



Addressing the Barriers to Economic Development On Reserve

The National Aboriginal Economic Development Board
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THE NATIONAL ABORIGINAL ECONOMIC DEVELOPMENT BOARD

Established in 1990, the National Aboriginal Economic Development Board (NAEDB) is an Order-in-Council board mandated to provide policy and program advice to the federal government on Aboriginal economic development. Comprised of First Nations, Inuit and Métis community and business leaders from across Canada, the Board plays an important role in helping the federal government develop and implement policies and programs that respond to the unique needs and circumstances of Aboriginal in Canada. The Board also provides a vital link between policy makers, federal departments and Aboriginal and non-Aboriginal business and community leaders.

The National Aboriginal Economic Development Board can be found online at:

<http://www.naedb-cndea.com>

The Board's members are:

Chair: Chief Clarence Louie, British Columbia

Chief, Osoyoos Indian Band

Vice-Chair: Dawn Madahbee, Ontario

General Manager, Waubetek Business Development Corporation

Member-At-Large: Pita Aatami, Quebec

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Chief, Community of Membertou

James Ross, Northwest Territories

President, AuraRoss Resources Limited

Chief Sharon Stinson Henry, Ontario

Chief, Chippewas of Rama First Nation



“First Nations communities, by virtue of the Indian Act, are impeded from developing their economies and attracting investment ... as a result of the Act, market forces do not operate properly on Indian lands, thus substantially raising the costs of doing business on reserve.”

– Sharing Canada’s Prosperity – A Hand Up, Not A Handout,
Standing Senate Committee on Aboriginal Peoples, March 2007



ADDRESSING THE BARRIERS TO ECONOMIC DEVELOPMENT ON RESERVE

I. INTRODUCTION

Historically, First Nations have been effectively legislated out of the mainstream economy through the imposition of laws, regulations and “Indian policies” that were developed and imposed upon First Nations without their consultation or consent. While the Royal Proclamation of 1763 recognized Aboriginal rights and title and set a foundation for nation to nation relationships between the Crown and First Nations, the first consolidated *Indian Act* in 1876 – developed without First Nation consent or participation – set the framework that today, despite numerous legislative changes, has been preserved fundamentally intact.

Currently, there are over 600 First Nations with more than 2800 reserves comprising over three million hectares of reserve land across Canada, the majority of which are administered under the *Indian Act* by the Department of Aboriginal Affairs and Northern Development Canada (AANDC). The *Indian Act* regulates almost every aspect of community life for nearly 565,000 registered Indians. It defines who is an Indian and, among other matters, regulates band membership and government, taxation, lands and resources, estates and moneys management. Moreover, while legislation and regulations in off-reserve contexts typically evolve over time, the largely static *Indian Act* leaves on-reserve communities with outdated and paternalistic rules and procedures which have not kept pace with the modern economy. In the Board’s opinion, the administrative interpretation of the *Indian Act* generally leans towards the protection of the Crown.

While legislation and regulations in off-reserve contexts typically evolve over time, the largely static Indian Act leaves on reserve communities are often left with outdated and paternalistic rules and procedures which have not kept pace with the modern economy.

In 2009, the Government released the *Federal Framework for Aboriginal Economic Development*, which sets the stage for a fundamental transformation in the way that the federal government works to help Aboriginal in Canada become full participants in the economy. The Framework’s objectives are focused on opportunities and removing obstacles, as well as recognizing the requirement to involve Aboriginal people in decisions affecting the development of lands and resources in Canada. Under the Framework, the federal government made a number of commitments to help foster economic development on reserve, including:

- Removing legislative and regulatory barriers that deter business development;
- Increasing access to debt and equity capital;
- Modernizing lands management regimes to enhance the value of assets; and
- Strengthening capacity for community economic development.

Delivering on these commitments requires the federal government to rethink its existing policies and practices and, in many cases, develop and implement new tools for communities to move ahead with their economic aspirations.





The National Aboriginal Economic Development Board (NAEDB) notes that a number of concrete steps have been taken in this direction, including the expansion of the *First Nations Land Management Act* regime and the modernization of the *Indian Oil and Gas Act*. However, the Board believes that more needs to be done to ensure that First Nations can assume their rightful place in the Canadian economy.

In a May 2012 letter to Chief Clarence Louie, Chair of the NAEDB, the Minister of Aboriginal Affairs and Northern Development Canada directed the Board to work on “the development and implementation of practical options to address sections of the *Indian Act* that, in the Board’s view, create the most significant barriers to economic development on reserve.” This Board’s advice in this area is consistent with the Board’s own 2012-15 Strategic Plan, in which it identifies *Addressing Barriers to Aboriginal Economic Development* as a long-term strategic priority.

The purpose of the NAEDB’s advice is to inform the federal government’s priority-setting and decision-making activities in the area of Aboriginal economic development. It is therefore important to note that the views and recommendations contained in this report are not intended to push First Nations people or their communities in any particular direction, but rather ensure that they have the necessary supports and tools to become full participants in the economy, if desired.

Finally, it must be noted that NAEDB’s advice to the federal government does not absolve the Crown from its legal duty to conduct proper consultations with Aboriginal groups when government decisions, policies, legislation and/or regulatory changes affect the lives, lands, resources and rights of First Nations, Inuit or Métis people.

Methodology

In 2011, the NAEDB began work to conduct case studies that provide an in-depth and detailed understanding of how barriers to economic development on reserve affected economic opportunities in the Community of Membertou in Nova Scotia, Chippewas of Rama First Nation in Ontario, and the Osoyoos Indian Band in British Columbia. Each case study includes a review of a specific project, identifies the barriers to economic development encountered by the community during the development of the project, and – where possible – provides an assessment of the specific transaction costs incurred by communities to overcome the barriers. A short overview of the projects in each case study can be found on page 5, while detailed summaries of the case studies can be found under Annexes C to E.

The case studies demonstrate that the direct financial impact of the unique legal and regulatory environment found on reserve can significantly influence the economic fortunes of a First Nation. It should be noted that these case studies reflect the experiences of the three communities alone and do not represent the experience of all First Nations.

In addition to the case studies, the Board met with First Nations organizations and federal officials to discuss the key impediments to economic development on reserve and to help inform their advice on practical options and recommendations on where the federal government should focus its efforts to help First Nations unlock the full economic potential of their communities. A list of the organizations that met with the Board during the development of our recommendations can be found in Annex B. The NAEDB wishes to thank the communities, organizations and officials that offered their time and insights to help inform our work.

ECONOMIC DEVELOPMENT PROJECTS PROFILED IN THE NAEDB CASE STUDIES



COMMUNITY OF MEMBERTOU

Membertou Trade and Convention Centre (MTCC): Located on the Membertou reserve, the MTCC is 100% owned by the Membertou Development Corporation (MDC). The MTCC is a \$7.2 million, 47,000 square foot facility, incorporating conference and meeting space and full catering and banquet services.

Membertou Hampton Inn Hotel: The Hotel is located on fee simple lands owned by the First Nation in a limited partnership with DP Murphy Group Inc. The hotel is a \$12.7 million, 80,000 square foot, 134 guest room facility.

Pedway: The Pedway is a \$1.2 million, 100% MDC owned, 100 meter fixed link connecting the MTCC – on reserve land – to the Membertou Hampton Inn Hotel – on fee simple lands

CHIPPEWAS OF RAMA FIRST NATION

Casino Rama: The Casino Rama Complex is located on the Rama reserve with over 2,300 slot machines, approximately 120 gaming tables, a 5,000 seat entertainment centre, a conference centre with several ballrooms, ten restaurants and a 300 room hotel with spa and indoor pool.

St. Eugene Golf Resort & Casino of the Rockies: Located on St. Mary's Indian Reserve near Cranbrook, British Columbia, St. Eugene was a business acquisition in partnership between the Chippewas of Rama First Nation, Samson Cree Nation (Alberta) and the Ktunaxa Nation (British Columbia). The St. Eugene's project includes a 19,000 square feet full service casino with 236 slots and off-track betting, a 125 room hotel, two restaurants and lounges, over 4,000 square feet of conference meeting space including an outdoor pavilion, and a golf course.

OSOYOOS INDIAN BAND

The Senkulmen Business Park: The Senkulmen Business Park is 100% owned by the Osoyoos Indian Band and located on reserve. The project was designed for light commercial and institutional use and built with green technology with the objective of being one of the most environmentally sustainable business park developments in Canada. Senkulmen is planned for a full build-out of 112 acres, to be developed in three phases for a total construction value of \$19 million. Current and future tenants include the Vincor winery and the Okanagan Correctional Centre.

* Summaries of the case studies can be found in Annexes C-E.





II. KEY FINDINGS

In our examination of the barriers to economic development on reserve, the Board has noted that – while a number of sections in the *Indian Act* slow economic development on reserve – additional impediments to economic development are found in other areas under federal jurisdiction. For example, the application of legislation such as the *Canadian Environmental Assessment Act* and the *Species at Risk Act*, and AANDC policies and administrative procedures associated with Additions to Reserve, have delayed economic projects in many First Nations across Canada. The Board's recommendations in this report therefore extend beyond the *Indian Act* and consider other legislation and practices under federal control.

Based on the knowledge and experience of our members, the advice of external organizations, and the findings of our case studies, the NAEDB has identified the most significant barriers to economic development on reserve as being:

Outdated and Inappropriate Tools for Economic Development

- The *Indian Act*, under which the vast majority of reserves operate, was never designed to accommodate the economic aspirations of First Nations. As such, many of the current tools available to First Nations for managing business projects on reserve are inappropriate for economic development – for example, legislation that applies to lands under federal jurisdiction – including reserves – such as the *Canadian Environmental Assessment Act* and *Species at Risks Act*, creates unique rules that, as implemented, pose obstacles to business development and investment.

Insufficient Resources

- There is a need for adequate investment in *Indian Act* reforms, specifically in terms of consultation on reforms, as well as adequate investment in alternative – but optional – legislative regimes and processes. Without access to workable legislation and processes, First Nations will continue to be delayed or blocked from developing their economies, lands and resources. The status quo is not an option: limited access to a viable solution is no solution at all.

Bureaucracy and Risk Aversion of the Crown

- The federal rules and procedures that influence economic development on reserve require too much involvement from the federal government and focus on limiting the Crown's liability, as opposed to emphasizing First Nations' economic progress. More often than not, bureaucratic oversight creates undue delays and costs to First Nations, negatively affecting business partnerships and slowing or blocking the growth of both reserve and regional economies.

Absence of Service Standards

- AANDC internal business practices are inefficient, and are not accountable to the First Nation clients they serve. A lack of client focus in the federal government's operations and decision-making results in frustration and strained relationships between federal departments and First Nation communities.



III. RECOMMENDATIONS

To address the barriers to economic development on reserve, the NAEDB believes that the federal government must develop an integrated approach that focuses on the following four priorities. Each of these priorities will be examined in the following pages.

1. Strengthen the Crown-First Nations relationship

There are a number of critical areas that require urgent work to move the Crown-First Nations relationship forward, including: focused and adequately resourced education programming to meet Canada's labour – technological and professional – needs, accelerating the settlement of land claims, advancing the role of First Nation governments, and increasing economic development on reserve. Improvements in any of these areas require a solid foundation of trust and accountability on both sides.

The Board believes that to resolve the many conflicts inherent in the Crown-First Nation relationship – such as their role in addressing the socio-economic needs of Aboriginal people conflicting with their understanding of the real situations of Aboriginal people – the federal government needs to enter into mature and modern arrangements with First Nations governments. These relationships should be characterized by stable and long-term funding arrangements, with decision-making and control exercised at the community level.

2. Simplify Federal Procedures and Processes

While the Crown has a fiduciary responsibility to "protect" First Nation people, the Crown also has a responsibility to protect itself from legal action, a potential conflict of interest that may not serve the best interests of First Nations.

A risk-based approach to economic development on reserve would allow First Nations to take on projects at their own risk, streamline policy requirements, remove ministerial oversight and decentralize AANDC approval processes, allowing First Nations economic development to progress at the same pace as their off-reserve counterparts.

There is also a need to ensure that legislated consultation with Aboriginal people regarding resource development occurs well in advance of formal project permitting. This would signify a meaningful consultation process.

3. Invest in Existing and Optional Solutions

The exercise of the federal government's responsibilities must keep pace with economic development on reserve. The government must properly implement and invest in solutions to overcome the restrictions to economic development inherent in the *Indian Act*, and support communities that wish to transition to regimes that increase First Nation control and self-determination, such as the *First Nations Land Management Act* and *First Nations Fiscal and Statistical Management Act*.

4. Increase Human Capacity On-Reserve

First Nations must have the right skill sets, tools and instruments which will allow them to plan, form partnerships and operate their businesses. Again, focused and adequately resourced education programming should be a priority for Aboriginal people to participation in all aspects of Canada's economy.



"[The] Department of Aboriginal Affairs machine is slow, often unresponsive, and not helpful. Bottom line, it is more worried about liability than true progress. It is our contention that it is possible to have speed of business under the present system. All it takes is a little vision and creativity."

- Chief Gilbert Whiteduck, Kitigan Zibi Anishinabeg First Nation,
Standing Committee on Aboriginal Affairs and Northern Development, Feb. 7, 2012.



1. Strengthen the Crown-First Nations Relationship

In June 2011, Canada and the Assembly of First Nations entered into the Canada–First Nations Joint Action Plan which commits both parties to “advancing a constructive relationship based on the core principles of mutual understanding, respect, ensuring mutually acceptable outcomes and accountability.”¹ The Board notes that “creating conditions to accelerate economic development opportunities and maximize benefits for all Canadians” is a priority under the Joint Action Plan.

The NAEDB believes that to achieve the vision set out under the Joint Action Plan, the federal role in assisting First Nations to develop their economies needs to change to resolve the conflicts inherent in the current Crown-First Nations relationship. For example: the federal government’s role of program administrator conflicts with their role of overseeing legislation relating to First Nations; their role of protecting the Crown’s interests conflicts with their role of protecting Aboriginal rights and title; their role of administering ‘Indian moneys’ conflicts with their role of managing the public purse; their role of providing sufficient funds to Aboriginal people conflicts with priorities related to deficit reduction; their role of addressing the socio-economic needs of Aboriginal people conflicts with their understanding of the real, on-the-ground situations of Aboriginal people.

AANDC, which is in essence a creation of the *Indian Act*, is only one of the federal departments responsible for meeting the Government of Canada's obligations and commitments to First Nations. AANDC's responsibilities are largely determined by numerous statutes, negotiated agreements and relevant legal decisions; complexities arise as other federal departments are implicated when development occurs on reserve. Federal officials’ lack of exposure to the lives and circumstances of First Nations leads to limited understanding of the needs and objectives of clients they serve, often resulting in frustration and strained relationships – ultimately hindering progress to effect positive change in the lives of First Nations.

From our case studies:

The Osoyoos Indian Band (OIB) experienced challenges with obtaining orderly and timely commitments for AANDC financing. While the participation of AANDC and Western Economic Development was crucial to the success for the Senkulmen project, the inconsistent and seasonal nature of funding was often challenging. In one application situation for a pre-development contribution, a shortage of personnel accompanied by the overworking of existing staff resulted in incomplete internal assessments with monies ultimately flowing back to Ottawa. These funds had been anticipated by the OIB to maintain project momentum and stay on schedule. The band was very cash strapped at the time, but ultimately had to proceed with their own resources.

a. Modernize Economic Development Arrangements

As resource development is increasingly present in Aboriginal – and particularly First Nations – territories, there is an increasing interdependence between First Nations and Canada’s economic interests. The NAEDB therefore believes that the federal government needs to move toward a modern

¹ <http://www.aadnc-aandc.gc.ca/eng/1314718067733/1314718114793>



relationship with First Nations based on stable, long-term and predictable fiscal arrangements. These relationships should be monitored and accounted for through annual financial audits, with periodic program and compliance audits. This would be in place of the reams of individual reports currently provided to the bureaucracy.

The Board also believes that First Nations should be equipped to manage their own cash flow without requiring the current level of federal involvement in their moneys management, unless requested by the First Nation. Furthermore, self-generated revenues should not subject First Nations to budget cuts. Federally funded programs and services are a treaty obligation. In addition, financial statements, audited or unaudited, for own-source revenues should not be required to be provided to the government as part of a consolidated federal funding financial statement. These revenues are reportable through audited and unaudited financial statements to the shareholders/members of the First Nation only and not the Canadian public. Nor should a First Nation's financial statements for own-source revenues be included or required by other departments of the federal government such as Health Canada. The latter should receive only the audited financial statements or reports related to the funded program area, for example, health. To be clear, First Nations are accountable through audited financial statements and reports to the federal government/Canadian taxpayers for funded program moneys only.

Recommendation 1.1

It is recommended that AANDC provide fiscal transfer payments directly to First Nations through multi-year agreements, accounted for by annual financial audits, with periodic program and compliance audits, where self-generated revenues would not be required to be reported to AANDC nor subject First Nations to budget cuts.

Recommendation 1.2

It is recommended that AANDC, upon the request of a First Nation, develop a trust model to manage cash flow and allow bands to spend project funds according to business requirements rather than government end-of-fiscal year deadlines.

b. Review Crown-First Nation Fiscal Arrangements

The NAEDB notes that a National Table on Fiscal Relations was previously established to focus on developing a new fiscal relationship between First Nations, the provinces and the Government of Canada. The Board believes that, as part of a broader effort to clarify and modernize the relationship between the Crown and First Nations across Canada, such an arrangement be put back into place. The mandate of such an organization should include the exploration of revenue sharing models with First Nations as an alternative to government transfers.



Recommendation 1.3

It is recommended that the Government of Canada re-establish a national Aboriginal table on fiscal relations to discuss further improvements and identify initiatives that could support First Nations and other Aboriginal groups fiscal management and arrangements.

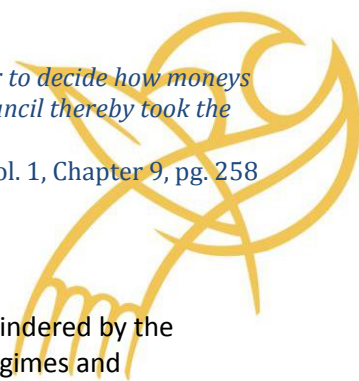
Recommendation 1.4

It is recommended that AANDC take on a liaising role and provide support to First Nations, if requested, in their dealings with federal, provincial and municipal governments or regulatory bodies on First Nation economic development initiatives.

It is further recommended that the Government institute a consistent practice of consulting and collaborating with First Nations prior to the development of programs, policies, legislation and regulations which directly or indirectly affect First Nations communities and their Treaty and resource rights.

“The 1880 {Indian Act} act also introduced a new provision denying band governments the power to decide how moneys from the surrender and sale of their lands or other resources would be spent. The Governor in Council thereby took the power to decide how to manage Indian moneys and retains it to this day”.

– RCAP Report, Vol. 1, Chapter 9, pg. 258



2. Simplify Federal Procedures and Processes

Evidence in the NAEDB’s case studies shows that on reserve economic development is hindered by the inefficiencies in federal legislative and administrative regimes. The primary legislative regimes and policies which have directly or indirectly affected economic development on reserve include:

- Lands designations, surrenders and leasing (s.37-41 of the *Indian Act*);
- Permitting (ss. 28(2), ss. 53 (1), or ss. 58(4) of the *Indian Act*);
- Restriction on mortgage, seizure, etc (s.89-90 of the *Indian Act*);
- Indian moneys management (s.61-69 of the *Indian Act*);
- AANDC’s Additions to Reserve Policy; and,
- Federal environmental approval processes.

a. Apply a Risk-Based Approach to Federal Decision Making

Many of the federal policies and procedures associated with economic development on reserve ensure that federal approvals or decisions minimize or eliminate potential risk and liability to the Crown. However, the Board believes that developing a mechanism that allows bands under the *Indian Act* to pursue projects at their own risk, for example following a Band Council Resolution, would encourage business-based decision making and eliminate many of the delays associated with the government fulfilling its fiduciary duty.

From our case studies:

In Membertou, much time was wasted deliberating over the Pedway, and ultimately led to the federal government’s decision that an *Indian Act* section 28(2) permit was required to provide a legal right of way as it crossed reserve lands. Construction of the Pedway was initially estimated at four months, but delays associated with the need for a permit under s.28 (2) caused the Membertou Trade and Convention Centre VIP room being unavailable for use for 10 months, resulting in approximately \$250,000 in lost rental revenues.

Such an approach already exists: for example, under the *First Nations Land Management Act*, section 34 releases and indemnifies the Crown from any actions taken following the First Nation’s land code coming into force. There also exist examples of AANDC accepting a release of liability for court ordered Indian moneys transfers to the Samson Cree Nation and the Ermineskin Cree Nation pursuant to *Indian Act* section 64(1)(k). In both court ordered transfers, the First Nations released the Crown from any future liability for the capital moneys transferred to the First Nations. However, no formal strategy exists for First Nations operating under the *Indian Act* to provide a release to the Crown when they want to pursue activities at their own risk.





Recommendation 2.1

It is recommended that the federal government allow *Indian Act* bands wishing to make business-based decisions to take on increased risk management responsibilities for land development.

This could be done by developing a mechanism such as a release and indemnification to the federal government that would allow bands under the *Indian Act* to pursue projects at their own risk, subject to community approval.

b. Streamline Federal Policies and Procedures that Affect On-Reserve Development

In AANDC's report *Creating the Conditions for economic Success on Reserve Lands: A Report on the Experiences of 25 First Nation Communities*, participating First Nations identified slow processes as having a significant and detrimental effect on economic development. Of particular note is the sharp difference between the 'speed of business' and the 'speed of government'. Participants in the study described AANDC's bureaucratic processes as limiting factors, and noted that they watched development opportunities pass them by as they were waiting for funding or project approval from AANDC.²

The NAEDB's case studies reveal that significant time and money are wasted by First Nations trying to navigate policies and procedures to develop reserve lands. Many of the barriers identified in the case studies were related to the cost and complexity of designation votes, the lack of flexibility of designation terms when circumstances change, and the time and complexity of securing a registered lease. Where the *Indian Act* acted as a road block to development, the communities had to expend a significant amount of resources to create "work-arounds" to ensure their projects would go forward.

The Board recognizes that efforts have been made to streamline the lands designation process by amending the *Indian Act* to reduce the voting threshold and authorize the Minister of AANDC, rather than the Governor in Council, to grant approvals. However, in consultation with First Nations, AANDC should examine additional streamlining by, for example, further decentralizing its approval processes, effectively causing the federal government to become more efficient and responsive to First Nations' needs.

The Board also notes that, in many instances, AANDC uses a delegation document to enable employees of the Department to exercise the Minister's authority under the *Indian Act* on his or her behalf. This mechanism could be refined or amended to create greater efficiencies in AANDC's decision-making processes under the *Indian Act*.

Ultimately, the federal government needs to focus on how it can best support First Nations in developing their own lands and resources, as opposed to being a gatekeeper that stands in the way of opportunity.

² *Creating the Conditions for economic Success on Reserve Lands*, pg. 13 (formally known as *Factors for Success and Barriers to Economic Development on Reserve Lands*)





Recommendation 2.2

It is recommended that AANDC streamline its policies and procedures to create simplified and cost effective processes in the following areas: land designations, leasing and permitting on reserve, environmental assessments, and accessing Indian moneys. A potential approach might be further use of a delegation document allowing federal officials to exercise the Minister's authority.

Recommendation 2.3

It is recommended that AANDC streamline transfer payment processes and reporting requirements by:

- Eliminating duplicate and unnecessary reports which carry with them significant costs to First Nations;
- Requiring only core project information to be submitted with supporting documentation; and,
- Eliminating requirements for First Nations to report their self-generated revenues.

Recommendation 2.4

It is recommended that AANDC establish internal controls such as service standards and performance targets to ensure timely, efficient decision-making process and accountability to First Nations. The Department's service standards and performance targets should be publicly reported on an annual basis.

Recommendations 2.5

It is further recommended that AANDC engage in a broad review of its policies and processes with the objective of: removing unnecessary criteria, removing Governor in Council and/or Ministerial oversight where possible, and decentralizing the AANDC approval processes through the delegation of authorities. Furthermore, this review process should include broadly the delegation of approvals directly to the First Nations.

c. Simplify Land Designation Requirements

The land designation process under the *Indian Act* is a major obstacle to economic development on reserve. It delays the speed at which a project can move ahead while causing First Nations to incur thousands of dollars to satisfy the requirements.

The due diligence associated with ministerial approval of

"Imagine Canada having to hold a referendum every 40 years on the Parliament buildings' location. Now imagine all the local businesses who have built their future on the location of these buildings and leaving their future up to a referendum. It is disruptive to the community and economies."





land designations results in significant delays. When economic development projects are time sensitive, these delays can lead to missed opportunities, and/or significantly raise costs to investors. Delays are further exacerbated by the voting system associated with community approval of a designation.

Communities that have well established economic development ventures located on reserve can be subject to a land designation referendum which puts business projects and revenue sources at risk. In the case of Casino Rama, through a community ratification vote, lands on which the casino could be built and operated were designated for a period of 40 years. For Casino Rama to continue operation, the community is required to hold another referendum – an onerous and expensive undertaking. Imagine Canada having to hold a referendum every 40 years on the Parliament buildings’ location. Now imagine all the local businesses who have built their future on the location of these buildings and leaving their future up to a referendum. It is disruptive to the community and economies.

From our case studies:

In Rama, the land in which Casino Rama is located has a fixed designation term. When that term expires, under the terms of the *Indian Act*, Rama will have to conduct another referendum to approve the future designation of those lands, putting a major revenue stream for the First Nation and surround communities at risk.

Recommendation 2.6

It is recommended that AANDC provide First Nations with the means to exercise greater discretion to make adjustments to the terms of designations without requiring them to seek subsequent designation votes.

d. Improve Access to Financing

The *Indian Act* restricts the use of reserve land as a source of collateral for First Nation communities and individuals. For example, section 89 of the *Indian Act* explicitly restricts the mortgage of property on reserve, with the exception of designated lands.³ The inability to obtain collateral against property located on reserve is a major barrier for communities that are seeking to obtain capital for economic development projects. In addition, many First Nations communities may not have existing revenue streams, such as lease income or other self-generated income, which could act as security for a loan.

The Board recognizes that the federal government has taken important steps to improve access to capital on reserve, notably through the creation of the *First Nations Fiscal and Statistical Management Act* (FNFSMA). The FNFSMA is optional legislation (discussed later in this report) which allows First Nations to develop their own property taxation and financial management regimes outside of the *Indian Act*, while also ensuring that they are able to obtain long-term, low-cost debt financing from the capital markets. This provides communities with access to similar tools and services enjoyed by other local governments in Canada.

³ Section 89 of the *Indian Act* reads as follows: "Subject to this Act, the real and personal property of an Indian or a band situated on reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band (1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution."





However, the Board believes that the creation or extension of federal loan guarantee instruments to assist in the financing of First Nations' economic development projects is necessary. In the Board's October 2012 report *Increasing Aboriginal Participation in Major Projects*, we recommended that the Government of Canada develop a loan guarantee instrument or other financing measures to facilitate equity participation for Aboriginal communities in natural resource projects. The Board reiterates the importance of such an instrument to provide First Nations to benefit from major economic projects.

Existing examples of federal loan guarantees include the Ministerial Loan Guarantees for on-reserve housing to secure loans for the purpose of construction, acquisition, or renovation of on-reserve housing projects. AANDC at one time also had a similar loan guarantee program for economic development through the Indian Economic Development Guarantee Order⁴, which was used as a means for a lending institution to receive a loan guarantee from the Minister on a loan to an applicant (including First Nations individuals and communities) whose activities contribute or may contribute to the "economic development of Indians".

From our case studies:

In the past Membertou was unable to secure commercial loans for terms longer than five years, costing the community more on short-term loan interest for infrastructure projects which by their nature are long-term. The Membertou Trade and Convention Centre and Pedway projects went forward relying on a combination of government loans and grants instead of conventional financing. As a result of the equity restrictions of the *Indian Act*, Membertou built the Hotel on fee simple lands.

Recommendation 2.7

It is recommended that the Government of Canada, in collaboration with Aboriginal organizations, provincial and territorial governments, and industry stakeholders, develop a loan guarantee instrument or other financing measures to facilitate equity participation for Aboriginal communities in natural resources projects.

⁴ SOR/72-247, *Canada Gazette* Part II, Vol. 106, No. 14, July 26, 1972, revocation P.C. 1977-3608 1977-12-22





e. Increase First Nations' Access to Indian Moneys

Under the *Indian Act*, “Indian moneys” are defined as “all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands”. Section 62 of the *Indian Act* defines these moneys as:

- **Capital moneys** – derived from the sale of surrendered lands or the sale of the capital assets of a First Nation. These moneys include royalties, bonus payments and other proceeds from the sale of timber, oil, gas, gravel or any other non-renewable resource.
- **Revenue moneys** – defined as all Indian moneys other than capital moneys. They are primarily derived from a variety of sources which include, but are not limited to, the interest earned on Band capital and revenue moneys, fine moneys, proceeds from the sale of renewable resources (i.e., crops), leasing activities (i.e., cottages, agricultural purposes, etc.) and rights-of-way.

Sections 61-69 of the *Indian Act* provide for the management of Indian moneys. Under these sections, all Indian moneys are held in the Consolidated Revenue Fund at a fixed interest rate set by the Governor in Council, and can only be expended for the use and benefit of the band as determined by the Governor in Council. The quarterly fixed interest rates on Indian moneys for the first three quarters of fiscal year 2012-2013⁵ are:

Quarter 1 (April 1 to June 30, 2012) – **0.5929%**

Quarter 2 (July 1 to September 30, 2012) – **0.5648%**

Quarter 3 (October 1 to December 31, 2012) – **0.5654%**

Currently, AANDC administers approximately \$813 million of capital and revenue Indian moneys⁶.

Moneys management under the *Indian Act* is an area in which the Crown’s fiduciary obligation to ensure that First Nations assets are protected can lead to sub-optimal economic outcomes. There can be delays in the disbursement of moneys as the Minister takes steps to verify disbursement is indeed “for the benefit of the band”. Many First Nations have noted that processes to access their own funds to respond to economic opportunities are “overly bureaucratic and risk averse.” For instance, where the Minister has exclusive jurisdiction to approve an expenditure request under s. 64(1) (k) of the *Indian Act*, the average processing time for approval is approximately 131.5 business days⁷. If a community is trying to mobilize resources for a time sensitive economic opportunity, such delays can be costly.

⁵ From April 1, 1980 to the present, interest has been calculated on quarterly average month-end balances on deposit and compounded semi-annually. The interest rate has been based on the quarterly average of those market yields of the Government of Canada bond issues as published each Wednesday by the Bank of Canada as part of its weekly financial statistics, which have terms to maturity of 10 years or over. Manual for the Administration of Band Moneys, Appendix B, AANDC, 2009.

⁶ Month end balance as of December 31, 2012.

⁷ Average of the Indian Moneys, Estates and Treaty Annuities Directorate 2011-2012 Service Level Standards for 64(1)(d) & (k) expenditure requests.





From our case studies:

Rama was prohibited from using its Indian moneys to invest in the purchase of business (St. Eugene) as it was located on another reserve (in spite of the fact that such a restriction is not evidenced in the Act itself). Had Rama not had own source revenue to draw from, this restriction could have potentially cost the First Nation and its partners considerable gross revenues annually and at worst the partnership not to proceed.

Recommendation 2.8

It is recommended that AANDC streamline requirements to provide greater control to First Nations over the revenues generated from on reserve land and resource management, or at the very least reduce restrictions for First Nations communities to have timely access to their Indian moneys. In addition, First Nations should be able to invest their funds in financial instruments that would better optimize their interest earnings.

f. Improve Additions to Reserve to Promote Economic Development

An Addition to Reserve (ATR) is a parcel of land that is added to the existing land base of a First Nation’s reserve. While First Nations may select lands for an ATR for a range of reasons, including cultural practices and land exchanges with the Crown, the ATR process also allows First Nations to strategically select lands that can accommodate future development and enhance economic self-reliance. From a First Nation perspective, there are many benefits to bringing lands into reserve status, including the application of community laws and by-laws, and exempting community members and community businesses from property and income tax.

At the present time, outside of Treaty Land Entitlements (TLEs) in the prairie provinces, the area within which a First Nation can select lands for an ATR must be “generally contiguous” to the community’s existing land base. This approach creates a significant barrier for landless First Nations and for First Nations that are located in areas where economic opportunities are not present. The Board believes that, to increase economic opportunities for disadvantaged First Nations, the selection area for ATRs should be expanded to include lands within their treaty area or traditional territory. To balance the interests of other Aboriginal communities located in an expanded selection area, the federal government must also consider and address Aboriginal or Treaty rights in this process.

“You need to simplify all AANDC processes that have anything to do with land, including the ATR process. Streamline them; make them more geared to move at a quicker pace. Make them responsive to First Nation’s needs. There cannot be a cookie-cutter approach.”

– Participant in AANDC Study *Creating the Conditions for economic success on Reserve Lands*, 2013

Delays in the existing ATR process are also a significant impediment to First Nations moving ahead on economic opportunities. The process in place in the prairies under TLEs provides a model for streamlining the current approach to ATRs. For example, under TLEs, ATRs can be completed by ministerial order rather than requiring Order in Council approval. Similarly, pre-reserve designations of

lands under TLEs help accelerate the ATR process by allowing First Nation members to vote on third-party interests in a proposed addition.



From our case studies:

Membertou would have converted the fee simple lands of the Membertou Hampton Inn Hotel to reserve lands through the Additions to Reserve process; however, the Additions to Reserve process would have taken at least seven years. In Membertou's most recent experience it took 14 years. Had the Hotel lands been added to the reserve, the First Nation's laws and by-laws would apply, community members would be able to work tax free, and property tax in the future would return to the community. Currently, Membertou is paying approximately \$600,000 annually in property taxes for the Hotel, money which Membertou could have spent within the community.

Recommendation 2.9

It is recommended that AANDC amend the Additions to Reserve policy to provide First Nations with the ability to select lands within their Treaty area, traditional territory or broader fee simple areas. This approach must consider and address the Aboriginal and Treaty rights of other Aboriginal communities located in an expanded selection area or other areas acquired on a willing seller-willing buyer basis.

Recommendation 2.10

It is recommended that AANDC streamline the Additions to Reserve process by adopting best practices that are in place for Additions to Reserve under Treaty Land Entitlements. Critical improvements should include granting the Minister of AANDC final approval over ATRs and allowing for pre-reserve designation of lands.

The NAEDB further recommends that AANDC continue to work closely with the Assembly of First Nations to ensure that changes to these processes reflect the needs and realities of First Nations.

g. Improve Environmental Approval Processes On Reserve

The federal government is responsible for the regulation of environmental protection on First Nations reserves that are managed under the *Indian Act*. In addition, given that reserve lands are under the jurisdiction of the federal government, environmental legislation such as the *Species at Risk Act* and the *Canadian Environmental Assessment Act* (CEAA) are applied to First Nations.

Each First Nation in Canada has a limited amount of reserve lands; any parcel restricted from development due to the application of environmental regulations impacts the social and economic development of the reserve, and reduces or removes viable economic opportunities for the First Nation. First Nations need the right conditions for economic development, which includes an environmental





process which is not cost prohibitive, is clearly defined, proceeds in a timely manner, and does not duplicate other processes.

The NAEDB believes that economic development on reserve must be done in an environmentally sensitive and sustainable manner. However, the Board also believes that environmental regimes must be common sense in their design and application, and should not create complex approval processes that deter economic development on reserve. In its case studies, the Board identified a number of challenges associated with the current environmental management regime applied to reserve lands, including:

- First Nations are unable to designate lands under the *Indian Act* for economic purposes without first undertaking an environmental assessment. Uncertainty surrounding the time required for environmental approvals, the costs associated with obtaining an approval, and the resulting decision outcome significantly deters potential investors.
- Reserve lands that do not have an economic purpose are required to undergo the same level of scrutiny and assessment under federal environmental regimes as those for which business projects are planned. This ‘one-size-fits-all’ approach to environmental management increases costs and delays to First Nations.
- Federal organizations involved in environmental management on reserve have differing agendas and responsibilities. While AANDC is responsible for approving land use and development on reserve, the *Species at Risk Act (SARA)* requires that AANDC defer to the Canada Wildlife Service on all environmental matters. This prioritizes CWS’s requirements over the interests of the First Nation.

The NAEDB also notes that environmental approvals for oil and gas activities on reserve are undertaken by Indian Oil and Gas Canada (IOGC), a federal agency. Our discussion with officials from IOGC revealed that their organization has been delegated authority for environmental approvals, and that they are able to execute these responsibilities in a significantly shorter timeframe than federal departments holding the same responsibilities.

Recommendation 2.11

It is recommended that Aboriginal Affairs and Northern Development Canada and Environment Canada improve the environmental regulatory regime on reserve by:

- Identifying opportunities for First Nations governments to provide environmental approvals on their lands
- Adopting the streamlined and timely approach to environmental reviews and approvals taken by Indian Oil and Gas Canada on reserve
- Ensure that only one federal organization conduct environmental reviews and provide approvals on reserve lands

The *Species at Risk Act (SARA)* has in many situations created an unlevel playing field for First Nations communities that are working to take advantage of economic opportunities on their lands. Because SARA applies on reserve, but not on adjacent lands that fall under provincial jurisdiction, First Nations that wish to undertake development projects are forced to undergo a number of assessments and approvals that are not required off reserve. These extra steps lead to substantial delays, and





consume the time and resources of the community. Evidence from our case studies also demonstrate that the processes under SARA also decrease confidence among potential developers, putting First Nations communities at a disadvantage with respect to attracting private investment.

SARA unilaterally imposes a requirement to protect critical habitat from development. Under this regime, First Nations must then bear the burden of conservation on an already limited land base. First Nations either require financial compensation or should be provided with an alternative usable land base. In fact, section 64 of SARA provides authority for the provision of compensation:

“The Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of:

a) section 58, 60, 61 or

b) an emergency order in respect of habitat identified in the emergency order that is necessary for the survival or recovery of a wildlife species.”

Unfortunately, details surrounding compensation are not set out in SARA and are to be provided in regulations established by the Governor in Council, which do not yet exist.

From our case studies:

In the Osoyoos case study, 220 acres was originally proposed for the development of the Senkulmen Business Park, of which 67 acres was required to be set aside for conservation to meet the requirements of SARA. The case study shows that Osoyoos’s financial loss as a result of SARA totals approximately \$76.28 million from the combined value of land lost and its potential tax revenue.

Recommendation 2.12

It is recommended that Aboriginal Affairs and Northern Development Canada and Environment Canada eliminate duplication and reduce delays in processing environmental approvals by:

- Removing the need for additional headquarter reviews of regional recommendations, or having reviews run concurrently
- Establishing clear timelines/service standards for the environmental approvals process
- Grandfathering and accepting existing environmental approvals for projects already underway when environmental legislation or regulations change
- Removing the need for additional environmental screening for lands which have already been environmentally screened when development occurs in phases





Recommendation 2.13

It is recommended that Canada consult and include First Nations in the immediate development of compensation regulations under the *Species at Risk Act*.

It is further recommended that Canada compensate First Nations for the value of any land alienated from economic purpose to gain environmental approval for a project. The application of compensation should be grandfathered in from the inception of the *Species at Risk Act*.

Compensation could potentially include an exchange of other Crown lands for the land set aside, offering equivalent economic value and not simply equivalent acreage. An accelerated Additions-to-Reserve process could be used as a mechanism to acquire additional land.

Recommendation 2.14

It is recommended that the federal government improve accountability to First Nations for the environmental approvals process by establishing a timely mediation mechanism to resolve disputes between the Canadian Wildlife Service and a First Nation when determining how to best meet environmental requirements under the *Species at Risk Act*.



“There is not a single First Nation that I've talked to that has said, we made a mistake and we want to go back to the Indian Act. There is not a single one.”

– Chief Austin Bear, Chair, First Nations Lands Management Resource Centre,
Standing Committee on Aboriginal Affairs and Northern Development, March 1, 2012

3. Maintain or Increase Investments in Existing and Optional Solutions

The federal government has developed a number of initiatives that provide First Nations with an alternative to the *Indian Act*. New, optional laws – notably the *First Nations Land Management Act* (FNLMA) and *First Nations Fiscal and Statistical Management Act* (FSMA) – were introduced to create First Nation-led institutions and provide First Nation governments with new powers. These efforts have helped improve the investment climate on reserve by increasing transparency in governance practices and providing First Nations with direct control over the decisions that affect their communities.

These options must be reviewed to ensure effective implementation, adequate resourcing and accessibility to all interested First Nations. Just as no two First Nations are the same, there is no one-size fits-all solution to eliminate barriers to economic development on reserve. For this reason, First Nations experiencing different levels of lands and economic development and capacity require a variety of options to choose from.

a. Increase Access to the *First Nations Lands Management Act*

The *First Nations Land Management Act* (FNLMA) came into force in 1999. The FNLMA allows First Nations to opt out of 34 land-related sections of the *Indian Act* and establish their own lands and resources management regimes, thereby providing for more control at the local level.

In 2009, a KPMG study found that First Nations participating in the FNLMA are making decisions more quickly and are displaying stronger economic outcomes when compared to First Nations that continue to have their land managed by the federal government under the *Indian Act*. The study, which found that the FNLMA provides First Nations with additional tools for community-based decision making and achieving greater legitimacy and accountability, concluded that FNLMA First Nations reported a 40 per cent increase in new business overall by band members, attracting approximately \$53 million in internal investment and close to \$100 million in external investment.⁸

The FNLMA regime has evolved during the twelve-year period from January 2000 to March 2012⁹:

- 14 signatory First Nations have increased to 76;
- 3 operational communities have increased to 37;
- the waiting list has expanded from 0 to 83¹⁰; and,
- the number of participating and interested First Nations in the Framework Agreement now represents 1 out of every 5 First Nations in Canada.

The FNLMA has proven itself to be a successful alternative to the *Indian Act* and the NAEDB notes the recent steps taken by the federal government to increase the number of participating First Nations. However, there are still 65 First Nations waiting to participate in the FNLMA¹¹ leaving them, and other communities, to continue to navigate under the barriers of the *Indian Act* until such time as there is adequate funding.

⁸ <http://www.aadnc-aandc.gc.ca/eng/1327092399232/1327092452551>

⁹ <http://www.fafnlm.com/documents/annualreports/11%2012%20AR.pdf>, Pg.5

¹⁰ Note: On April 13, 2012, 18 additional First Nations signed on to the Framework Agreement on First Nation Land Management.

¹¹ <http://www.fafnlm.com/documents/PR%20FN%20Control%20March%2026,%202012.pdf>





Like any other new initiative, there are growing pains. The KPMG report noted a number of issues with FNLMA’s program design and delivery, in particular delays in concluding Contribution Funding Agreements between AANDC and the Resource Centre, the entry process for interested First Nations and addressing Individual Agreement issues (e.g., legacy land issues, surveys, environmental, environmental management agreement and operational funding).¹²

Recommendation 3.1

It is recommended that AANDC provide unrestricted and fully funded access to the *First Nation Land Management Act* (FNLMA) development process for all First Nations that elect to pursue their own land management under the regime, as well as ongoing operational funding.

It is further recommended that federal approvals and processes under the FNLMA be streamlined, properly resourced and simplified to ensure success for participating First Nations.

b. Increase Access to the *First Nations Fiscal and Statistical Management Act*

The *First Nations Fiscal and Statistical Management Act* (FSMA) came into force on April 1, 2006, and affirms First Nations powers to raise local revenues through property taxation and to access more favourable interest rates through pooled investment and borrowing. To access these powers, a First Nation must request, through Order in Council, to be scheduled under the Act and develop the required laws and management systems. There are three First Nations-led institutions under the Act that support its implementation: the First Nations Tax Commission, the First Nations Financial Management Board (FNFMB), and the First Nations Finance Authority (FNFA).

“Never in my lifetime did I think there would come a time that Tzeachten would have access to affordable financing to enable us to complete multiple capital projects all at one time and on our terms and to be able to utilize those funds for transactions such as land acquisitions.”

– Chief Glenda Campbell, Tzeachten First Nation

The FNFA, in particular was developed to address the impediments to long-term, low cost financing enjoyed by other local and senior governments across North America. There are currently 95 First Nations scheduled to the FSMA, with nine approved borrowing members.¹³ The Community of Membertou, an approved borrowing member which received the inaugural FNFA loan, is now saving \$140,000 per month by refinancing its bank loan with FNFA, savings which are being re-invested into the community’s infrastructure.¹⁴ Tzeachten First Nation became the second First Nation in Canada, working under the FSMA, to access loan financing at rates below bank prime. With Tzeachten’s loan rate of 2.5%, they can now service a \$3 million FNFA loan, tripling the community’s loan serviceability compared to other lenders.¹⁵

¹² KPMG, *First Nation Land Management Summative Evaluation, Final Report*, November 2007, pg.33

¹³ <http://laws-lois.justice.gc.ca/eng/acts/F-11.67/FullText.html>,

¹⁴ Ernie Daniels presentation on FNFA to NAEDB October 17, 2012.

¹⁵ <http://www.fnfa.ca/en/pdf/media/3.pdf>

While the benefits of such a system are well known, through the Board's discussions with the FNFA and FNFMB, certain impediments or limitations have been identified and could benefit from adjustments to make access more timely and inclusive.



Recommendation 3.2

It is recommended that AANDC make the following adjustments to the *First Nations Fiscal and Statistical Management Act*:

- Remove the scheduling requirement in the FSMA to allow interested First Nations to participate in the FNFA in a more timely manner;
- Expand the FNFA to allow other Aboriginal entities to participate, such as tribal councils, corporations, and other Aboriginal governments;
- Increase First Nations' borrowing capacity by allowing for First Nations' Goods and Services Tax rebates to be deemed an eligible revenue stream;
- Provide additional support to increase the FNFA's credit enhancement fund to adequately accommodate the loan demands of future borrowing members; and,
- Establish a process under which band by-laws under the FSMA are approved by the FNFMB rather than Minister of AANDC.



“Without the capacity and means to develop and use their lands and resources sustainably for their economic benefit, the opportunities for First Nations to improve their quality of life and approach the standard of health and well-being enjoyed by other communities in Canada are severely restricted.”

– Report of the Auditor General of Canada to the House of Commons.
Chapter 6, Fall 2009.

4. Increase Human Capacity On Reserve

In the NAEDB’s 2011 report *Recommendations for the Renovation of Aboriginal Economic Development Programs*, the Board noted that a “secure land base is an important asset and source of equity for First Nations seeking private sector investment, resource development and economic expansion. The sustainable use of these assets is critical for building partnerships with other governments and the private sector, and for maintaining strong relationships with neighbouring communities.”

The Board’s views on this topic have not changed. We know that the reserve land base is the foundation upon which First Nations’ economic success is built. The NAEDB therefore continues to endorse its recommendations from the 2011 report, particularly the need for the federal government to set and enforce timelines and service standards to expedite land management processes, and ensure that economic development proposals are reviewed by officials with sufficient expertise to identify environmental considerations.

a. Develop Professional First Nations Managers

Even with streamlined federal processes, First Nations communities still need the right people in place – such as land managers – to maximize the economic value of their land. Indeed, in the 2013 AANDC report *Creating the Conditions for economic success on Reserve Lands: A Report on the Experiences of 25 First Nation Communities*, a key finding was that economically successful First Nations have not just the right tools at their disposal to leverage economic opportunities, but access to qualified individuals within their communities to take advantage of these tools.

First Nations often depend on their local labour force to support the administration of community programs and services and development activities. Having access to well educated and competent workers is the driving force of a community’s success. Coupled with the right tools and guidance to facilitate economic development on reserve, First Nations will be able to strategically plan development, solicit the right partners and investors and take on more complex and lucrative projects.

Investing in First Nation post secondary education is not only beneficial to the individual, but also to their communities and the Canadian economy as a whole. Despite First Nations being one of the youngest and fastest growing demographic groups in Canada, AANDC’s Post Secondary Student Support Program budget has been capped at 2% since 1996. In 2008, 3,213 eligible students were denied funding, including a backlog of 10,589 students who were unable to get funding to go to school.¹⁶ According to AANDC’s main estimates, AANDC’s expenditure in post-secondary education went from \$280M in 2004-05 to \$329M in 2012-13, an approximate increase of 1.9% per year. In comparison, between 2004-05 and 2011-12, funding for postsecondary education at the Ministry of Training Colleges and University of Ontario went from \$3.5B to \$5.4B, an increase of more than 7.75% per year.¹⁷

¹⁶ Canadian Alliance of Student Associations, Taking Action on Canada’s Commitments: Adequate Funding for the Post-Secondary Student Support Program. www.casa-acae.com/wp/wp-content/uploads/2012/12/PSSSP-Brief-2012-Final_PDF.pdf

¹⁷ Ministry of Finance of Ontario: *Public Accounts of Ontario 2004-2005 Ministry Statement and Schedule*, p. 366 and *Public Accounts of Ontario 2011-2012, Ministry Statement and Schedule*, p. 368.





Table 1 – AANDC Expenditure Trends in Education¹⁸

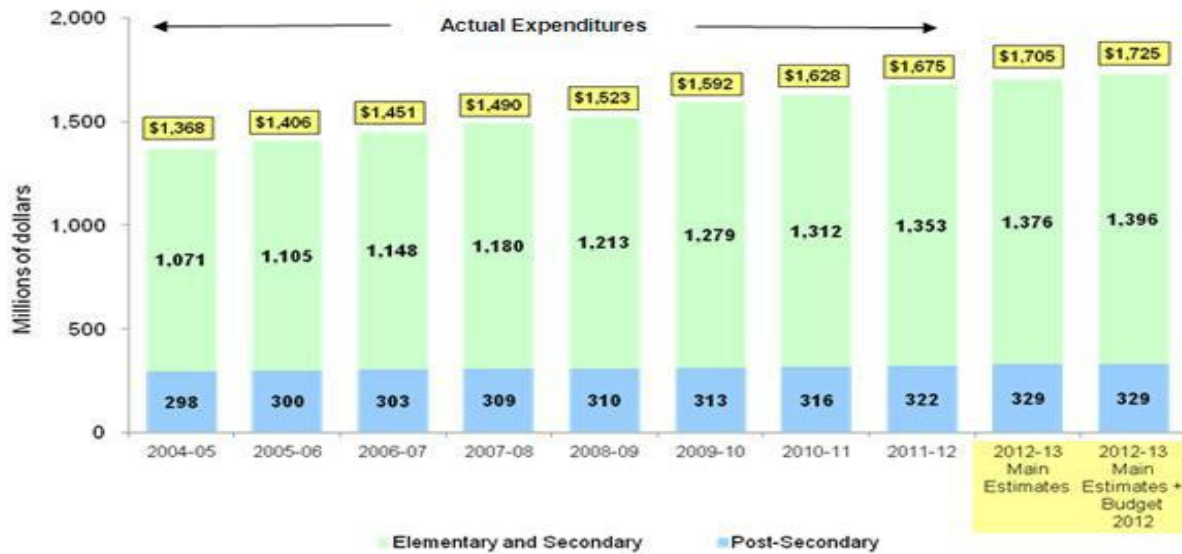
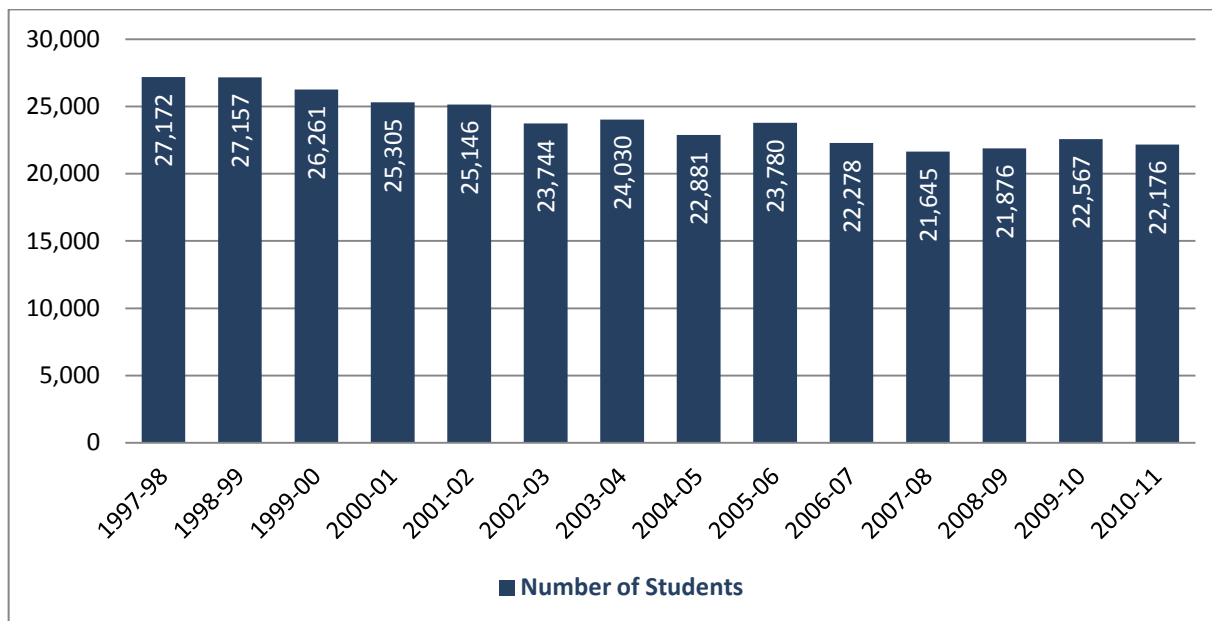


Table 2 – Total of Postsecondary Students Funded 1997–2011



¹⁸ Source: 2004–05 to 2010–11 as per Departmental Performance Reports (restated); 2011–12 as per Main Estimates (restated) and 2012–13 as per Main Estimates.

Note – To be consistent with figures displayed for 2012–13, figures for 2004–05 through 2011–12 have been restated to reflect the transfer of funding for Education Agreements to the Treaty Management Program Activity (as per the revised Program Activity Architecture for 2011–12) and the consolidation of Cultural Education Centres and First Nations and Inuit Youth Employment Strategy in Elementary and Secondary Education (as per the revised Program Activity Architecture for 2012–13). In addition, an adjustment has also been made to the DPR figures for the period 2004–05 through 2008–09 to provide consistency with the display of Internal Services as a separate program activity beginning in 2009–10 (ie. Internal Services was previously attributed across all program activities). Figures may not add due to rounding.



From our case studies:

Membertou's success can be traced back to the adoption of good governance and financial management, accountability and transparency, as well as education of their people. Since the mid-1990's, Membertou has successfully implemented a community-based development plan that enables them to compete in the mainstream economy while improving the quality of life of their members. This development approach has become known far and wide as the "Membertou Business Model" which is a business approach to government, management and economic development to achieve social objectives.

The Membertou Model, which consists of three stages – capacity building, preparation, and economic development, advocates for the establishment of sound business practices and policies, and strategic planning, as the basis for the creation of new ventures and partnerships, and economic success.

Recommendation 4.1

It is recommended that AANDC further enhance community-based capacity by providing adequate support to First Nations wishing to pursue post secondary studies by lifting the 2% annual funding cap on expenditure increases for the Post-Secondary Student Support Program.

To attract investment on reserve, First Nations communities need not only the right human resources to facilitate development, but also need to be familiar with the legislative and regulatory processes which govern reserve lands to effectively build relationships with potential business partners.

The Board believes that federal efforts to increase professional and technical expertise on reserve are maximized when they leverage partnerships with existing Aboriginal organizations and associations that already have the networks and expertise to assist First Nations communities. For example, the National Aboriginal Land Managers Association (NALMA), the Aboriginal Finance Officers Association (AFOA), National Aboriginal Trust Officers Association (NATOA), the First Nations Financial Management Board (FNFMB), the Council for the Advancement of Native Development Officers (CANDO), the First Nations Market Housing Fund (FNMHF), and Tribal Councils all work to enhance professional development and technical expertise in First Nations' land management and economic development activities.

Recommendation 4.2

It is recommended that AANDC increase efforts to build professional expertise in First Nations by:

- Providing financial support for the development of comprehensive community plans, strategic planning, land use plans and surveys;
- Supporting tools to assist First Nations in their lands and economic development activities such as: templates, instruments, standards, toolkits, business models and best practices;
- Working with existing Aboriginal organizations to ensure that First Nations have access to community-based training on lands and economic development; and,
- Developing and sharing training and communications material for developers, First Nations leadership and management about AANDC leasing requirements on reserves.





IV. CONCLUSION

The NAEDB believes that economic development is the foundation upon which First Nations' independence and self-reliance is built. However, there is solid evidence – from our case studies, in reports from the Auditor General of Canada, and in reports from Standing Committees – that even highly successful First Nations encounter significant challenges when pursuing economic opportunities due to barriers beyond their control. Indeed, AANDC's study *Factors for Success and Barriers to Economic Development on Reserve Lands: A Report on the Experiences of 25 First Nation Communities* demonstrates that First Nations face significant challenges in pursuing economic development due to federal policies, processes and laws.

Despite these barriers, many First Nations have successfully pursued economic opportunities by acting in areas under their control and influence, such as separating politics and business, participating in optional legislative regimes like the *First Nations Land Management Act*, and developing community land use plans. Efforts to extend the benefits of these practices and tools to all First Nations communities are a first step to improving the lives of First Nations people across the country. However, all parties recognize that more can be done.

The NAEDB's recommendations for addressing the barriers to economic development on reserve emphasize that, for First Nations to reach their full economic potential, the federal government must:

- Allow communities – when they are ready and willing – to increase control over their affairs to the greatest extent possible;
- Balance its fiduciary responsibility to First Nations with the economic development aspirations of communities;
- Work directly with First Nations on the development and implementation of solutions, and;
- Apply a common sense approach to the development and enforcement of rules on reserve.

The recommendations set out in this report represent the National Aboriginal Economic Development Board's first step to help address the barriers to Aboriginal economic development. As such, the Board will continue its work in this area to identify obstacles to economic participation for First Nations, Inuit and Métis people and make specific recommendations to the federal government to help create a level playing field between Aboriginal people in Canada and their non-Aboriginal counterparts.

Addressing the barriers to economic development on reserve is not just good for First Nations, it is good for Canada. Across the country, from the Maa-nulth First Nations in British Columbia to the Community of Membertou in Nova Scotia, First Nations are driving regional economies, creating jobs and generating wealth for all Canadians.





LIST OF RECOMMENDATIONS

Recommendation 1.1

It is recommended that AANDC provide fiscal transfer payments directly to First Nations through multi-year agreements, accounted for by annual financial audits, with periodic program and compliance audits, where self-generated revenues would not be required to be reported to AANDC nor subject First Nations to budget cuts.

Recommendation 1.2

It is recommended that AANDC, upon the request of a First Nation, develop a trust model to manage cash flow and allow bands to spend project funds according to business requirements rather than government end-of-fiscal year deadlines.

Recommendation 1.3

It is recommended that the Government of Canada re-establish a national Aboriginal table on fiscal relations to discuss further improvements and identify initiatives that could support First Nations and other Aboriginal groups fiscal management and arrangements.

Recommendation 1.4

It is recommended that AANDC take on a liaising role and provide support to First Nations, if requested, in their dealings with federal, provincial and municipal governments or regulatory bodies on First Nation economic development initiatives.

It is further recommended that the Government institute a consistent practice of consulting and collaborating with First Nations prior to the development of programs, policies, legislation and regulations which directly or indirectly affect First Nations communities and their Treaty and resource rights.

Recommendation 2.1

It is recommended that the federal government allow *Indian Act* bands wishing to make business-based decisions to take on increased risk management responsibilities for land development.

This could be done by developing a mechanism such as a release and indemnification to the federal government that would allow bands under the *Indian Act* to pursue projects at their own risk, subject to community approval.

Recommendation 2.2

It is recommended that AANDC streamline its policies and procedures to create simplified and cost effective processes in the following areas: land designations, leasing and permitting on reserve, environmental assessments, and accessing Indian moneys. A potential approach might be further use of a delegation document allowing federal officials to exercise the Minister's authority.





Recommendation 2.3

It is recommended that AANDC streamline transfer payment processes and reporting requirements by:

- Eliminating duplicate and unnecessary reports which carry with them significant costs to First Nations;
- Requiring only core project information to be submitted with supporting documentation; and,
- Eliminating requirements for First Nations to report their self-generated revenues.

Recommendation 2.4

It is recommended that AANDC establish internal controls such as service standards and performance targets to ensure timely, efficient decision-making process and accountability to First Nations. The Department's service standards and performance targets should be publicly reported on an annual basis.

Recommendations 2.5

It is further recommended that AANDC engage in a broad review of its policies and processes with the objective of: removing unnecessary criteria, removing Governor in Council and/or Ministerial oversight where possible, and decentralizing the AANDC approval processes through the delegation of authorities. Furthermore, this review process should include broadly the delegation of approvals directly to the First Nations.

Recommendation 2.6

It is recommended that AANDC provide First Nations with the means to exercise greater discretion to make adjustments to the terms of designations without requiring them to seek subsequent designation votes.

Recommendation 2.7

It is recommended that the Government of Canada, in collaboration with Aboriginal organizations, provincial and territorial governments, and industry stakeholders, develop a loan guarantee instrument or other financing measures to facilitate equity participation for Aboriginal communities in natural resources projects.

Recommendation 2.8

It is recommended that AANDC streamline requirements to provide greater control to First Nations over the revenues generated from on reserve land and resource management, or at the very least reduce restrictions for First Nations communities to have timely access to their Indian moneys. In addition, First Nations should be able to invest their funds in financial instruments that would better optimize their interest earnings.

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should include granting the Minister of AANDC final approval over ATRs and allowing for pre-reserve designation of lands.

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It is recommended that the federal government improve accountability to First Nations for the environmental approvals process by establishing a timely mediation mechanism to resolve disputes between the Canadian Wildlife Service and a First Nation when determining how to best meet environmental requirements under the *Species at Risk Act*.



Recommendation 3.1

It is recommended that AANDC provide unrestricted and fully funded access to the *First Nation Land Management Act* (FNLMA) development process for all First Nations that elect to pursue their own land management under the regime, as well as ongoing operational funding.

It is further recommended that federal approvals and processes under the FNLMA be streamlined, properly resourced and simplified to ensure success for participating First Nations.

Recommendation 3.2

It is recommended that AANDC make the following adjustments to the *First Nations Fiscal and Statistical Management Act*:

- Remove the scheduling requirement in the FSMA to allow interested First Nations to participate in the FNFA in a more timely manner;
- Expand the FNFA to allow other Aboriginal entities to participate, such as tribal councils, corporations, and other Aboriginal governments;
- Increase First Nations' borrowing capacity by allowing for First Nations' Goods and Services Tax rebates to be deemed an eligible revenue stream;
- Provide additional support to increase the FNFA's credit enhancement fund to adequately accommodate the loan demands of future borrowing members; and,
- Establish a process under which band by-laws under the FSMA are approved by the FNFMB rather than Minister of AANDC.

Recommendation 4.1

It is recommended that AANDC further enhance community-based capacity by providing adequate support to First Nations wishing to pursue post secondary studies by lifting the 2% annual funding cap on expenditure increases for the Post-Secondary Student Support Program.

Recommendation 4.2

It is recommended that AANDC increase efforts to build professional expertise in First Nations by:

- Providing financial support for the development of comprehensive community plans, strategic planning, land use plans and surveys;
- Supporting tools to assist First Nations in their lands and economic development activities such as: templates, instruments, standards, toolkits, business models and best practices;
- working with existing Aboriginal organizations to ensure that First Nations have access to community-based training on lands and economic development; and,
- Developing and sharing training and communications material for developers, First Nations leadership and management about AANDC leasing requirements on reserves.

ORGANIZATIONS

To help inform the recommendations found in this report, the NAEDB met with a number of Aboriginal communities and organizations, private sector entities and federal departments and agencies.

Aboriginal Communities and Organizations

First Nations Financial Management Board
First Nations Financial Authority
First Nations Tax Commission
Muskowekwan First Nation, Saskatchewan
National Aboriginal Capital Corporation Association
National Aboriginal Land Managers Association

Federal Government

Aboriginal Affairs and Northern Development Canada
Indian Oil and Gas Canada

Private Sector

Advanced Explorations Inc.
mPower North





COMMUNITY OF MEMBERTOU

ANALYSIS OF THE IMPACT OF LEGISLATIVE AND REGULATORY BARRIERS ON BUSINESS PARTNERSHIPS IN MEMBERTOU

Objective

To provide an in-depth analysis of the Membertou Trade and Convention Centre, Membertou Hampton Inn Hotel and pedestrian walkway ('Pedway') to better understand how the structural barriers under the *Indian Act* impact economic and business development at the community level and created additional costs (financial, time and opportunity).

Community Overview

The Community of Membertou is an urban First Nation community located on Cape Breton Island in Nova Scotia, spanning approximately 100.5 hectares. Membertou's reserve base is subject to the land management provisions of the *Indian Act*. Membertou has 1,352 registered members, with approximately 824 living on the reserve. Membertou's leadership is comprised of one (1) Chief and 12 Councillors, elected under the *Indian Act* for two year terms.

Project Information

Membertou Trade and Convention Centre (MTCC): The MTCC is located on the Membertou reserve and is 100% owned by the Membertou Development Corporation (MDC). The MTCC is a \$7.2 million, 47,000 square foot facility, incorporating sophisticated conference and meeting space including a 10,000 sq. ft. Great Hall, individual conference/break-out rooms, and full catering and banquet services.

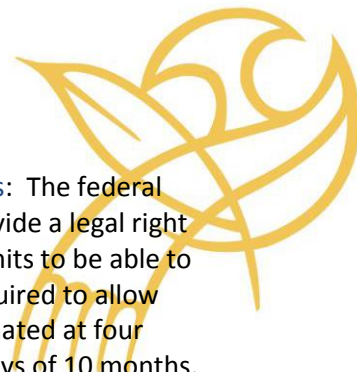
Membertou Hampton Inn Hotel: The Hotel is located on fee simple lands owned in Limited Partnership with DP Murphy Group Inc. The hotel is a \$12.7 million, 80, 000 square foot facility, with 134 guest rooms, a fitness centre, a pool and a Pedway linking the hotel to the MTCC.

Pedway: The Pedway is a \$ 1.2 million, 100% MDC owned, 100 meter fixed link over the parking lot connecting the MTCC –on reserve lands – to the Membertou Hampton Inn Hotel – on fee simple lands.

Key Barriers

- ***Indian Act* (s.37-41) surrender and designation**: Through Membertou's unfortunate history with land surrenders, Membertou's Council and community members do not distinguish between land designation and land surrender. As a result, the development of reserve lands through the *Indian Act* is obstructed by failed community referendums. If a referendum is successful, the whole process to designate could be anywhere from two to three years before completion. As a result of the *Indian Act* limitations to developing reserve lands, the Membertou Hampton Inn Hotel was built on fee simple lands.





- **Indian Act (s.28(2)) permitting for non-exclusive use and occupation of reserve lands:** The federal government concluded that an *Indian Act* section 28(2) permit was required to provide a legal right of way for the Pedway, as it crossed reserve lands. Membertou needed special permits to be able to open the Pedway and to allow people to walk across it; although no permit was required to allow people to walk across the parking lot. Construction of the Pedway was initially estimated at four months, but delays associated with the need for a permit under s.28 (2) caused delays of 10 months, resulting in approximately \$250,000 in lost facility rental revenues.
- **Indian Act (s.89-90) restriction on mortgage, seizure, etc., of property on reserve:** Previously, Membertou was unable to secure commercial loans for terms longer than five years, costing the community more on short-term loan interest for infrastructure projects which by their very nature are long-term. The MTCC and Pedway projects went forward relying on a combination of government loans and grants instead of conventional financing. As a result of the restrictions on accessing capital contained in the *Indian Act*, Membertou built the Hotel on fee simple lands.
- **Additions to Reserve:** Membertou would have converted the fee simple lands of the Membertou Hampton Inn Hotel to reserve lands through the additions to reserve process. However, this process would have taken at least seven years. In Membertou's most recent experience it took 14 years. Building on reserve land would be more meaningful for the community's future as its laws and by-laws would apply, community members would be able to work tax free, and property tax in the future would return to the community. Currently, Membertou is paying approximately \$600,000 annually in property taxes for the Hotel, money which Membertou could have spent within the community.

Key Recommendations

- It is recommended that Canada eliminate the need to surrender Indian lands to the Crown prior to development through the provision of a 'sovereign guarantee' for all First Nation economic development initiatives located on reserve land that meet certain pre-established criteria.
- It is recommended that Aboriginal Affairs and Northern Development Canada (AANDC) allow *Indian Act* bands to take on increased risk management responsibilities for development of their lands. This could be done by developing a mechanism that provides indemnification to the government and allows bands to pursue projects at their own risk.
- It is recommended that AANDC create a new First Nation designation process similar to a municipal designating or zoning authority, which can be tailored to meet a First Nation's specific needs and community objectives in the development of reserve lands.
- It is recommended that Canada conduct a complete overhaul of the additions to reserve process to provide for a streamlined and funded process that minimizes delays and expenses for First Nations.
- It is recommended that Canada amend federal law and policy in consultation with First Nations to ensure efficient and affordable access to tax exemptions for First Nation individuals and bands where development occurs on reserve.





CHIPPEWAS OF RAMA FIRST NATION

AN ANALYSIS OF THE IMPACT OF LEGISLATIVE AND REGULATORY BARRIERS ON BUSINESS PARTNERSHIPS IN RAMA FIRST NATION

Objective

To provide an overview of two projects – the Chippewas of Rama First Nation’s Casino Rama and the St. Eugene Golf Resort & Casino – to better understand how the rules and processes under the *Indian Act* negatively impact economic and business development at the community level and created additional costs (financial, time and opportunity).

Community Overview

The Chippewas of Rama First Nation (Rama) is located in Central Ontario with a land base of approximately 2,500 acres in eight separate parcels of land. Rama has over 1,700 registered members, with approximately 700 living on the reserve. Rama’s leadership is comprised of one (1) Chief and six (6) Councillors, elected under the *Indian Act* for two year terms.

Project Information

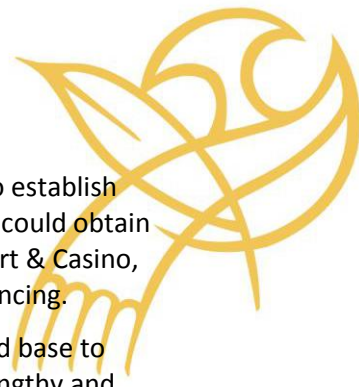
Casino Rama: The Casino Rama Complex is located on the Rama reserve with over 2,300 slot machines, approximately 120 gaming tables, a 5,000 seat entertainment centre, a conference centre with several ballrooms, ten restaurants, and a 300 room hotel with spa.

St. Eugene Golf Resort & Casino of the Rockies: is located on St. Mary’s Indian Reserve near Cranbrook, British Columbia and was a business acquisition in partnership between Rama, Samson Cree Nation (Alberta) and the Ktunaxa Nation (British Columbia). St. Eugene’s is a 19,000 square foot full service casino with 236 slots, table games and off-track betting, a 125 room hotel, two restaurants and lounges, an interpretive centre, over 4,000 square feet of conference meeting space, a spa and pool, and a golf course.

Key Barriers

- ***Indian Act* (s.37-41) surrender and designation:** The lands on which Casino Rama is located are designated under the *Indian Act* for a specific term. Rama must conduct another community referendum to extend the designation of these lands into the future, which puts jobs and revenues at risk if the designation vote is unsuccessful.
- ***Indian Act* (s.61-69) management of Indian moneys:** Rama was prohibited from using its Indian moneys to invest in the purchase of a business (St. Eugene) located on another reserve in spite of the fact that such a restriction is not evidenced in the Act itself. Had Rama not had own source revenue to draw from, this restriction would have blocked the First Nation from participating in this economic project.





- **Indian Act (s.89-90) restriction on mortgage, seizure, etc., of property on reserve:** To establish collateral security, Rama had to surrender its lands for Casino Rama so that its bank could obtain security over property and equipment. For the purchase of the St. Eugene Golf Resort & Casino, Rama and its partners had to enter in to a joint and several guarantee to obtain financing.
- **Additions to Reserve:** Rama has a small land base and is looking to expanding its land base to facilitate community economic development. The Additions to Reserve process is lengthy and expensive, and for Rama to convert the fee simple lands it holds off reserve would potentially cost over \$1,000,000 in compensation to affected municipalities for lost tax revenues, not including the administrative costs to process the ATR.

Key Recommendations

- Instead of surrendering reserve lands prior to development, the Crown should provide for a 'sovereign guarantee' for all First Nation economic development initiatives located on reserve land that meet certain pre-established criteria.
- It is recommended that Canada conduct a complete overhaul of the Additions to Reserve (ATR) process to provide for a streamlined and funded process that does not create undue delays and expenses to First Nations.
- It is recommended that Canada amend federal law and policy in consultation with First Nations to ensure efficient and affordable access to credit for First Nation individuals and bands where development occurs on reserve.
- It is recommended that AANDC amend *Indian Act* policies and procedures to provide greater control to First Nations over their Indian moneys, or at the very least reduce restrictions for First Nation communities such that they have timely access to these moneys for economic development projects on and off reserve.
- Canada should provide First Nations fully funded access to the *First Nation Land Management Act* (FNLMA). It is recommended that requirements and processes under the FNLMA process be streamlined and simplified to ensure even greater success for First Nations undertaking the process.

OSOYOOS INDIAN BAND

IMPACTS OF BARRIERS TO ECONOMIC DEVELOPMENT ON CANADA'S FIRST NATION RESERVE LANDS: A CASE STUDY FOCUSING UPON THE SENKULMEN BUSINESS PARK

Objective

To provide an in-depth analysis of the Osoyoos Indian Band's Senkulmen Business Park to better understand how the structural barriers under the *Indian Act* impact economic and business development at the community level and created additional costs (financial, time and opportunity).

Community Overview

The Osoyoos Indian Band is located in the South Okanagan in British Columbia, with a land base of 32,000 acres. Osoyoos has 517 registered members, with approximately 324 living on the reserve. Osoyoos's leadership is comprised of one (1) Chief and four (4) Councillors, elected under the *Indian Act* for two year terms. The Osoyoos Indian Band is subject to the provisions of the *Indian Act* for the majority of its activities, but is also scheduled under the *First Nations Fiscal and Statistical Management Act* which, among other benefits, allows a First Nation to enact its own property taxation and assessment laws.

Project Information

The Senkulmen Business Park: The Senkulmen Business Park is 100% owned by the Osoyoos Indian Band and located on reserve. The project was designed for light commercial and institutional use and built with green technology with the objective of being one of the most environmentally sustainable business park developments in Canada. Senkulmen is planned for a full build-out of 112 acres, to be developed in three phases for a total construction value of \$19 million. Current and future tenants include a Vincor winery and the Okanagan Correctional Centre.

Key Barriers

- **Canadian Environmental Assessment Act (CEAA) and Species at Risk Act (SARA) environmental approvals process:** The duplication of environmental assessments for the 2002 Vincor winery expansion cost Osoyoos \$45,000 and 12 months lost obtaining a CEAA decision. In 2004, Senkulmen was comprised of 220 acres for development; however, with SARA coming into force in 2005, Osoyoos had to set aside 67 acres – without compensation – for conservation purposes, making those lands unavailable for development. The total timeline for obtaining environmental approvals for the Senkulmen Business Park took three years. The total cost of the environmental approvals process associated with Senkulmen is \$212,500, as well as \$92.73 million in missed opportunities due to environmental restrictions to develop lands.
- **Indian Act surrender /designation and leasing requirements:** A designation vote was conducted in 2008 for the Senkulmen project to set designation length at 69 years and allow for light industrial uses for the park. It cost Osoyoos \$50,000 and took 3-5 months to conduct the vote. Later, when Osoyoos and the BC Provincial Government were exploring the option to build the Okanagan





Correctional Centre on the Senkulmen Business Park, AANDC and the Department of Justice refused to consider the possible lease to the Okanagan Correctional Centre as a commercial lease. This forced Osoyoos to conduct a second designation vote to change the terms of the designation to allow for institutional tenants putting the \$250 million project at risk. AANDC designation and leasing requirements associated with Senkulmen cost Osoyoos a total of \$153,000 in additional expenses.

- *Indian Act (s.89-90) restriction on mortgage, seizure, etc., of property on reserve:* Osoyoos experienced difficulties obtaining a mortgage-of-lease for Vincor. Its application to one major Canadian bank was rejected, but later approved by the Bank of Montreal; however, Osoyoos had to pay \$80,000 in legal and administrative costs to complete this complex transaction. Original plans for Senkulmen included the development of five acres for residential purposes; however, this plan had to be abandoned due to difficulties obtaining a Canada Mortgage and Housing Corporation-insured mortgage-of-lease for residential leaseholds.

Key Recommendations

- It is recommended that existing environmental approvals for projects already underway be grandfathered in and continued to be accepted by authorities when environmental legislation or regulations change.
- It is recommended that if an entire parcel of land has been designated for particular uses and set aside for leasing purposes, the environmental process should be considered as complete, even if the development occurs in phases.
- It is recommended that Canada compensate First Nations for the value of any lands set aside to gain environmental approval for a project. Compensation could potentially include a swap with other Crown lands, and should recognize equivalent value, not equivalent acreage. An accelerated ATR process could be used as a mechanism to acquire other lands.
- It is recommended that Aboriginal Affairs and Northern Development Canada (AANDC) allow *Indian Act* bands to take on increased risk management responsibilities for development of their lands. This could be done by developing a mechanism that provides indemnification to the government and allows bands to pursue projects at their own risk.
- It is recommended that AANDC create a new First Nation designation processes similar to a municipal designating or zoning authority, which can be tailored to meet a First Nation's specific needs and objectives in the development of reserve lands.
- It is recommended that AANDC allow First Nations the authority to make adjustments to the terms of existing land designations. It is further recommended that AANDC develop strategies to eliminate the need for a second designation vote when changes in use or term occur.
- It is recommended that AANDC work with financial institutions to create financial instruments to secure headleases. This will ensure that timely financing can be obtained where there are headleases, so that issues such as the current Canada Mortgage and Housing Corporation residential mortgage challenge (a perceived risk of default on headleases) do not occur in a commercial context. Having a more precise instrument acceptable to financial institutions to secure a mortgage-of-lease will reduce legal costs.