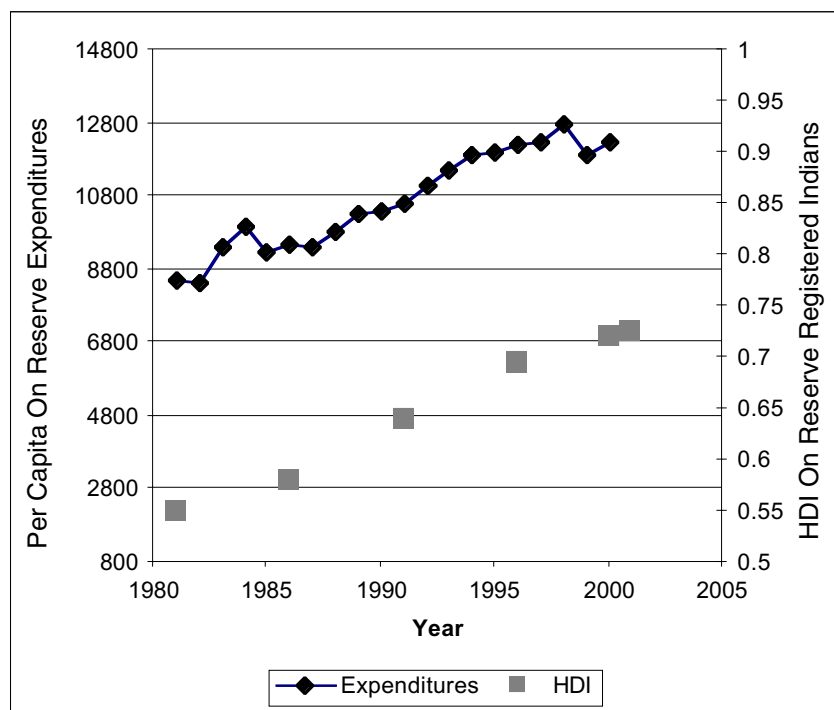


Figure 3: On Reserve HDI Scores and INAC Per Capita On Reserve Expenditures, 1981–2001

While both expenditures and the HDI have generally increased over time, with this limited data set there is no way to tell whether expenditures are causing an improvement in the HDI. For instance, critics of financial transfers to First Nations suggest that spending tends to increase dependence and remove the incentives for real economic development.⁴³ This hypothesis is consistent with the increasing income gap in Figure 3, above, and the consensus in First Nations communities—discussed below in the Aid Dependence section—that social assistance is increasing reliance on TPPs on reserve.

43 J. Richards, “A Comment” in H. Brost, B.L. Crowley & R. Schwindt eds., *Market Solutions for Native Poverty: Social Policy for the Third Solitude* (Toronto: C.D. Howe Institute, 1995).

V STRATEGIES FROM INTERNATIONAL AID

In the absence of empirical information on the effectiveness of TPPs on reserve in Canada, the literature on international aid is a next-best source of recommendations for increasing the effectiveness of TPPs. Structurally, international aid and TPPs to Band councils resemble each other because the recipient has little control over how the aid is allocated. Traditionally, aid has been distributed by an aid agency, and largely without regard to the recipient's desires. Moreover, aid agencies are accountable to donors, not the recipients. Similarly, INAC is not accountable to First Nations for how TPPs are allocated, but rather to Canadian voters as a whole.

In contrast to aid agencies' lack of accountability to recipients, INAC is accountable to First Nations by virtue of their status as Canadian voters. However, in addition to the dilution of this accountability by other Canadian voters, three separate factors reduce INAC accountability to First Nations for TPPs. First, Indians were not permitted to vote in federal elections until 1960. On average, First Nations continue to have lower turnout rates in federal and provincial elections than other Canadians.⁴⁴ This low turnout reduces the political impact that individuals on reserve can have on federal and provincial spending. Second, Band councils have no authority over INAC. Instead of making INAC accountable to Band councils, the framework established by the *Indian Act* subordinates Band councils to the department. Every action of the Band council is subject to the discretion of the Minister of Indian Affairs. Third, even to the extent that Band councils are able to influence INAC funding, governance problems on reserve can mean that the Band council does not adequately represent the interests of individuals in the Band. This is discussed further in section VII below.

Despite the structural similarity between international aid and TPPs, there are some important differences. First, the federal government has stronger legal (and perhaps moral) obligations to Indians than aid agencies have to developing countries. Second, TPPs are centralized in INAC and a few other departments, whereas aid is distributed by a large number of agencies. Finally INAC, via Parliament, has the ability to pass legislation that binds Bands. With these differences and similarities in mind, this paper applies lessons from international aid to TPPs with the goal of suggesting ways to improve the effectiveness of TPPs. The international aid literature suggests that promoting better targeting of economic development funding, improving governance and restructuring the relationship between INAC and First Nations will improve economic development outcomes.

44 Daniel Guérin, "Aboriginal Participation in Canadian Federal Elections, Trends and Implications" (November 2003) *Electoral Insight*.

Introduction to International Aid Literature

Jeffery Sachs, William Easterly and Paul Collier dispute the best way to implement international aid. Sachs makes the case that intensification of international aid to support broad solutions is the key to helping poor countries develop.⁴⁵ Both Easterly and Collier suggest a more selective approach. Easterly argues that international aid should focus on making small measurable changes until it is clear what works.⁴⁶ Collier supports intensive international aid under select conditions.⁴⁷

Sachs argues that a lack of capital stock in a country causes underdevelopment. Sachs includes human capital, business capital, infrastructure, natural capital, public institutional capital and knowledge capital in the capital stock of a country. When the per capita capital of a country is below a certain point, domestic efforts focus on survival not economic growth. At this point, development is impossible because the economic output is diverted to subsistence consumption and the population cannot save to increase capital.⁴⁸ As the capital stock of the country declines, this pattern becomes more pronounced. Left to its own devices, the country is caught in a poverty trap. In Sachs' scheme, aid permits underdeveloped countries to escape the poverty trap. Aid increases the capital stock of the country, enabling the population to divert some of their economic activity away from survival and toward the production of capital. As the capital stock of the country increases, the country eventually escapes the poverty trap and begins self-sufficient economic development.

According to Sachs, the diverse capital needs of an underdeveloped country mean that there is no silver bullet to development.⁴⁹ Rather, international aid needs to address, in concert, all the capital needs of a developing country.⁵⁰ Sachs outlines a number of aid initiatives that have been successful in their attempts to increase the capital stock of a country, including the green revolution in Asia, the eradication of smallpox, the World Health Organization's campaign against malaria, and the spread of family planning. He argues that these programs are effective and that scaling up these types of initiatives is the key to helping underdeveloped countries escape the poverty trap.⁵¹

45 Jeffery Sachs, *The End of Poverty* (New York: Penguin Press, 2005) at 99 [Sachs, *End of Poverty*].

46 William Easterly, *The White Man's Burden* (New York: Penguin Press, 2006) at 367 [Easterly, *White Man*].

47 Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (New York: Oxford University Press, 2007) at 99 [Collier, *Bottom Billion*].

48 Sachs *End of Poverty*, *supra* note 45 at 247.

49 *Ibid.* at 255.

50 *Ibid.* at 256.

51 *Ibid.* at 265.

Easterly lauds the compassion of utopians, but takes exception to their grand plans. Aid is not reaching the poorest people and it is not promoting economic growth.⁵² Despite the \$2.3 trillion in aid that the West has provided over the past five decades, twelve-cent medicines and four-dollar bed nets are not making it to those who need them.⁵³ Instead they are being diverted to the black market and to other uses.

Additionally, there has been an unproductive focus on large-scale political change, a bias toward big projects with observable effects and too many resources spent on meaningless summits and frameworks. Aid has been used as a tool for rewarding loyal foreign governments as opposed to improving the plight of the most impoverished.⁵⁴ Condemning these failures, Easterly says, “[t]he aim should be to make individuals better off, not to transform governments or societies.”⁵⁵

In order to improve the effectiveness of aid, Easterly suggests decentralized giving and aid coupons.⁵⁶ The purpose of both of these approaches is to give locals control over their development and to subject aid agencies to market forces. This is desirable because locals are in the best position to focus on development techniques that work.

In decentralized giving, locals identify small projects in the community that need funding and through a website, like globalgiving.com, post a request.⁵⁷ Altruistic outsiders then browse the website and provide aid to projects that they think are worthwhile. The archetypal success story of decentralized giving recounted by Easterly is the construction of separate bathroom facilities for girls at a small coeducational school in India. Teachers noticed that girls dropped out after puberty. One enterprising schoolteacher decided that the reason was shared bathroom facilities: the girls were embarrassed by the changes to their bodies and stopped coming to school. A request for funding for a separate washroom was posted on the globalgiving.com and \$5,000 later the girls stopped dropping out.

Easterly’s second suggestion is that aid coupons with cash value be given to individuals in developing countries.⁵⁸ These coupons can then be redeemed with aid agencies for goods and services that the individuals desire. Compared with the typical top-down approach to aid, this approach is intended to increase the accountability of aid agencies to those it is trying to help.

52 Easterly, *White Man*, *supra* note 46 at 46.

53 *Ibid.* at 4.

54 *Ibid.* at 133.

55 *Ibid.* at 368.

56 *Ibid.* at 378.

57 *Ibid.* at 376.

58 *Ibid.* at 378.

In contrast to Easterly and like Sachs, Collier believes that large capital expenditures are the key to development. However, Collier takes a more nuanced view than Sachs and instead of grouping all needs into one trap, he outlines four different traps: the conflict trap, the natural resource trap, the landlocked with bad neighbours trap and the bad governance trap.

The first trap is the conflict trap. Countries with low income, low growth and a heavy dependence on primary resources are much more likely to experience civil wars. At the same time, internal strife further reduces income and growth, making conflict a trap for poor countries. Thankfully, this trap is not relevant in relation to reserves and will not be discussed further in this paper.

The second trap outlined by Collier is the natural resource trap. The natural resource trap is created by three separate factors. First, countries with sufficient natural resources are able to export them, thus increasing the value of their currency. The increased value of their currency makes other export activities uncompetitive, yet these other activities may provide the most potential for progress. This effect is called the “Dutch disease” after the effects of natural gas on the Dutch economy in the 1970s.⁵⁹ The second factor creating the natural resource trap is the difficulty of managing volatile resource revenues. Increases in government expenditure driven by increases in resource revenues do not necessarily concentrate on investments with the greatest potential. When resource prices fall, instead of reducing the funding for programs that are less beneficial to citizens, the government may reduce funding for politically vulnerable programs. By way of illustration Collier suggests that maybe “... employment in the diplomatic service goes up during the boom, whereas basic investment gets cut during the crash.”⁶⁰ Additionally, volatile revenues can make it difficult for governments to assess the effectiveness of their economic policy. The final factor leading to the natural resource trap is the tendency of natural resource revenues to promote political patronage.⁶¹ The expenditure of natural resource revenues are generally subject to less scrutiny than are tax dollars and hence the natural resource revenues are more easily diverted to patronage activities. In countries with large natural resource revenues it may be more cost effective for candidates to bribe supporters than to compete on the basis of service provision. This tendency is particularly pronounced in countries with strong ethnic loyalties and that lack a free press. Since money is already the problem, aid can do very little to help countries stuck in the natural resource trap.⁶² As a result, the natural resource trap is not a focus of this paper. However a variant of this analysis may be applicable on reserves with large natural resource revenues.

59 Collier, *Bottom Billion*, *supra* note 47 at 39.

60 *Ibid.* at 40.

61 *Ibid.* at 44.

62 *Ibid.* at 107.

The third trap is being landlocked with bad neighbours. In this context bad does not imply a moral failing, rather it refers to neighbours with low incomes and low economic growth. The combination of having no ports and having neighbours without the infrastructure or ability to trade leads to high import and export costs and economic stagnation. Collier suggests a number of remedies for this trap. These remedies include improving air and electronic access, encouraging remittances by emigrant workers and focusing on rural development.⁶³ Aid has an important role to play for landlocked countries by supporting infrastructure development and increasing the standard of living in those countries.⁶⁴

The final trap is bad governance. Countries with corrupt governance and bad economic policy have a very low probability of escaping from this state by themselves; Collier estimates it to be 1.6 per cent in any given year.⁶⁵ Of the four traps, aid is most helpful for enabling countries to escape the governance trap. Aid that rewards good governance *ex post*, the donation of skills and the correct timing of financial aid can all help countries escape the governance trap. As discussed further, in section VII below, this trap is pertinent for reserves.

While both Collier and Sachs support large projects, Collier is much more selective about the projects he supports. For instance, Collier argues that large aid projects will do little to help countries in the natural resource trap. Additionally, according to Collier, aid exhibits diminishing returns and at a saturation point becomes ineffective.⁶⁶ By his estimate, under traditional modalities, international aid is ineffective once it reaches 16 per cent of the GDP of the country to which it is given.

With the right strategies this saturation point can be pushed higher. For instance, the saturation point can be pushed higher for countries in the governance trap if aid donors tailor their giving to the political climate of the recipient. Regime changes provide a signal that the population supports reform. After the regime change, aid agencies should provide expertise to help identify and implement reforms. A “few years” in, massive financial aid is given.⁶⁷ Timing is important because large revenues received too soon after regime change can divert the attention of political actors from reform to capturing aid for their pet projects and interests.⁶⁸ A corollary to the effectiveness of these strategies is that more aid is not always better, especially when it is not strategically deployed.

63 *Ibid.* at 60.

64 *Ibid.* at 107.

65 *Ibid.* at 71.

66 *Ibid.* at 100.

67 *Ibid.* at 116.

68 *Ibid.* at 116.

Sachs: More Money, But How Should It Be Spent?

INAC's current strategy is to transfer funds to address shortfalls of human and physical capital on reserve to Band councils, while retaining ultimate oversight. Unfortunately, it is clear from Figure 1 that intensification of per capita spending has not been sufficient to close the HDI gap between Canadians and on reserve Indians. Additionally, Figure 3 paints an even more worrying picture as Canadian and on reserve Indians' incomes continue to diverge. Are reserve Indians destined to have a lower HDI score than other Canadians?

Looking at the HDI scores presented above in section II, Sachs' answer might be that First Nations are caught in a poverty trap and the solution is an increase in funding. The Assembly of First Nations (AFN) echoes this suggestion.⁶⁹ In 1995, a 2 per cent per year cap was placed on increases on INAC spending on core programs. Inflation and population growth on reserve are much higher than 2 per cent a year.

According to the AFN, compared to other Canadians, First Nations receive less per capita funding from public sources. While federal funding to First Nations is higher than for other Canadians, this discrepancy is reversed once provincial and municipal spending is taken into account. The AFN estimates that First Nations received just over \$7,200 per capita in grants or contributions for 2003–04, and compares this with the \$14,900 per capita received in services by Canadians living in Ottawa during 2004–05.⁷⁰ Compounding this discrepancy is the greater needs on reserve due to the remote location of many reserves, their young population and the legacy of poverty.⁷¹

Leaving aside the different time periods, the AFN figures are difficult to compare because the figure for First Nations does not reflect money spent on administration or bureaucracy, whereas the figure for Ottawa residents does. Since only 67 per cent of the money targeted to reserves is transferred, the exclusion of administrative costs could explain much of the discrepancy.⁷²

69 The funding cap is discussed at greater length in Judith Rae's paper in this issue.

70 AFN, *Facts, Myths, supra* note 13 at 5.

71 *Ibid.* at 18.

72 *Ibid.* at 18, endnote 12, explains how the AFN arrived at the per capita Ottawa expenditure: the total budgets of the Government of Canada, Province of Ontario and City of Ottawa were summed on a per capita basis. This includes money spent on administrative and bureaucratic functions. To calculate the First Nations expenditure, only the portion actually transferred to First Nations was included. This excludes money spent on administrative and bureaucratic functions. The AFN did not respond to my requests for more information on their methodology.

The disparity might be normatively justified on the basis that a higher proportion of the administrative budget is spent locally in Ottawa than on reserves. Ottawa has many civil servants who are paid salaries from administrative costs. In contrast, for First Nations, many of the salaries derived from administrative costs are for INAC bureaucrats whose salaries do not contribute to the reserve economy since they do not reside on reserve.

Sachs and the AFN may be correct that more money would help. However, Collier's caution about aid saturation (discussed above in section V, under Introduction to Aid Literature) suggests there is a limit to this strategy. It is beyond the scope of this paper to determine where this saturation point lies and the level of expenditure necessary to break the poverty trap on reserves. Instead, building on Collier's argument, this paper will concentrate on how expenditure should be structured to increase its effectiveness. This is the focus of the remainder of this paper.

Easterly: Naïve Implementation But Good Idea

So far, decentralized giving and social assistance (an analogue of coupons) have not been successful on Canadian reserves. There are no projects proposed on globalgiving.com for Canadian reserves.⁷³ Social assistance payments given by INAC to unemployed reserve members are very similar to Easterly's coupon suggestion; however, social assistance places fewer restrictions on permissible expenditures by recipients. Easterly's suggestion is that competition among aid agencies for monetary vouchers held by recipients will improve the quality of service offered by the aid agency so that it corresponds to recipients' development needs. This has not happened in the context of private sector competitors for the money of on reserve recipients of social assistance. The indirect recipients of social assistance dollars—for example, grocery stores—do not have the correct incentives to assist First Nations with development. To better understand the limits to Easterly's suggestions, consider a failed development project in Mistamit, a Cree reserve in Northern Quebec.⁷⁴

Development in Mistamit

An outsider had patented a process for turning caribou hair into a useful textile and wanted to train residents of Mistamit in the creation and marketing of the textile over a five-year period. The community would then continue to run production while paying a modest royalty to the outsider. Workers would make about \$8.50 an hour. At first the initiative seemed to go favourably; information sessions with Band members were well attended.⁷⁵

The initiative went downhill when the Band's Economic Development office, which received money from INAC for economic development, only

73 *Find a Project*, online: Global Giving <<http://www.globalgiving.com/ac/ctry00canada1.html>>.

74 Robin L. Goodfellow-Baikie & Leona M. English, "First Nations and Community Economic Development: A Case Study" (2006) 41 *Community Development Journal* 223 [Goodfellow-Baikie & English, *Community Economic Development*].

75 *Ibid.* at 223.

approved 17 per cent of the project's budget.⁷⁶ Without funding, residents' attendance dropped and the project had to be continued on a volunteer basis. Using community interviews, Goodfellow-Baikie and English investigated these failures. The investigation revealed funding constraints, poor education, a lack of leadership and a negative view of work as the causes of the failure.

The five-year horizon of the project was incompatible with the Band's Economic Development Office's remit as it could only give funding on a yearly basis. This meant that sufficient funds could not be committed at the beginning of the project to ensure completion. Additionally, the project had to compete with an English literacy program for economic development funding.⁷⁷

Band leadership did not properly support the project. This was partially because much of the leadership's time was occupied with land claims and proposed mining and hydro projects.⁷⁸ Moreover, Goodfellow-Baikie and English's interviews also suggested that the Band leadership was more sceptical of the project than other community members.

Finally, interviews revealed that people in the community were not willing to work for \$8.50 an hour. This was a rational response to a federal government program that paid community members \$15 an hour to train for other, non-existent jobs.⁷⁹ Additionally, community members viewed Industrial work as dehumanizing.⁸⁰

Limits of Easterly's Approach

The Mistamit initiative did not implement Easterly's suggested approach to aid. Consequently its failure does not indicate that Easterly's approach is unworkable. However, subsequent research that examined the reasons for the failure of the caribou hair project suggests that his approach will be of limited value in communities like Mistamit. Easterly's approach calls for individuals in developing communities to direct aid. In order for this approach to be effective, the amount of aid that one individual can allocate must have the potential to unlock development, or individuals must be able to coordinate their efforts. However, in Goodfellow-Baikie and English's follow-up interviews, community members were not able to identify changes they would make to encourage development. For instance, they wanted better education and leadership, but could not suggest how to achieve this. If a community does not have the capacity to identify approaches for development, then distributed aid will not help. The lack of suggestions for Can-

76 *Ibid.* at 227.

77 *Ibid.* at 227.

78 *Ibid.* at 226.

79 *Ibid.* at 228.

80 *Ibid.* at 227.

adian reserves on globalgiving.com and the failure of competition for social assistance dollars to promote real economic development on reserve are consistent with Goodfellow-Baikie and English's follow-up observations.

Despite these observations, there is potential in Easterly's idea that aid recipients should have input into development through market mechanisms. While the Mistamit community members may not be able to suggest opportunities for development, they should be able to give feedback on existing ones. One option would be to structure INAC programs so that First Nations can reward bureaucrats for helpful initiatives and penalize them for poor ones. Had such a system been used, the initial support among the population may have made the Mistamit Economic Development Office more receptive to the project's extended horizon. This idea is returned to below, in section VIII, where the relationship between INAC and reserves is discussed.

Collier: Selectivity

Collier is critical of the tendency of aid agencies to spread aid among many countries and initiatives.⁸¹ He would prefer an approach where aid is targeted to the situations in which it can do the most good. However, for those stuck in the landlocked trap, with little immediate potential for economic development, Collier advocates aid "to bring some minimal decency to standards of living."⁸² Aid for minimal decency in standards of living would likely be distributed on a per capita basis, which, as we will see in the next section, is how TPPs are generally allocated.

Per Capita Allocation

Current TPP amounts are tied to the number of Status Indians on the Band list of a reserve. At first glance this seems to be a fair way to allocate scarce resources. Education and health expenses generally increase with population. However, the official Band list may not match the actual population of the reserve. Furthermore, as discussed above in section II, conditions on reserves vary widely. More particularly, on some reserves there are particularly elevated school dropout rates and levels of disease. CFAs that fund specific programs do not give Band councils the fiscal ability to address these local problems.

Even TPPs for economic development are tied to the population of a reserve. While, as mentioned above in section III under Economic Development, specific development plans must be submitted to receive development funds, the total funds approved are capped for each reserve based on popu-

81 Collier, *Bottom Billion*, *supra* note 47 at 122.

82 *Ibid.* at 107.

lation.⁸³ No assessment is made of the relative merit of the project or whether there are other funds available. For instance, in 1992, \$20 million went to 73 on reserve organizations that were classified by INAC as being fully developed. In contrast, \$33 million was split between 296 less-developed reserve organizations.⁸⁴

The per capita approach to TPPs means that opportunities to escape the governance trap on reserves, when there are recent changes in Band government, are probably being forgone. In the international context, the fastest growing economies are a subset of the lower-income economies.⁸⁵ The higher level of funding enjoyed by more developed organizations suggests that opportunities are also being forgone on low-income reserves. To optimize the effectiveness of aid, INAC needs to consider conditions on reserve, like regime change and the level of development. It might also be a good idea to conduct an assessment of the merit of a project and the funds already available to support the project. A per capita approach does not provide the right information. This requirement is revisited below in section VI.

Limits on Selectivity

TPPs would be more consistent with Collier's theory if per capita funding were eliminated and reserves with the best chance of escaping the governance traps supported. Two considerations limit the implementation of this suggestion. First, as Collier would recognize, it is not possible to implement his strategy with all types of TPPs. On many reserves, TPPs are the primary source of funding for education and housing. If TPPs were withdrawn from all reserves except those with the most potential for growth, life would be unbearable in those communities where TPPs bring "some minimal decency to standards of living."⁸⁶ Second, such an approach would be incompatible with Canada's treaty obligations to First Nations.⁸⁷

83 Auditor General of Canada, *Canadian Aboriginal Economic Development Strategy* (Ottawa: Office of the Auditor General of Canada, 1993) at para 11.54 [Auditor General, *Economic Development Strategy*].

84 *Ibid.* at para 11.56. Information on the criteria used by INAC to assess whether a reserve organization is developed is no longer available because INAC no longer uses this classification system. Since it is impossible to target TPPs without analysing conditions on reserve, INAC's abandonment of the classification system suggests that it is moving away from, as opposed to toward, targeted TPPs. INAC should re-implement the classification system and this system should take into account development goals of First Nations. For more discussion of the importance of gathering input from First Nations see A Common Solution under section VIII below.

85 Mark Olson, "Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others are Poor" (1996), 10 *Journal of Economic Perspectives* 3 at 20.

86 Collier, *supra* note 47 at 107.

87 Please see section I above for a discussion of why this approach would be incompatible with treaty obligations. This analysis needs to be based on what treaty rights cover specifically, as in *God's Lake First Nation*, *infra* note 88.

A more practical approach would be to sustain education, health, social assistance and housing funding and pursue Collier's strategy only with funds earmarked for economic development. This idea has potential since CFAs and FTAs have purely legislative status. They are not treaty rights and hence the government may stop making them or reallocate them as it desires. This conclusion is reached implicitly through the application of *McDiarmid Lumber Ltd. v. God's Lake First Nation*.⁸⁸ There, the majority of the Supreme Court of Canada, per Chief Justice McLachlin, in deciding whether s. 90 of the *Indian Act* prevented the garnishment of CFA funds, had to determine whether CFA funds were a treaty obligation. Answering this question in the negative, the majority permitted the garnishment of the funds. The same result would likely hold for FTA funds whenever they are not explicitly addressed in a treaty.

Aid Dependence

The proposal system used for TPP economic development grants means that much of the economic development funding given by the government goes to starting businesses that would not be funded by the private sector. The criterion for funding from INAC for a project is the ability to fill in paperwork, not the commercial viability of the project. For instance, in the Per Capita Allocation section above, the higher funding level of developed organizations on reserve can be explained by the increased ability of developed organizations to fill in paperwork.

Since 1987, the Harvard Project on American Indian Economic Development has studied economic development on American Indian reservations. Experience has shown that business ventures funded by the government, without regard to commercial potential, generally fail. The explanation offered for this empirical observation is that Band councils have a strong incentive to manipulate the ventures to promote job creation at the expense of profitability. In the short term, high employment rates improve the Band council's popularity. However, in the long term the ventures often run out of capital and either fail or require more government funding.⁸⁹

The sawmill on Moricetown Reserve, British Columbia, is a prime example of the type of project criticized by the Harvard Project. The Band uses the WOP to pay a portion of the workers' wages.⁹⁰ The sawmill can pay

88 *McDiarmid Lumber Ltd. v. God's Lake First Nation* [2006] 2 SCR 846 [*God's Lake First Nation*]. Of course, funding for a program that is based on a treaty right still has treaty status.

89 Stephen Cornell & Joseph Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today" (1998), 22 *American Indian Culture and Research Journal* 187 [*Harvard Project*].

90 Cassidy & Seward, *Alternatives to Social Assistance*, *supra* note 38 at 31.

WOP workers less than non-WOP workers because WOP worker's wages are topped up by INAC. Since the Band's finances are tight and there are more potential workers than positions, only WOP workers are employed at the sawmill. Since WOP is limited to one year per employee, the preference for WOP workers creates a high turnover rate at the mill. Employee turnover raises the costs of operating the mill, thus creating a vicious cycle. At the same time, the requirement that revenues created by virtue of WOP work be applied against future social assistance costs impedes the ability of the sawmill to expand.

In addition to their non-sustainable nature, subsidized activities have the potential to crowd out real business opportunities. For instance, the Mistamit project was (rationally) poorly attended because people on reserve did not see why they should work for \$8.50 an hour when they could train for non-existent jobs at \$15 an hour.

First Nations Elders also suggest that social assistance has created dependency on reserve. Ahenakew and Wolfart interviewed a group of Cree grandmothers who grew up on reserves between World War I and World War II. In their view, the large social assistance payments that began in the 1970s undermined the self-reliance of individuals living on reserve. Before social assistance programs were created in the 1970s, the grandmothers remember working very hard. For instance, one of the grandmothers, Glecia Bear, said:

I used to work in a restaurant for thirty-five dollars a month, I used to get there at six o'clock in the morning, traveling there on foot; and would come home at midnight, also on foot. I worked so terribly hard, emptying pails, very big slop-pails, I have done everything.⁹¹

Describing today's young living on reserve, Glecia Bear suggests that they are not self-reliant nor are they in touch with traditional ways of living:

Today the children are so well off, hey, their lunch boxes are full to the brim, and they are still dissatisfied. They are properly dressed, and they are incredibly lazy, the children of today. For us, there was none of that, we worked very hard all along, carrying firewood into the house and hauling water, providing sufficient water in our house. Today the children are not even able to carry firewood into the house and to make a fire, they are unable to do anything for they are raised as Whites. Today the White-Man has entirely ruined the traditional lifestyle.⁹²

Another grandmother, Janet Feitz, explicitly identifies social assistance payments as the culprit:

Long ago of course there was no family-allowance as it is called, and there also were no old-age pension cheques. Everybody had to work at feeding himself; but today that is why people will not even try to do something in order to feed

91 F. Ahenakew and H.C. Wolfart, *Our Grandmothers' Lives as Told in Their Own Words* (Saskatoon: Fifth House Publishers, 1992) at 67 [*Grandmothers' Lives*].

92 *Ibid.* at 209.

themselves—for they are simply given money anyways, they are simply looked after. But, as for me, I think that what is happening is not right; at least that is how I myself see it, when I look at the life as it used to be and that of today. These people who used to travel by boat long ago, they used to be strong, even the children used to be strong, they used to carry big loads at portages, they used to work a great deal. People used to be very fit physically; and they were not sickly, for they did not eat all the various kinds of food, I suppose they only ate fish, meat and things like that; and there also was not much smoking at that time. And now today I do not know anyone who would really be strong. I watch today when they keep trying, in competition with one another, to carry loads on their backs; but, I am certain, they never carry as much as they used to carry before, when the people had been strong, but I guess it is because they were not sickly⁹³

John Bighetty, a Manitoba Cree strikes a similar chord contrasting the pre-World War II period with contemporary conditions in the North:

People worked much harder in the older days but they were much stronger and healthier. Now the people depend on store goods and food, but they used to get everything they needed from the bush. Women used to use moss instead of baby diapers from the store. The Indians used not to need doctors. They had their own doctors and got all their medicine from the bush [forest]. The women used to work harder than the men do today. Men used to go out hunting every day. Younger people today are like ishwiwak [women]. They don't know how to live in the bush. The older Indians didn't eat store food. Just straight meat. They could stand the cold much better. They could sleep outside in the winter without a fire and not get cold. Indians are getting too soft because of welfare. They're [provincial welfare offices] trying to help. But people are spoiled today. If the Indians had kept up with the old ways with the hunting and the dreams, they'd be a hundred percent today.⁹⁴

A member of the Stoney Creek reserve in British Columbia also identifies social assistance as reducing self-reliance:

When I was a kid I was never aware of welfare. We never relied on it. Well, it simply wasn't there. But we never starved. I was raised to survive on nature. The [B]and moved with the seasons. We had a fishing camp. We caught fish and duck, mouse, beaver, muskrat, and rabbit. Nearly all our foods were smoked, salted and dried for winter. We trapped furs which we could sell or use ourselves. We also sold beadwork.

My family travelled to wherever there was work. Mum worked in the canneries and in meat packing. Dad—even though he had TB—worked the bush. So I worked really hard at physical work when I was young. We never just depended on our parents. I was brought up to look ahead; to manage my life by what potlatch teaches: respect, discipline, pride and humility. When you re-

93 *Ibid.* at 99.

94 M. Bighetty & B. Senyk, eds, *Mississippi Ethniwuk* (Winnipeg: Pukatawagan Language Project, 1986).

ceive something you always give something in return. So I never remember anyone with their hand out.

Social assistance has taken away a lot from our people. It has taken away our self-reliance, our sense of community reliance. It's all lost to us now. It has destroyed us But even if we wanted to return to traditional ways it would be impossible. The trap lines are all logged out, and government hunting and fishing regulations are just too restrictive.⁹⁵

While the degradation of the environment and the relocation of reserves away from natural resources have also undermined the self-sufficiency of First Nations, social assistance is a primary culprit. Decades of social assistance have undermined the ability of First Nations to take care of themselves, both individually and as communities. The dependence created by social assistance programs makes it clear that promoting economic growth on reserves is not simply a question of spending more money. After all, the Mistamit training program was intended to improve human capital on reserve (one of Sachs' desired investment objectives), but it ended up retarding business growth. Changes must be made that improve the self-reliance of individuals and communities if economic growth is to have any hope of being realized.

A similar effect has been observed in the international aid context. Collier has recognized the potential of aid to crowd out local economies.⁹⁶ The existence of aid dependency is one of the strongest arguments against Sachs' general program of intensification. In order to avoid aid dependency, Collier recommends that aid focus on reducing the costs of exporting goods from an economy. He gives the example of building a port. While aid dependency might be a factor during construction of the port, once the port is built, the dependency associated with its construction fades and the increased ease of export remains.⁹⁷

Avoiding Aid Dependency on Reserve

While building ports is not a sensible solution on most reserves, there are other barriers to export that reserves do face. Removing these barriers and allowing the private sector to develop businesses would avoid the failed business problem identified by the Harvard Project. To this end, Fiscal Realities Economists studied four First Nations business projects and summarized the barriers faced by these projects.⁹⁸ These barriers included:

95 Cassidy & Seward, *Alternatives to Social Assistance*, *supra* note 38 at 49.

96 Collier, *Bottom Billion*, *supra* note 47 at 121.

97 *Ibid.* at 121.

98 Fiscal Realities Economists, *Expanding Commercial Activity on First Nation Lands: Lowering the Costs of Doing Business on Reserve* (Vancouver: Fiscal Realities Economists, 1999).

- (1) Physical infrastructure incapable of meeting the demands of business.
- (2) Inability of investors to find investment opportunities.
- (3) Risk to businesses caused by lack of clarity about First Nation jurisdiction on reserve.
- (4) Inability of First Nations to raise capital.

Using economic development funds to build roads, run telephone wires and create other infrastructure on promising reserves could help to address the first barrier. Maintaining a detailed database of opportunities for investment could help to address the second.

The third and fourth barriers have their roots in deeper structural problems. The operation of the *Indian Act* means that it is hard to tell whether a Band council has the power to meet its obligations. For instance, without an agreement from the federal government, a Band council may not be able to grant the appropriate zoning for a shopping centre.

Until the *Indian Act* is reformed, a solution would be for the federal government to be a third party to development agreements between Bands and private parties. The federal government could use development funds to indemnify the Band and the private party for additional expenses incurred by virtue of jurisdictional uncertainties. Additionally, the federal government could provide guidance on avoiding jurisdictional uncertainties in the first place.⁹⁹

The fourth barrier, the inability of First Nations to raise capital is created by ss. 37(1) and 89(1) of the *Indian Act*. Section 37(1) forbids the transfer of land from a Band to any one other than the Crown. This means that it cannot be collateral for a loan. Additionally, s. 89(1) specifically forbids mortgages on “the real and personal property of an Indian or a band situated on a reserve.” Any attempt to work around these requirements would be commercially limited by political opposition to the foreclosure of First Nations’ land.¹⁰⁰ This means changes to the *Indian Act* or new statutes, like the *First Nations Land Management Act*, are the only way to address the fourth barrier.¹⁰¹ Businesses can succeed on reserve.¹⁰² The objective is to increase the number that do.

99 Unfortunately even with the opportunity to provide guidance, it is unlikely that INAC would as it is currently arranged. Suggestions for reforms within INAC are suggested below in A Common Solution in section VIII.

100 One such work around would be for the Crown to enter an agreement with the Band, paralleling market terms for a mortgage, but using existing economic development funding.

101 S.C. 1999, c. 24. Jamie Baxter & Michael Trebilcock’s paper in this issue discuss land tenure in much greater depth.

102 For examples see A. Sisco & R. Nelson, *From Vision to Venture: An Account of Five Successful Aboriginal Businesses*, (Ottawa: The Conference Board of Canada, 2008).

VI REPORTING

As mentioned in section III, since INAC retains ultimate responsibility for expenditures, it must report to Parliament on the use of the funds. To do this, INAC requires reports from Bands. The Auditor General has conducted an investigation of the reporting from Bands to INAC and found it thoroughly dysfunctional. The biggest problem is the volume of data reported.

For Bands operating under the CFA, 202 reports are required per year. The load for Bands operating under the FTA is lighter, at 168 reports per year.¹⁰³ Filling in these reports takes considerable time and interferes with the ability of leaders to plan.¹⁰⁴ The administrative burden of reporting is especially pronounced for the 61 per cent of reserves that have fewer than 500 residents.¹⁰⁵ Some Bands claimed that it was physically impossible to meet the reporting requirements of CMHC, given the resources available, as there was not enough time to gather all the data each year.¹⁰⁶ Up to five separate audited financial statements are required from each Band council.¹⁰⁷

Efforts to reduce this reporting burden are ongoing, but are often ineffectual. For instance, in 1989 the Canadian Aboriginal Economic Development Strategy was supposed to consolidate economic development programs and reporting requirements. Since then the reverse has occurred. Before the Strategy was articulated, there were three business support programs; today there are 10 business support programs.¹⁰⁸

In one year, INAC receives about 60,000 reports from the 600 Band councils.¹⁰⁹ Not surprisingly, given the volume of data reported to INAC, it does not have time to verify reports.¹¹⁰ For instance, as mentioned above in section III, under Comprehensive Funding Arrangements and Financial Transfer Arrangements, before receiving FTA funding a Band must complete a self-assessment and a development plan. As of 1999, INAC had not verified a single self-assessment or development plan and simply rubber-stamped the FTA applications.¹¹¹ In the same vein, because INAC staff often do not have time to read reports, they cannot give meaningful feedback to Band councils. This is especially unfortunate because many councils feel that meaningful feedback from INAC would be valuable.¹¹²

103 Auditor General of Canada, *First Nations Reporting to Federal Organizations* (Ottawa: Office of the Auditor General of Canada, 2002) at 10 [Reporting].

104 *Ibid.* at 13.

105 *Reporting, ibid.* at 3.

106 *Ibid.* at 11.

107 *Ibid.* at 21.

108 Auditor General, *Institutional Arrangements*, *supra* note 29 at 15. For a list of these programs see *infra* note 138.

109 Auditor General, *Management of Programs*, *supra* note 20 at 163.

110 Auditor General, *Reporting*, *supra* note 103 at 22.

111 Auditor General, *INAC Follow-up*, *supra* note 28 at 10.

112 Auditor General, *Reporting*, *supra* note 103 at 13.

The volume of reporting is a significant burden on Band councils and overwhelms INAC. In its current form, it consumes leadership resources and yields little helpful data. These shortcomings are especially significant because a good reporting system is a necessary requirement for identifying Bands with the most potential for economic development. Additionally, good reporting could identify specific barriers faced by Bands that economic development funding could address.

VII GOVERNANCE REFORMS

Good institutions have an important role to play in development.¹¹³ The World Bank has conducted econometric studies that demonstrate that better institutions and governance cause economic growth.¹¹⁴ Even Sachs, one of the most fervent defendants of aid, recognizes the importance of public institutional capital and, thus, governance.¹¹⁵ In the context of aid, the World Bank suggests that aid is more effective in countries with strong policies and institutions.¹¹⁶ Collier's system of targeted aid is based on this observation. To provide effective aid to countries caught in the governance trap, he advocates targeting moments in time when it is easiest to improve governance. On reserves these moments might include a change in the members of the Band council.

In order to improve the effectiveness of TPPs, it is important to promote good governance on reserve. This section suggests three ways to do this: encouraging discussion, improving reporting, and improving third-party management. The section concludes with a concrete example of how good governance can help mitigate the problems of fixed funding.

Improving Governance with Traditional Government

One of the biggest problems facing reserve governance is that the structure imposed on Bands by s. 74(1) of the *Indian Act* makes it difficult for the leadership to reflect the interests of the rest of the Band.¹¹⁷ Unlike traditional

113 See for instance Douglas North, "The New Institutional Economics and Third World Development," in J. Harris *et al.*, eds., *The New Institutional Economics and Third World Development* (London: Routledge, 1995).

114 D. Kaufman, "Governance Redux: The Empirical Challenge" in World Economic Forum, ed., *The Global Competitiveness Report 2004-2005* (Washington, DC: World Bank, 2004).

115 Sachs, *End of Poverty*, *supra* note 45 at 244.

116 World Bank, *Assessing Aid: What Works, What Doesn't and Why* (Oxford: Oxford University Press, 1998).

117 Cynthia Chataway, "Aboriginal Development: The Process is Critical to Success" in Daniel J.K. Beavon, Jerry Patrick White & Paul S. Maxim, eds., *Aboriginal Policy Research: Setting the Agenda for Change* (Toronto: Thompson Educational Pub, 2004) [*Process*].

First Nations governments, which typically emphasized discussion and consensus decision-making, the *Indian Act* establishes a first-past-the-post election system.¹¹⁸ Highly fragmented voting means that members of the largest family on the reserve often fill the council and chief positions.¹¹⁹ More colourfully, one commentator says that the easiest way to predict the outcome of an election is to check the Band phonebook.¹²⁰

Drawing on her experience on reserves, Chataway suggests that this election system leads to “entrenched negative patterns of interaction.”¹²¹ Since broad popular support is not required to win an election, the council and chief have little incentive to act in accordance with the wishes of the majority. For instance, in the Mistamit example discussed above in section V under Development in Mistamit, community members expressed frustration with their leaders’ preoccupation with maximizing funding received by the Band. Instead of only pursuing funding maximization, community members felt that leaders should also respect traditional values and promote activities that could build capacity, like the (failed) economic development project.¹²² When the Band council and chief cease to act in the best interest of the reserve community, members stop respecting the legitimacy of the regime. The result is that the Band council and chief cannot lead the reserve because few members will follow them.

Chataway sees the problem as a lack of social capital on reserve and, drawing on her experience with a Mohawk Band, demonstrates that there are solutions.¹²³ When Chataway arrived on the Mohawk reserve only 10 to 15 per cent of eligible voters participated in elections. Traditional leaders had no voice in the decisions of the elected representatives. The rest of the community frequently criticized the decisions of the elected leaders as being un-Mohawk.

By encouraging discussion about the type of values that the elected leaders should follow, Chataway began to see an improvement in the working relations of the elected leaders and the rest of the community. Once these discussions had taken place, the Band was better positioned to address particular problems. As one participant remarked: “We’ve never done it [value

118 For more discussion of the importance of cultural match between current and historical see *Harvard Project*, *supra* note 89.

119 Chataway, *Process*, *supra* note 117 at 68.

120 Christina Dowling, “The Applied Theory of First Nations Economic Development” (2005), 4 *The Journal of Aboriginal Economic Development* 123. This problem is further exacerbated by the two-year-term limit on reserve, see J. Graham & J. Wilson, “Aboriginal Governance in the Decade Ahead: Towards a New Agenda for Change”, A Framework Paper for the TANAGA Series (Ottawa: Institute on Governance, 2004) at 7.

121 Chataway, *Process*, *supra* note 117 at 79.

122 Goodfellow-Baikie & English, *Community Economic Development*, *supra* note 74 at 229.

123 Chataway, *Process*, *supra* note 117 at 77.

discussions] before. We always jump right into the nitty gritty, without clearing the air first. It may be lengthy, but we have to address these issues.”¹²⁴

As a result of the community discussions, a formal process was initiated requiring elected leaders to consult the rest of the community and traditional leaders. In 2000, the Band decided to move toward a more traditional form of government, which is now possible under the *Indian Act*.¹²⁵ While the complexities of managing modern reserves may prevent a total restoration of traditional governments, the new process requires a greater plurality of votes to win an election.

The Mohawk community as originally studied by Chataway is not the only First Nations community caught in a governance trap. One former First Nations leader, Wally McKay, explains:

It would be fair to state that all First Nation communities have experienced serious forms of divisions amongst themselves as a result of elections. Not only do we have divided loyalties between clans but these election systems have divided families, brother against brother, sister against sister, parents against their own children, and elders against elders. The youth are confused, frustrated and exasperated as they witness these incredible often nasty events in the selection of leaders.¹²⁶

For instance, Chataway’s approach would make a large difference in a community like Mistamit. By bringing the goals of leadership and the population into alignment, the Band would be able to deploy labour (controlled by the Band members) and capital (controlled by the leaders) in conjunction to make projects work. INAC would be well advised to hire experts to go onto reserves with low election turnouts to lead dialogues similar to that led by Chataway. This is similar to Collier’s recommendation that agencies donate expertise to help countries caught in a governance trap. Under this scheme, the improvements achieved in governance would pave the way for increased economic development spending.

Improving Governance with Reporting

INAC could also improve governance on reserve by changing the type of information reported so that Band councils can use the reported information in their decision-making process. For instance, reporting on the revenue generated by economic development programs, as opposed to the number of

124 *Ibid.* at 79.

125 The federal government is currently considering legislation to modify “term lengths, election appeals, the appointment of electoral officers and ensuring that off-reserve band members can vote” of traditional reserve governments: Bill Curry, “What the documents reveal” *The Globe and Mail* (March 2, 2009) on line: *The Globe and Mail* <<http://www.theglobeandmail.com/>>.

126 Wally McKay, *Instruments of Governance: Restoring First Nations Governments* (Toronto: CESO Aboriginal Services, 1999).

projects supported, could help Band councils administer economic development programs. If the reported information can play a dual role, then time spent reporting is more easily justified.

Improving Governance with Third-Party Management

Third-party managers are experts in financial decision-making. Since expertise is provided to Band councils that have financial problems, third-party management presents an ideal opportunity to help improve the capacity of Band councils.

Unfortunately this potential is not currently being realized because of the selection process for third-party managers and the monitoring of those managers. INAC appoints the manager without formal input from the Band.¹²⁷ A better approach would guarantee the council input into the selection, as the Band is more likely to work closely with someone it feels it has helped to choose. INAC could develop a list of individuals and the council could pick the manager from the list. Alternatively, INAC could stipulate the qualifications that a manager must have and permit the council to choose among qualified individuals.¹²⁸

INAC requires managers to spend time on reserve. However, INAC does not monitor this.¹²⁹ Additionally INAC relies on the *ad hoc* approaches of managers to impart financial skills to the Band. Evidence from Bands suggests that many managers spend little time on reserve and do little to build the financial capacity of the Band.¹³⁰ Requiring Band input into the selection of third-party managers, setting requirements for training and monitoring third-party managers could transform the system of third-party management from an attempt to satisfy INAC's accountability requirements to Parliament into an important tool for developing the financial capabilities of Bands.

One Advantage of Improved Governance

As discussed above in section V under Per Capita Allocation, different Bands might have different per capita needs for health care and education. One approach that INAC has pursued to remedy this difficulty is to move Bands from CFAs to FTAs. FTAs would allow Bands to accommodate above-average education costs by dipping into their health-care funding.

127 Auditor General, *Other Observations*, *supra* note 32 at 9.

128 These suggestions may be perceived as paternalistic. The object of these examples is to show that external safeguards and internal control can co-exist to a greater extent than they currently do, or that the current arrangements are not Pareto efficient with respect to external safeguards and internal control.

129 Auditor General, *Other Observations*, *supra* note 32 at 10.

130 *Ibid.* at 10.

While such a solution is not feasible for Bands that also have large health costs, some Bands would benefit.

It was the stated goal of INAC to move all Band councils from CFAs to FTAs by March 1998. However, in 1999, CFAs still constituted more than 80 per cent of funding administered by Band councils.¹³¹ The failure of Band councils to adopt FTAs stems from four reasons:¹³²

- (1) Band councils believe they will receive less funding under the FTA.
- (2) Band councils feel that they have not been adequately consulted on the structure of the FTA.
- (3) Some Band councils are unwilling or unable to manage the increased risk associated with the FTA.
- (4) There is a lack of training to allow Band councils to deal with the FTA.

Improved governance can help address the third and fourth barriers. Rethinking the relationship between INAC and Band councils could address the first and second. This relationship is discussed in the next section.

VIII FEDERAL—RESERVE RELATIONSHIP

So far, four shortcomings with INAC's delivery of the TPPs have been identified: spending that promotes aid dependence, onerous reporting, poor third-party management interaction and lack of support for FTAs. Two more, inefficient housing delivery and a poor economic development funding approval process are identified in this section. After discussing these problems, this section suggests that the reason for these problems is that INAC bureaucrats do not have sufficient incentives to take into account the requirements of Bands. Ways of better aligning these incentives are investigated.

Canadian Mortgage and Housing Corporation Funding

The CMHC is responsible for funding on reserve residential construction. Before the CMHC can approve funding, it requires a ministerial guarantee from INAC. INAC has to wait until it has received the audited financial statement of a Band before it can provide the ministerial guarantee. Since the financial statement is due 120 days after the fiscal year, housing construction on reserves typically starts in August. This entails winter construction, which increases costs, especially on remote reserves.¹³³

131 Auditor General, *INAC Follow-up*, *supra* note 28 at 8. While there is not a more recent audit figure available for the percentage of funding that CFAs constitute, CFAs are still in use and listed in INAC's recent literature.

132 *Ibid.* at 7.

133 Auditor General, *Reporting*, *supra* note 103 at 13.

Economic Development Funding Approval

Businesses on reserve generally have a lower rate of failure than off reserve businesses. INAC sees this as an indicator that on reserve economic development is well managed.¹³⁴ However, Band councils suggest that the lower rate of failure on reserve actually shows a flaw in INAC's economic development policies.¹³⁵ Business opportunities and risks are co-extensive. The higher rate of success of business on a reserve actually suggests that higher-risk on reserve businesses are not being encouraged. This means that opportunities for economic development are being passed up on reserve that would be pursued off reserve.

There is evidence that dependence on government approval for development funding, as opposed to other sources of funding (like mortgages), harms the economic performance of Bands. Band councils report that they have been unable to pursue time-limited business opportunities because government approval could not be granted quickly enough.¹³⁶ Part of the reason for this delay is the criteria for granting economic development funding are not clear within INAC. This leads to the criteria being applied inconsistently, which delays applications.¹³⁷

Finally, the structure of economic funding development grants makes it difficult for Band councils to run projects. The first problem is the limited time horizon for investment. Economic development funds are often disbursed on a year-to-year basis making it difficult to sustain multi-year projects. The failed project in Mistamit, outlined above in section V, provides a good example of this problem. The second problem is the fragmentation of development funding. There are currently more than 10 different economic development-funding programs, each one with a different purpose.¹³⁸ When Band councils create multi-dimensional projects, many different sources of INAC funding have to be combined, which is a significant bureaucratic burden for Band councils.

134 Auditor General, *Institutional Arrangements*, *supra* note 29 at 8.

135 *Ibid.* at 8.

136 *Ibid.* at 8.

137 *Ibid.* at 8.

138 *Ibid.* at 15. INAC provides the Community Economic Development Program, The Economic Development Opportunity Fund, the Resource Partnerships Program, the Resource Access Negotiations Program, the Resources Acquisition Initiative, the Major Business Projects Program, the Regional Partnerships Fund and the Marshall Response Initiative. INAC and Industry Canada jointly administer the First Nations Component of the Infrastructure Canada Program. Finally, Industry Canada runs Aboriginal Business Canada.

A Common Solution

The problems identified in TPPs could be avoided if INAC bureaucrats took better account of the interests of First Nations. Currently, there are two barriers to this: the incentives of bureaucrats and the lack of input sought.

Bureaucratic Limitations

Collier identifies the existing structure of aid organizations as a major barrier to his selective aid approach. Concentrating aid on countries with new governments means that there will be fewer aid projects, and each individual one will be worth more. This will increase the exposure of the aid agency to risk. Senior bureaucrats at aid organizations are dependent on the success of aid projects for their reputation and employment.¹³⁹ Additionally, the bureaucrats tend to be risk averse: modest failure may not threaten their continued tenure, but massive failure will be a blight on their career. As a result, aid agencies will be reluctant to pursue Collier's approach.

The same reasoning applies to INAC. INAC's reports to Parliament include figures such as the number of projects supported and total money spent, as opposed to performance data.¹⁴⁰ As long as funds make it to reserves everyone gets to keep their job. This leads to an unresponsive environment. For instance, in a 1999 follow-up to a 1996 INAC audit, the audit team noted: "The Department's experience with the development of funding arrangements since 1986 shows that progress has been slow."¹⁴¹ In some cases it seems that INAC initiatives are moving backwards. While flexibility has been identified as an important goal for TPPs, the replacement of FTAs with Canada/First Nations Funding Arrangements (CFNFA) may actually reduce flexibility. As the 1999 follow-up audit team also noted: "Officials in one regional office believed that the proposed CFNFA was more restrictive than the FTA and that First Nations were not provided adequate opportunity for input to its design; we reported on this issue in 1996 regarding the FTA."¹⁴²

As Collier suggests, a more dynamic approach is necessary where bureaucrats are rewarded for actual successes on reserves. Within INAC, several enterprising individuals should be charged with economic development. Their remuneration, promotion and job retention would be tied to the performance of the entire portfolio of economic development projects that they facilitate. This performance could be assessed with reference to meas-

139 Collier, *Bottom Billion*, *supra* note 47 at 117.

140 Auditor General, *Reporting*, *supra* note 103 at 20.

141 Auditor General, *INAC Follow-up*, *supra* note 28 at 9.

142 *Ibid.* at 9. No audit has been done of whether CFNFAs are actually more restrictive.

ured criteria, or by First Nations on reserve, as suggested above in section V under Limits of Easterly's Approach. To comply with labour agreements these might have to be management positions. A similar approach might make sense for bureaucrats charged with delivering essential services like infrastructure, health and education funding. The measured criteria will enhance the oversight of INAC by federal politicians.

The challenge will be to come up with appropriate measured criteria for measuring good performance in each area. If a good performance continues to be avoiding major failures, few improvements will be realized. Instead, the relative weighting of success in determining rewards needs to be increased. To address the concern that high-risk projects are not pursued on reserve (discussed above in this section under Economic Development Funding Approval), the performance of an individual's economic development portfolio should be compared to comparable private investment portfolios.

By rewarding actual economic success, this bureaucratic reform will reduce the tendency of projects to create aid dependency and poor economic approval decision-making. Additionally, by seeking the input of First Nations, other problems (like those discussed above in this section) can be better addressed. These measures are intended as a supplement to the existing accountability achieved through the democratic process and the oversight of federal politicians. As suggested above in section V, there is also considerable room for improvement in political accountability.

Input as a Solution

Had INAC sought input from First Nations on reporting, third-party management, housing or FTAs, program performance would have been improved. Even if bureaucrats do not, First Nations know that onerous reporting interferes with leadership, that third-party managers may shirk, that winter is a bad time to build houses, and that without sufficient support they will not switch to FTAs. Armed with the correct incentives, bureaucrats will seek out this knowledge and implement better programs.

This approach is similar to Easterly's market suggestions discussed above in section V under Easterly: Naïve But Good Idea. It allows the information possessed by locals to be used by aid agencies. However, by putting the entire bureaucratic structure behind locals, it has the power to solve large problems.

An alternative to this paper's suggestions would be to dismantle INAC and transfer the saved administrative costs to reserves. INAC is so thoroughly dysfunctional that the increased transfers might benefit First Nations. Collier's work suggests this alternative would be a mistake. Aid to the poorest countries has improved economic growth, whereas natural resource

revenues have hampered economic growth.¹⁴³ The fundamental structural difference between these two revenue sources is the role of aid agencies in disbursing aid. As a result, despite all the shortcomings of aid agencies, Collier attributes the difference in economic growth between aid and natural resource revenues to aid agencies. The money spent on aid agency administration has had real benefits.

Social assistance's promotion of aid dependency instead of economic growth (discussed above in section V under Aid Dependence), the lack of projects listed on globalgiving.com for reserves and the content of Good-fellow-Baikie and English's follow-up interviews in Mistamit (discussed above in section V under Limits of Easterly's Approach) all suggest that Collier's analysis holds on at least some reserves. Other reserves would do better managing their own affairs. The key is for INAC to develop the capability to gauge reserve conditions accurately so it can distinguish between these sets of reserves.

IX FUTURE RESEARCH

Foreign Direct Investment Literature

One goal of TPPs, as discussed above in section V under Avoiding Aid Dependency On Reserve, should be to help reserves reach a point where they are more attractive to private investment. The literature on Foreign Direct Investment (FDI) might provide helpful suggestions for TPPs structures to become better suited to attracting private investment. Additionally, the FDI literature might also be a useful source for ideas for potential frameworks to govern private investment on reserves.

The proximity of the HDI score for Canadian reserves to those of countries that typically receive FDI, as opposed to countries that typically receive aid, further suggests that the FDI literature may be a promising source of suggestions for structuring TPPs. Figure 4 below presents country HDI scores for Ethiopia, Sudan, and Sri Lanka, and the average HDI score on reserve in Canada for 2000. The FDI literature concentrates on countries with higher HDI scores, like Sri Lanka,¹⁴⁴ whereas the foreign aid literature concentrates on African countries, which typically have lower HDI scores. The correlation between FDI and higher HDI scores is unsurprising since FDI responds to existing opportunities, which require a certain level of development. As shown in Figure 4, the reserve HDI score is closer to the

143 Collier, *Bottom Billion*, *supra* note 47 at 102.

144 For an example see A. Perry, "Effective Legal Systems and Foreign Direct Investment" (2000), 49 *The International and Comparative Law Quarterly* 779.

higher HDI of Sri Lanka, than the lower scores typical of aid recipients, underlining the potential applicability of the FDI literature to reserves.

Africa		Canada	Asia
Ethiopia	Sudan	Reserve	Sri Lanka
0.323	0.489	0.720	0.772

Figure 4: HDI scores for 2000¹⁴⁵

X CONCLUSIONS

Judith Rae's paper in this issue highlights the risk that program delivery devolution within the existing INAC-reserve relationship might become a quagmire. Similarly, economic development within the existing INAC-reserve relationship might also become a quagmire, undermining the end goal of self-government. It is possible that economic success within the current framework could reduce desire among First Nations and the general population for change. If the current system works, the question will be why should we fix it? Since First Nation groups, like the AFN, believe that self-government is the solution for the multitude of problems that they face, this concern requires serious consideration.¹⁴⁶ Additionally, the risk that economic development might undermine self-government is especially worrying in light of the Harvard Project's conclusion that the alignment of incentives created by self-government is the key to successful economic development on reserves.¹⁴⁷

At the same time, economic development may also increase the desire for self-government. Among First Nations, success at running one's own affairs may make INAC management seem less desirable, increasing the already considerable support on reserves for self-government. Additionally, in order to reduce the negative impact that jurisdictional uncertainties have on economic development, as real business opportunities become available the desire for jurisdiction and jurisdictional clarity will increase. Successful economic development on reserve may also increase the support among the general Canadian population for self-government. As businesses on reserves succeed, investors will bring more pressure to bear on the government to reduce barriers, including jurisdictional problems. This might increase sup-

145 United Nations Development Program, "Human development index trends", *Human Development Reports 2007-2008*, online: UN Development Program <<http://hdr.undp.org/en/statistics/>>. The year 2000 is the most recent date for which comparable data is available.

146 AFN, *Facts, Myths*, *supra* note 13.

147 *Harvard Project*, *supra* note 89 at 98. The argument is that the alignment creates a sense of ownership on reserves for development projects.

port for self-government, since properly negotiated self-government may present one way of addressing these jurisdictional problems. Economic success for First Nations will also highlight how costly the current arrangement is for Canadian taxpayers and reduce worries about the costs of self-government and claim negotiations. This support and realization by taxpayers could translate into increased political pressure on INAC, via the Minister, to expedite self-government and claim negotiations.

It is not clear whether a desire to maintain the *status quo* or a continued desire for self-government will be the result of successful economic development. The result may vary from reserve to reserve. However, government adoption of the suggestions in this paper will change the nature of the relationship between INAC and First Nations by making INAC more accountable and responsive to First Nations, thus making the *status quo* less objectionable.

Additionally, structuring TPPs to help First Nations improve governance will advance the ability of First Nations to realize their desires. Improved governance will ameliorate the ability of First Nations to negotiate self-government if they still desire it. While these desires might change in the process (or they might not), as long as First Nations ultimately achieve what they desire, this is not a compelling reason to avoid improving conditions on reserves.

This paper proposes that per capita funding for essential services be at least maintained on reserves, while economic development funding be targeted to make the biggest possible improvement. To avoid aid dependency, this funding should concentrate on removing barriers to private investment on reserves. Reporting and third-party management should be reformed to help improve Band council governance. Additionally, expertise should be provided specifically to help improve Band council governance. Finally, bureaucrats should be given the appropriate incentives to align their interests with the interests of First Nations.