INVESTING ACCORDING TO INDIGENOUS TRADITION
An Assessment of Indigenous Laws and Investment

Paul Seaman, with Scott Robertson and Robert Ford
GOWLING LAFLEUR HENDERSON LLP

ABSTRACT

Indigenous peoples have inhabited North America since time immemorial, using Indigenous laws as guiding principles on how to live sustainably. However, since European contact, Indigenous communities have seen their roles in planning for the future progressively eroded. Now that many new and modem investment opportunities are presenting themselves to Indigenous communities, some guidance on making the right investment decisions may be needed. The authors argue that because European laws and policies have historically not accommodated the unique requirements of Indigenous communities, communities may choose to apply proven Indigenous laws when making sustainable investment decisions today.

INTRODUCTION

The face of modern Aboriginal[1] economic development continues to be revealed in Canada. Many communities have made significant strides in various niche areas of business and settled billions of dollars in land claims. Among the most successful ventures have been those in the hospitality, tourism, and gaming industries. Perhaps surprisingly, although sizable claims have been settled and gaming ventures typically generate tens of millions of dollars in annual net profit, investment of settlement funds and gaming profits appears to be only just beginning. Some obstacles to economic development still remain. While acknowledging the survival of Indigenous

Paul Seaman is a Métis lawyer practising Energy, Technology and Aboriginal law in Gowlings' Toronto office, Scott Robertson is a Haudenosaunee lawyer practising Aboriginal law and general litigation in Gowlings' Ottawa office, and Robert Ford is a lawyer practising in Private Equity, Venture Capital, and Technology law in Gowlings' Ottawa office.
The authors welcome comments on this article at the following e-mail addresses: Paul Seaman (paul.seaman@gowlings.com); Scott Robertson (scott.robertson@gowlings.com); Robert Ford (robert.ford@gowlings.com).

[1] Note that throughout this paper, the term 'Indigenous' is used where possible to broadly refer to the original inhabitants of what is now Canada. Where necessary, the term "First Nation" or legal terms (Aboriginal, Indian, Métis, and Inuit) are used to indicate reference is being made to a specific group in a given context.

legal principles in Canada, this paper examines the reasons why diversified investments may make sense for Aboriginal communities and attempt to identify some potential investment opportunities. We suggest that flexible trust structures, greater access to gaming revenues, asset allocation, recent legislative changes, and certain developments in the energy and environmental sectors provide communities with an opportunity to sustainably plan their own economic affairs and build substantial economic capacity. We are of the view that many of these concepts and opportunities are currently within the reach of many communities.

INDIGENOUS LAW AND SUSTAINABILITY

Indigenous legal scholars argue that some, if not all, Indigenous communities in Canada have surviving laws that ought to dictate their role in modern self-determination and self-government. The Supreme Court of Canada has affirmed that, to the extent such laws prevail, they must not be incompatible with combined Canadian sovereignty, must not have been surrendered by treaty, and must not have been otherwise extinguished by the Crown.[2] The Supreme Court has also held that Aboriginal rights are not frozen in time.[3]

There are examples of Indigenous laws that may correspond to a right to self-reliance and sustainability in a modern investment context. For example, the Haudenosaunee Great Law of Peace *Kaianerekowa* requires decision-makers to consider the needs of future generations when making important decisions that may impact those generations.[4] Similarly, Anishinabek law deems humans to have a trust-like relationship with land insofar as it is "held by the present generation for future generations"[5] and that any discretion the present generation may exercise over land is to be tempered by an overarching, guiding principle that future generations must also thrive on it.[6] Similar parallels exist in Canadian law. For example, the chief actuary of the Canada Pension Plan reports on the intergenerational sustainability of the Canada Pension Plan ("CPP") on the basis of looking 75 years into the future, directly influencing government decisions on how investment returns and CPP contributions may sustainably meet the needs of future generations.[7]

How the CPP has historically operated in respect of First Nations people provides another apt analogy. Until political will dictated otherwise in 1988,[8] status Indians who worked tax-free on reserve lands were precluded from contributing their earnings to the CPP altogether. Although this was changed to allow contributions from tax-exempt earnings of status Indians in 1989, the amendment was not retroactively applied, and participation in the CPP by status Indians is now merely optional.[9] The Federal Court of Appeal, ruling on litigation aimed at gaining a right to make retroactive CPP payments in 2003, held that the Old-Age Security and Guaranteed Income Supplement payments were acceptable substitutes in lieu of retroactive CPP contributions.[10] Without commenting on the fairness of this ruling on any individual, at minimum, the outcome illustrates one reason why the historical exclusion of Aboriginal people from certain aspects of sustainable planning in Canada drives the need for communities to engage in their own sustainable economic planning today.

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2 See generally *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 ("*Mitchell*").

3 See generally *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385.

4 John Borrows, *Canada's Indigenous Constitution*, (University of Toronto Press, 2010) at p. 75. Among other things, Professor Borrows argues in this work that Indigenous laws and lawmaking live on in Canada, both in codified form and what may be conceptualized as an Indigenous "common law."

5 Borrows, ibid, at p. 246.

6 Ibid.

7 Canada Pension Plan, R.S.C. 1985, c. C-8, s. 115(1.1).

8 The political will was driven by the equality guarantee in s. 15 of the *Canadian Charter of Rights and Freedoms* as adopted in 1982. See *Bear v. Canada (Attorney General)*, 2003 FCA 40, [2003] 3 F.C. 456 ("*Bear*") at para. 40.

9 Canada Pension Plan Regulations, C.R.C., c. 385 s. 29.1(1).

10 See generally *Bear*, supra note 8.

UTILIZING CAPITAL SUSTAINABLY

According to the Canadian Council for Aboriginal Business and the Canadian Venture Capital Association, Aboriginal communities have acquired as much as $10 billion in capital from settling outstanding land claims and specific claims[11] in Canada.[12] Often, the funds associated with these claims are placed in a trust structure administered by a large financial institution. Assuming that the trust allows it, the funds are then invested according to the risk and return sought by the particular community. Because a lump-sum claim settlement is a one-time payment, often representing a community's lost landmass, and is intended for the benefit of the community as a whole for generations to come, it is often in a community's best interests to protect such funds by managing them conservatively.

GAMING

Annual profits from gaming also present a unique opportunity for investment. Because gaming is jointly regulated by provinces and the Canadian federal government, Aboriginal gaming ventures are normally implemented as bricks-and-mortar casinos that are established and operated in co-operation with the respective provinces.[13] A prominent example of this co-operation is the Saskatchewan Indian Gaming Authority (SIGA), a First Nations-run entity that operates six casinos under traditional governance principles throughout Saskatchewan. SIGA was formed after considerable negotiations between the Federation of Saskatchewan Indians Nations (FSIN) and the Saskatchewan provincial government. The product of the negotiations was a Framework Agreement that delegated the responsibility to certain First Nations-run casinos in Saskatchewan to SIGA.

SIGA has generated over $60 million in net profits in each of the past three years.[14] However, under the present iteration of the 2002 Framework Agreement FSIN signed with the province,[15] 25% of SIGA's net profit is added to the Saskatchewan provincial coffers, 50% is allocated for redistribution to Saskatchewan First Nations, and the remaining 25% is distributed to Community Development Corporations operating in the communities that the various casinos operate in. Much like the settlement claims discussed above, use of SIGA profits is controlled by a trust structure. Although clearly social, education, and infrastructure development is likely to remain justifiably high on the list of the permissible uses of the First Nations Trust, trust funds may also be used for "economic development", leaving open the possibility that certain investments may be made with the trust money gleaned from SIGA profits.

While the creation of SIGA and negotiation of the Framework Agreement can be lauded for many things — like its co-operative approach with the province, use of traditional governance principles, and the resulting on-reserve infrastructure and employment for First Nations people in Saskatchewan — it's likely that the 2002 Framework Agreement could be further sweetened, with the goal of providing more funds for investment pur-

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[11] Comprehensive claims are Aboriginal claims to land in areas of Canada where land rights have not already been formally addressed through treaty. Specific claims are claims negotiated between a First Nation and the Federal Government in respect of specific grievances a First Nation may have with unfulfilled treaty obligations or other losses attributed to alleged actions or inaction of the Crown. Specific claims may or may not deal with land. For more information, see Indian and Northern Affairs Canada, *Land Claims*, online: <http://www.ainc-inac.gc.ca/al/ldc/index-eng.asp>.

[12] Canadian Council for Aboriginal Business & Canada Venture Capital Association, *2011 Aboriginal Private Equity Summit*, online: <http://www.cvca.ca/files/2011_Aboriginal_Private_Equity_Summit_Invite_REV.pdf>. See also Richard Remillard & Grant Kook, in Private Capital Volume 4, Issue 2, *Building Bridges: Aboriginal Business and Private Equity*.

[13] At least one community, the Mohawks of Kahnawake, established itself as a leading online gaming regulator in the late 1990s. The Kahnawake Gaming Commission operates independent of any agreement with a provincial or federal government. For a discussion of the evolution of gaming as Aboriginal economic development in Canada, see Paul Seaman, Brenda Pritchard, David Potter, *Betting on Reconciliation: Law, Self-Governance, and First Nations Economic Development in Canada*, Gaming Law Review and Economics. April 2011, 15(4): 207–19.

[14] SIGA, *September 7, 2010 Media Release: SIGA Reports Third Straight Year of Profits Above $60M* online: <http://www.siga.sk.ca/Upload/files/Media%20Release%20Revenues%20Sept%202010.pdf>.

[15] The Framework Agreement may be viewed online at the following address: online <http://www.slga.gov.sk.ca/Prebuilt/Public/2002%20Gaming%20Framework%20Agreement.pdf>.

poses. FSIN, for its part, has indicated a desire to both increase SIGA's profits through online gaming and eventually retain all of SIGA's profits. The Framework Agreement contains a clause that mandates a review of its terms by the province and FSIN every five years, leaving open the possibility that the Framework Agreement could be further improved to facilitate broader economic investment. Should the province allow FSIN to keep the additional $15 to $25 million in question, optimally within a highly-flexible trust structure, it could be used in whole or in part to guarantee loans or otherwise fund investments in various emerging opportunities now available to First Nations.

If a greater share of SIGA profits is negotiated by FSIN under the Framework Agreement, that money may, at least in some cases, be best spent on upgrading on-reserve infrastructure, such as roads, water, and housing. However, it seems unfair to use such funds to replace expenditures in infrastructure that some may argue, at least in some cases, ought to be characterized as replacing ongoing but unfulfilled treaty obligations of the Crown. Where First Nations have access to significant excess revenues from gaming, a sovereign wealth model may be appropriate to reinvest the profits. Sovereign wealth funds are investment funds held by a sovereign state that are used for reinvestment in various financial assets, such as domestic and foreign equities, bonds, real property, and sometimes precious metals. Some sovereign wealth funds are formed from the accumulation of non-renewable, resource-based revenues or comprised of large, conservatively managed pension funds, although technically these funds may be rooted in sovereign savings of any origin.

While SIGA's profits are relatively modest in comparison to most sovereign wealth funds,[16] they could eventually come to reach a substantial size if the share currently contributed to the Saskatchewan coffers was redirected to such a fund. Establishing such a fund to invest gaming revenue may be a prudent and important move. First Nations need to look no farther than recent lessons others have learned to discover why. The first lesson is that gaming and hospitality businesses are not recession-proof: SIGA profits dropped approximately 10% during the 2009/2010 financial period, which encompassed the lowest point of the recent global financial crisis. During that same period, the unemployment rate in Las Vegas skyrocketed from 3.8% to 12.3% over three years.[17] Some Las Vegas casinos were forced to discount room rates by as much 75% in order to reach an occupancy rate of 82% from 72%, an unsustainable occupancy rate in the hotel industry.[18] The State of Nevada, which has no income tax and is funded primarily by taxes on casino revenues, went "nearly bust" during the recession, underscoring the negative effect a recession can have on gaming.[19]

The second lesson is managing the use of proceeds earned from nonrenewable or otherwise finite resources. Alberta provides a good perspective in this regard. On May 5, 2011, the Alberta Premier's Council for Economic Strategy released a report entitled "Shaping Alberta's Future."[20] In this report, the council bemoaned the use of non-renewable resource revenue — such as oil royalties — by the provincial government to pay provincial expenses, rather than investing in a fund to ensure the future of the province. The rationale and general principle for Alberta's proposed fund is simple — investing profits from nonrenewable resources so that once the resource is reduced, the missing revenue from royalties is at least partially replaced by investment income.

Although gaming profits admittedly are not the same as royalties from nonrenewable

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16 Sovereign Wealth Fund Institute, *Sovereign Wealth Fund Rankings*, online: <http://www.swfinstitute.org/fund-rankings/>.

17 Time Magazine, *Less Vegas: The Casino Town Bets on a Comeback*, (August 14, 2009) online: <http://www.time.com/time/nation/article/0,8599,1915962,00.html>.

18 Ibid.

19 Ibid.

20 Premier's Council For Economic Strategy, *Shaping Alberta's Future*, online: <http://www.premier.alberta.ca/plansinitiatives/economic/RPCES_ShapingABFuture_Report_web2.pdf>. Saskatchewan's Opposition NDP party has also recently promoted the possibility of creating a "rainy day fund" in Saskatchewan. See CBC News, *Saskatchewan needs to save for future: NDP*, (September 1, 2011) online: <http://www.cbc.ca/news/canada/saskatchewan/story/2011/09/01/sk-resource-fund-1108.html>.

resources, some analogous limitations are apparent. For example, SIGA is precluded from operating casinos in two of Saskatchewan's largest urban centers[21] under the Framework Agreement, and it has already opened casinos near to or within most other significant Saskatchewan urban centers.[22] Although tourism and promotion efforts may be one way to help increase overall cash flow and profit at existing casinos, the growth and sustainability of SIGA's operation in Saskatchewan may be reaching a plateau if it remains precluded from entering the Regina and Moose Jaw gaming markets. SIGA has indicated an interest in entering the online gaming market to increase annual revenues, but the recent crackdown on online gaming in the United States may diminish the appeal of earning profits from international sources.[23] Running out of provincial gaming market space is not unlike running out of oil. The case for First Nations to reinvest gaming profits in diverse investments or other meritorious projects is therefore relatively clear.

Whether dealing with a one-time claim settlement payment or ongoing profits that are subject to trust structures, one way that Aboriginal communities may better ensure that funds are managed in a sustainable way is to ensure that trust structures strike the difficult balance between protecting settlement funds while also allowing such funds to be used for investment in modern projects. In order to facilitate growth while also remaining somewhat risk-averse, adopting a broad asset allocation strategy will likely increase the appeal of private equity investment to communities. Establishing a diversified risk and return profile that matches the funds available and the risk tolerance of distinct communities would be important, and Aboriginal finance professionals managing such investments are likely to play an important role in ensuring that Aboriginal people achieve the proper asset allocation profile and effectively remain in charge of their own investments.[24] Investing could be used with a view toward strategic business investments or savings — strategies that will likely need to change over time. Because, generally speaking, investing in private equity is a riskier proposition than purchasing government bonds, decisions to invest in such projects must always be evaluated carefully.

ELECTRICITY

Power generation, transmission, and export are opportunities that are already realized by some Aboriginal communities in Canada. Demand for renewable energy is increasing as provinces currently dependant on "dirty" coal-based generation and/or aging nuclear infrastructure seek out alternative sources of energy to support their electricity supply mix. Ontario's Bill 150, the *Green Energy and Green Economy Act, 2009*[25] introduced several possibilities for Ontario's Métis and First Nations communities to develop and maintain renewable power generation projects. Among the amendments made by Bill 150 to the *Electricity Act*[26] was one that has allowed the Ontario Power Authority to develop a Feed-In Tariff (FIT) program, complete with amendments to other legislation which allows for streamlined approval and implementation processes for renewable power generation projects. Aboriginal communities have had good opportunities available to them under the FIT program: depending on how much of a particular project is owned by an Aboriginal community, those communities may be paid higher amounts on kilowatt hours generated than other FIT partici-

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[21] Under the agreement, Saskatchewan Gaming Corporation, a Crown entity, operates casinos in Regina and Moose Jaw.

[22] SIGA, a First Nations entity, operates casinos in North Battleford, Prince Albert, Yorkton, Swift Current, White Bear First Nation, and near Saskatoon on Whitecap First Nation. SIGA has recently indicated a desire to operate all casinos in Saskatchewan, including taking over operations at Casinos Regina and Moose Jaw. See Karin Yeske (CKOM News), *Sask. First Nations seek control over province's casinos*, (June 7, 2011) online: <http://www.ckom.com/node/9345>.

[23] CNET News, *Internet poker giants indicted in U.S. crackdown*, (April 15, 2011) online: <http://news.cnet.com/8301-13578_3-20054433-38.html>.

[24] A pair of landmark decisions handed down by the Supreme Court of Canada in July 2011 have, in certain circumstances, made interest earned on certain types of investments purchased at on-reserve financial institutions tax exempt. See *Bastien Estate v. Canada*, 2011 SCC 38 and *Dubé v. Canada*, 2011 SCC 39.

[25] S.O. 2009, c. 12.

[26] 1998, S.O. 1998, c. 15, Sch. A.

pants (a so-called "Aboriginal adder"). As part of the FIT program, a provincial loan guarantee fund was formed with the intent to grant Aboriginal communities some flexibility in financing renewable generation projects.

Like Ontario, Saskatchewan also appears to want to phase out coal generation. This push appears to have been inspired by a 2009 report commissioned by the provincial government that addressed the possibility of implementing a nuclear power station in Saskatchewan. The report generally rejected the proposition of building a nuclear power station in favor of first exploring the possibility of investing in other generation technologies, like wind, solar, biomass, natural gas, and "clean" coal technologies.[27] Without sufficient hydroelectric or nuclear "base load" power available, Saskatchewan is left with supplementing coal generation with natural gas and renewables, heralding a likely push to privately-developed renewable energy projects of medium to large size, and corresponding transmission infrastructure.

Although meeting the province's growing need for electricity is of paramount concern, Saskatchewan is also missing out on international export opportunities. Despite demand for exported electricity in the United States, Saskatchewan only exported 125,509 megawatt-hours of electricity in 2010 (valued at only $4,420,574).[28] Qualifying this amount as "only" is apt when one considers that Saskatchewan's more hydroelectrically-endowed neighbour Manitoba exported 9,071,355 megawatt-hours (valued at $320,393,536) in the same time period.[29] Manitoba's export profits are expected to continue to rise when the $1.3 billion, 200-megawatt Wuskwatim hydroelectric station comes online at Taskingup Falls, Manitoba in 2012. That project is an equity partnership between Manitoba Hydro and the Nisichawayasihk Cree Nation. The power produced by the project is not projected to be needed domestically in Manitoba until 2020, leaving Hydro Manitoba and Nisichawayasihk Cree Nation with an excellent opportunity to profit from the proven export market for electricity in the United States and other Canadian provinces.[30]

Perhaps not surprisingly, on March 29, 2010, SaskPower announced it had signed a memorandum of understanding with the First Nations Power Authority, a group dedicated to developing First Nations-run power projects in Saskatchewan. Membership in the First Nations Power Authority is open to any of the 74 First Nations within Saskatchewan**.** Some First Nations are already moving to take advantage of power generation opportunities: the Meadow Lake Tribal Council is pursuing a project that would re-use waste from its preexisting forestry operations as fuel for a biomass generation project.[31]

At the present time, power generation, transmission, and export projects appear to be a premium investment opportunities for many First Nations communities.

COMMERCIAL REAL ESTATE

Recent legislative changes may also allow First Nations with "urban reserve" land to profit from commercial real estate deals. The *First Nations*

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[27] Dan Perrins (Committee Chair), *Future of Uranium Public Consultation Process Final Report*, online: <http://www.er.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=10785,3385,5460,2936,Documents&MediaID=29016&Filename=Future+of+Uranium+Public+Consultation+Process+-+Final+Report.pdf>.

[28] National Energy Board, *Electricity Exports and Imports, Monthly Statistics for December 2010*, online: <http://www.neb-one.gc.ca/clf-nsi/rnrgynfmtn/sttstc/lctrctyxprtmprt/2010/lctrctyxprtmprt2010_12-eng.pdf>.

[29] Ibid.

[30] National Energy Board*, Outlook for Electricity Markets 2005–2006 (Energy Market Assessment)* (Calgary: National Energy Board, 2005) at Section 3.5. See also Manitoba Hydro, *Wuskwatim Generation Project Overview*, online: <http://www.hydro.mb.ca/projects/wuskwatim/overview.shtml>. For more information on Import and Export of Electricity in Canada, see Gowling Lafleur Henderson LLP Energy and Infrastructure Group, *The Electricity Industry in Canada* (Toronto: Carswell, 2009) at Chapter 17 "Import and Export of Electricity".

[31] CBC Canada, *Power Deals with Sask. First Nations Sought*, (March 29, 2011) online: <http://www.cbc.ca/news/canada/saskatchewan/story/2011/03/29/sk-power-first-nations-110329.html>. See also Enterprise Saskatchewan, *Saskatchewan Economic News, February 19, 2010*, online: <http://www.enterprisesaskatchewan.ca/enr021910>.

Commercial and Industrial Development Act[32] (FNCIDA) is legislation that came into force in 2006 to address a "regulatory gap" associated with commercial and industrial developments located on-reserve. FNCIDA itself was developed in consultation with five First Nations.[33] On March 1, 2011, FNCIDA was amended by Bill C-24, the *First Nations Certainty of Land Titles Act* to allow commercial developments located on-reserve to circumvent the federal Indian Lands Registry System (ILRS) and instead be registered in a system similar to existing provincial land-title systems. ILRS has been roundly criticized for "lacking the necessary rigour to protect third parties' legal interests in land" and for potentially increasing associated transactional costs to four times those of developments on properties off-reserve.[34] Despite the general inalienable nature of reserve lands, regulations made under Bill C-24's provisions may allow reserve lands to be held in fee simple or otherwise be transferred or surrendered by a First Nation, in certain circumstances.

These changes may be good news for many First Nations, perhaps most significantly for those First Nations that currently hold urban reserve land in larger centres as a result of the Treaty Land Entitlement ("TLE") process. Several First Nations with urban reserves in Saskatchewan have already moved to develop their urban land with a variety of different projects.[35] Other First Nations in other provinces have taken other unique approaches: one of the major advocates of C-24's provisions was the Squamish First Nation, which sought to use its reserve lands to the highest possible value, particularly in respect of a proposed condominium development in West Vancouver.[36]

The flexibility of Bill C-24's provisions may allow TLE First Nations and other First Nations with land in or near major centres to more easily develop the land in new and innovative ways. Infrastructure projects like roads, bridges, Elders' homes, courthouses, and correctional facilities may also follow the so-called "P3" model[37] and become joint projects between First Nations, the Crown and private enterprises in building, owning, and operating particular infrastructure assets. Formation of and investment in a First Nations infrastructure fund to finance or guarantee loans for infrastructure projects may complement this type of capacity development.

CARBON OFFSET PROJECTS

First Nations with access to forest resources either through treaty entitlement or traditional use claims may be able to seize upon a burgeoning new economic development model which produces a revenue stream through the registration and sale of carbon credits. Offset projects which capture carbon are a relatively untapped source of creating revenue. Carbon credits are generated by implementing a program such as the planting of trees, adhering to a forest management regime, or altering agricultural practices to improve soil management. The additional carbon that is captured as a result of the program can be monitored, registered and a value assigned to it. Once certified, carbon credits can then be bought and sold just like any other commodity.

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[32] S.C. 2005, c. 53 ("FNCIDA").

[33] The five First Nations were Squamish Nation of British Columbia; Fort McKay First Nation and Tsuu T'ina Nation of Alberta; Carry the Kettle First Nation of Saskatchewan and Fort William First Nation of Ontario. See Indian and Northern Affairs Canada, *First Nations Commercial and Industrial Development Act*, online: <http://www.ainc-inac.gc.ca/ecd/cid/index-eng.asp>.

[34] Library of Parliament, *Legislative Summary, Bill C-24: First Nations Certainty of Title Act*, online: <http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/40/3/40-3-c24-e.pdf>.

[35] City of Saskatoon, *Urban Reserves and Treaty Land Entitlement*, online: <http://www.saskatoon.ca/DEPARTMENTS/COMMUNITY%20SERVICES/PLANNINGDEVELOPMENT/FUTUREGROWTH/URBANRESERVESANDTREATYLANDENTITLEMENT/Pages/UrbanReservesandTreatyLandEntitlement.aspx>.

[36] Ibid.

[37] Projects adhering to the so-called "P3 Model" are public-private-partnerships that provide a novel risk model by engaging the private sector in building public infrastructure. For more information, see Canadian Council for Public-Private Partnerships, *Definitions*, online: <http://www.pppcouncil.ca/resources/about-ppp/definitions.html>.

In Canada, carbon credits are traded on the voluntary market because at present there is no regulated market for carbon transactions. However, even without a government policy regulating the sale of carbon in Canada, sales of carbon are increasing. Excepting the recent recession in 2009, the aggregate volume and value of the global voluntary carbon credit market has followed a general upward trend over the past decade.[38] Figures from 2007, 2008, and 2009 have estimated the value of the voluntary carbon market at $263 million, $419 million, and $338 million, respectively.[39]

Voluntary markets for the purchase of carbon credits are generally fuelled by private industry in an attempt to offset their own carbon emissions. There may also be some incentives to increase corporate responsibility and adopt practices to comply with future regulations. With these types of incentives and a worldwide upward trend in the sale of carbon, First Nations may consider a carbon offset project in their future economic development plans.

Before implementing a carbon offset project there are a number of issues that should be considered and assessed by First Nations. There is still considerable debate in Canada on whether carbon strategies will ever be regulated. Included in this debate is whether government will enact a carbon tax or a cap-and-trade system. Recently, Sustainable Prosperity, an environmental research group, drafted a report on the negative economic effects implementing a carbon tax would have on First Nation communities, specifically northern communities.[40]

Adding to the uncertainty surrounding the regulation of carbon offset projects are the initial start up costs of certification. Most offset projects will require third party verification and monitoring in order to become certified for sale. This has the potential to increase the overall costs of the project. One option to consider when negotiating a deal for the sale of carbon credits is to off load the development costs to the purchaser. Additional value for First Nation carbon credits may also be sought on the basis of the actual benefits assisting the local community and strengthening overall biodiversity of a region.

A final hurdle in assessing an offset project may be to determine whether or not First Nations have an ownership interest in the carbon credits generated. Currently, First Nations are proceeding under the guise that carbon credits generated on reserve land are the property of the First Nation and therefore revenues generated from the sale of those credits belong to the band. However, it should be noted that ownership of carbon offsets generated on reserve or on traditional territory has not been the subject of any major litigation. There are interim measures which can be taken by First Nations in order to provide some certainty as to the ownership of this new resource. One example of this is the carbon credit revenue sharing agreement incorporated within the Kunst'aa Guu-Kunst'aayah Reconciliation Protocol by the Haida and the province of British Columbia.[41]

While questions remain relating to the viability of the global carbon market, there is still an opportunity for First Nations to position themselves as a developer of the carbon resource. Ironically, First Nations may benefit economically by certifying forest management regimes on their land that have already been practised for generations. Not only could this provide direct economic benefit to a particular community, it could allow First Nations to export their expertise to other offset project.

CONCLUSION

Potentially lucrative opportunities await ambitious Aboriginal communities in Canada who can

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[38] World Bank, *State and Trends of the Carbon Market, 2010*, at p. 37 online: <http://siteresources.worldbank.org/INTCARBONFINANCE/Resources/State_and_Trends_of_the_Carbon_Market_2010_low_res.pdf>. See also World Bank, *State and Trends of the Carbon Market, 2009*, at p. 1. online: <http://siteresources.worldbank.org/EXTCARBONFINANCE/Resources/State_and_Trends_of_the_Carbon_Market_2009-FINALb.pdf>.

[39] Ibid.

[40] Sustainable Prosperity, Carbon Pricing and Fairness, July 2011 online at <http://www.sustainableprosperity.ca/article1626>.

[41] Kunst'aa Guu-Kunst'aayah Reconciliation Protocol. online: <http://www.newrelationship.gov.bc.ca/shared/downloads/haida_reconciliation_protocol.pdf>.

access sources of substantial revenue, debt or equity-based financing. In one sense, Indigenous law supports investment models, whether as private equity, sovereign wealth-like funds, or by making other direct investments in specific projects. One important factor in determining the risk and return profile of Aboriginal investment is considering the source of the funds that a community seeks to invest and what that source represents to the sustainability of the community. As mentioned above, the source of the funds may be lucrative annual gaming profits that may be invested aggressively, or the funds may represent a community's lost land that demands a more moderate approach in order to support the community well into the future.

Our hope is that Indigenous legal concepts continue to evolve in the present and continue, at least in part, to guide communities in how they sustainably plan their affairs. Indigenous notions of self-reliance and sustainability are not so unfamiliar to Canadians that they ought to be considered incompatible with Canadian sovereignty. Whether or not such laws and law-making powers have been taken away by legal or technical means is one question, but perhaps the proper focus ought to be on the unique rights of Aboriginal peoples and the distinct economic development opportunities available to communities seeking their own solutions to achieve self-reliance and sustainability. Arguably, many communities would be in much different circumstances today if they had been considered or consulted with by the Crown on legislation or other matters relating to sustainable planning. As discussed in the CPP example above, history appears to show otherwise. Unfortunately, from an Indigenous perspective, existing Canadian legislative regimes may be inadequate to meet the goals of traditional Indigenous self-sustainability and planning.

In many cases, a co-operative approach between the Crown and Aboriginal communities will likely be necessary to achieve the traditional sustainable planning goals of Indigenous people. The Crown, to its credit and for mutual benefit, is offering greater opportunities for Aboriginal communities to develop modern projects relating to energy, commercial land development, and potentially carbon credits. Capital held by communities should be protected, but also remain available for investments that build community economic capacity in ways that acknowledge and remain true to Indigenous legal principles.