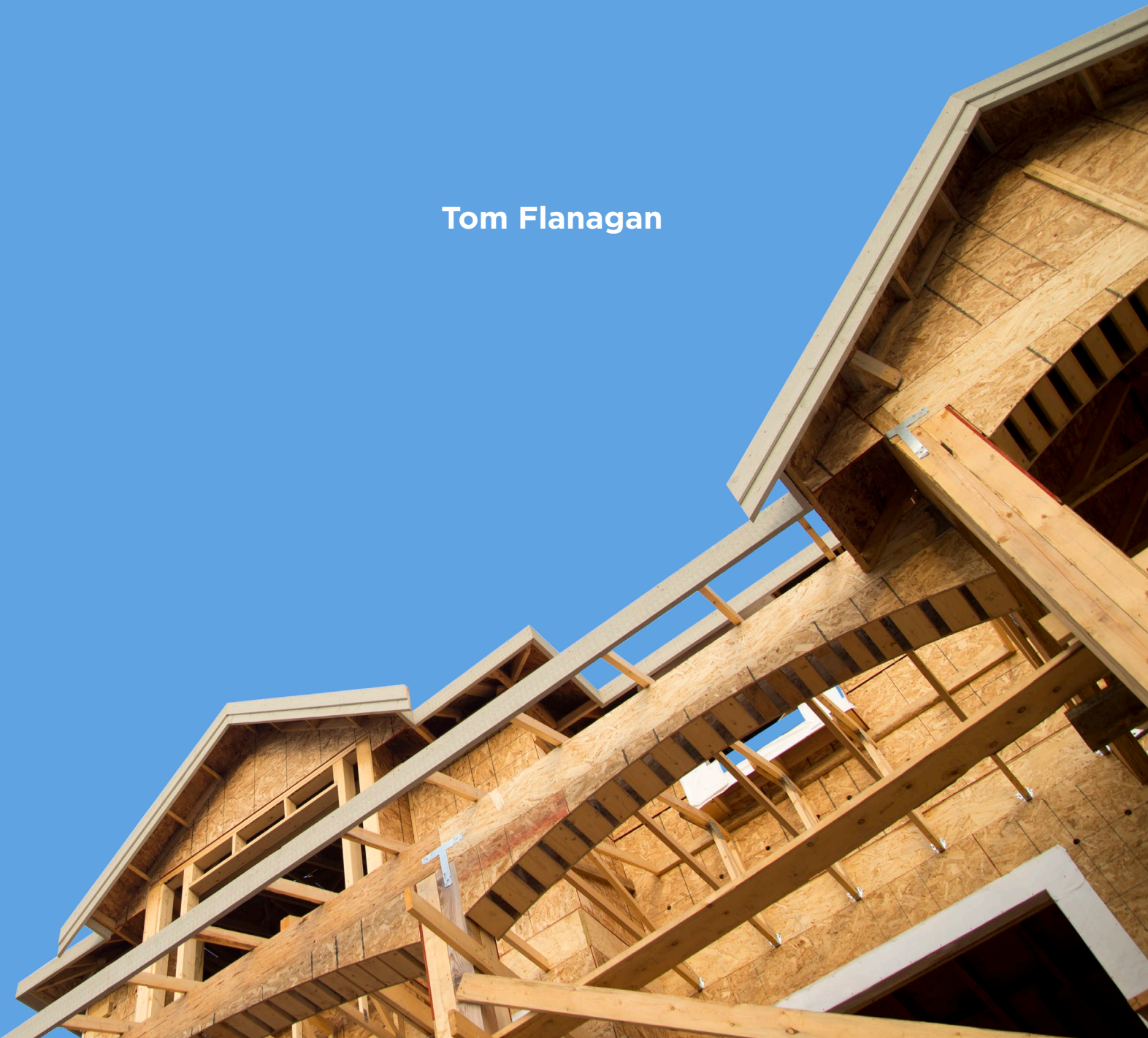


PROPERTY RIGHTS AND PROSPERITY

A Case Study of Westbank First Nation

Tom Flanagan



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by Tom Flanagan

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Executive summary

First Nations people living on Indian reserves are the most disadvantaged segment of Canada's Indigenous population. Yet the situation is not all bleak because some First Nations are finding a path toward prosperity. Scholars, like journalists, often focus on bad news, but we should also study the good news to see what can be learned from successful First Nations. Westbank First Nation, located in British Columbia on the west side of Okanagan Lake opposite Kelowna, is a highly successful First Nation, and its achievements offer important lessons to other First Nations as well as to Canadian policy makers.

Westbank First Nation (WFN) has combined individual property rights, in the form of certificates of possession (CPs), with a system of government enabling these rights to become useful in the economy. The lesson is that neither property rights nor government can succeed on their own, but the two together can become a powerful engine of wealth creation. To be most effective, property rights must be supported by a government that defines and records these rights, enforces them impartially under the rule of law, and supports owners with services and utilities such as roadways, police and fire protection, water and sewerage, and other amenities required to make property development attractive.

WFN's success is a story of incremental learning. As reserve land started to acquire potential economic value in the 1960s, members obtained CPs and used them to grant leases for trailer parks. The WFN government also created a housing estate from community land. But governmental institutions were weak, and economic development led to internal conflict, with many charges of secrecy and favouritism. The Hall Commission, appointed in 1986, set WFN on the path of governmental reform. The end result was a self-government agreement with Canada enacted by federal legislation in 2005.

WFN's constitution has made its government open and accountable, with positive effects upon the real-estate market. The total assessed value of WFN lands (Indian Reserves 9 and 10 within the city of West Kelowna) rose more than 600% after inflation from 2005 to 2019. Most of that value has been created by holders of CPs (now known as allotments) leasing their lands for residential development, while the WFN government has also leased community land for commercial projects such as shopping centres. Leases are typically for 99 years or even longer, giving lessees something close to the certainty of fee-simple ownership. Tenants who are not WFN members do not have the right to vote for Chief and Council, but they are consulted through a residents' advisory council that they do elect. Property taxes are assessed according

to British Columbia standards in consultation with the First Nations Tax Commission. Thus tenants are not subjected to the sudden and arbitrary tax increases that have sometimes occurred on First Nation lands elsewhere.

The WFN government has also engaged in other business investments, with varying degrees of success. Although some have prospered, there were two notable setbacks: investment in the Northland Bank, which went bankrupt in 1985; and the costly failure of a proposal to build a medical clinic, which led to the defeat of the incumbent chief in 2016. Learning from experience, WFN has reorganized its business ventures to take investment decisions away from Chief and Council and place them in the hands of a more independent board—a step towards best practice for government-owned enterprises.

It is sometimes mistakenly asserted that First Nations are inherently collectivist and have no conception of private property. The history of Westbank First Nation shows otherwise. The members of WFN have embraced private property in the forms of allotments (CPs) and supporting mechanisms such as leases, mortgages, contracts, and property tax. The result is a thriving real-estate economy that provides benefits both for WFN members and the far more numerous non-members who now live on WFN lands. It is a win-win situation, in which First Nation prosperity through economic participation also benefits the larger society.

First Nations people living on Indian reserves are the most disadvantaged segment of Canada's Indigenous population (Flanagan, 2019: 4–5). Yet the situation is not all bleak because some First Nations are finding a path toward prosperity. Scholars, like journalists, often focus on bad news, but we should also study the good news to see what can be learned from successful First Nations.

Westbank First Nation (WFN), located on the west side of Okanagan Lake opposite Kelowna, is a highly successful First Nation, and its achievements offer important lessons to other First Nations as well as to Canadian policy makers. WFN has combined individual property rights, in the form of certificates of possession, with a system of government enabling these rights to become useful in the economy. The lesson is that neither property rights nor government can succeed on their own, but the two together can become a powerful engine of wealth creation. To be most effective, property rights must be supported by a government that defines and records these rights, enforces them impartially under the rule of law, and supports owners with services and utilities such as roadways, police and fire protection, water and sewerage, and other amenities required to make property development attractive.

Certificates of Possession

When Canada embarked on its 19th-century policy of setting aside land reserves for Indians, as they were then called (and are still today under the *Indian Act*), little attention was paid to their pre-existing property rights. They were confined to reserves owned by the Crown, as stated in s.91(24) of the *Constitution Act, 1867* and on which private ownership of land would not be allowed. It was almost like Karl Marx's "primitive communism," enacted as if Indigenous people had never possessed farms, trap lines, fishing stations, sugar bushes, and berry patches (Flanagan, Alcantara, and Le Dressay, 2010: 30-41). The one exception to this collectivist regime was the "location ticket," which was thought to be a path to enfranchisement and assimilation. Indians could get a piece of land on reserve, which they could take with them when they became enfranchised. This was consistent with the 19th-century understanding of reserves as temporary places of refuge where Indians could become civilized before receiving civil and political rights.

Parliament modernized the *Indian Act* in 1951, understanding that First Nations people were here to stay and that residence on Indian reserves would be more or less permanent and not a stepping stone to enfranchisement and assimilation. At that time, location tickets were converted into "certificates of possession" (CPs) (*Indian Act*, s.20(3)), which are now the main form of individual property in land on Indian reserves. About half of Canada's 618 First Nations employ CPs to some degree. More than 140,000 CPs have been issued, covering about 4% of total land on reserves (Aragón and Kessler, 2017: 7). They are common in the southern parts of British Columbia, Ontario, Quebec, and Atlantic Canada, where land is valuable because of urbanization or agricultural potential, but rare in the three Prairie Provinces and the northern parts of all provinces.

CPs resemble ownership in fee simple in some respects: they are permanent, they confer the right to use the land and to exclude others, and they can be enforced in Canadian courts. In one respect they are even superior to fee simple; they cannot be seized by creditors for non-payment of debt (s.29). That, however, is a double-edged sword, as it means they cannot be used as security for loans.

CPs also have serious limitations in comparison to fee simple. To be obtained, their issue must be approved by both Chief and Council and the Minister (s.20(1)), which introduces elements of delay and uncertainty. They can be leased, but only with the approval of the Minister (not the Band Council) (s.58(3)). They can be transferred by sale, gift, or inheritance, but only to other members of the same band (s.24), which undercuts the possibility of a real-estate market on reserve. Band members may want to own CPs in order to leave a house or farm to their heirs, but they cannot build equity like other Canadians by investing in housing and real estate.

The lease of CPs provides a path to overcome some of their legal limitations. Leases can be seized by lenders, so mortgages become possible. And leases can be transferred outside the limits of band membership, creating a basis for real-estate markets on reserve. By their nature, leases confer temporary possession rather than true ownership; but the longer the term of the lease, the more it resembles fee simple. Leases can also be written with provisions that reduce the uncertainty surrounding renewal, again making them more like fee simple. Such provisions might include arbitration procedures as well as way stations for periodic review of the ground rent, to avoid an unmanageable increase at the lease's expiry date.

Previous research on CPs has established that their use is statistically associated with higher levels of the Community Well-Being Index (CWB) (INAC, 2015) for First Nations people living on Indian reserves. The association is strongest in relation to the housing component of the CWB (Aragon and Kessler, 2017: 12–13; Flanagan, 2019: 32). That connection is logical because in practice CPs are most often used to secure possession of land for housing on reserve, and that security leads to higher levels of owner investment in construction and upkeep. However, more research needs to be done on whether and how CPs can be used to produce not just better housing but a generally higher standard of living on reserve.

Westbank First Nation (WFN) provides an important test case of the proposition that the use of CPs can lead to higher levels of prosperity. The combination of CPs with leases has driven WFN's remarkable economic growth over the last half century, particularly since the achievement of full self-government in 2005. The use of CPs is not the whole story, because the WFN government also leases community property for economic advantage, but it is the main story.

The WFN case study makes an interesting comparison with earlier research on the Fort McKay First Nation, which makes no use at all of CPs (Flanagan, 2019: 57–73). In the Fort McKay case, Chief and Council took the lead in organizing band-owned enterprises to sell services to oil sands companies. Because of location in the heart of the oil sands and the companies' demand for services, this proved to be a highly successful development strategy. At WFN, in contrast, the main function of Chief and Council has been to provide physical infrastructure and set up a legal framework within which development of CP land could profitably occur. The push from profit-seeking individuals made the WFN economy grow with remarkable alacrity. The function of government was crucial in both cases, but in different ways, emphasizing collective entrepreneurship at Fort McKay and creation of a framework for individual entrepreneurship at WFN. In fact, there is also individual entrepreneurship at Fort McKay and government-led collective entrepreneurship at WFN, but the relative proportions are different.

Methodology

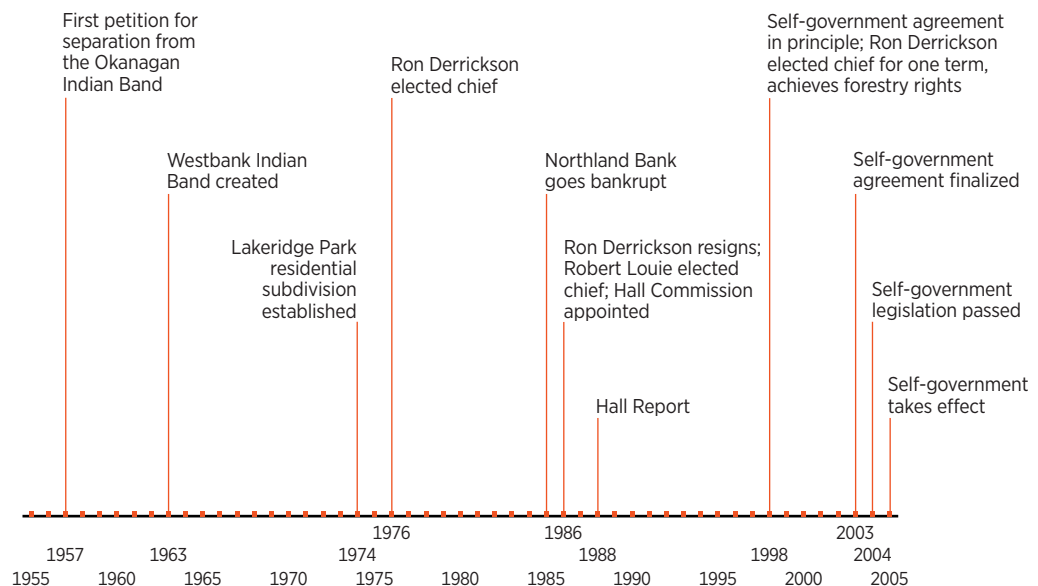
The first phase of the research involved reading what is available in print and online about WFN. A great deal can be learned this way because of the abundant information posted on the WFN's website (<https://www.wfn.ca>). I then visited WFN for three days in April 2019 for interviews with about 15 informants: senior staff members, consultants, and the non-members Advisory Council. I was graciously received, and all informants were frank and forthcoming in conversation; but I could not obtain certain types of quantitative information regarding CP holdings, budget revenues and expenditures, and balance sheets of the corporations owned by WFN. Because of that, some of my conclusions in these areas are qualitative in nature, based on interview sources rather than precise statistical information. As in the case study of the Fort McKay First Nation, I have not identified staff members by name.¹ I did not ask to interview the incumbent Chief and Councillors because an election campaign was scheduled to begin in summer 2019 and, like all elected people considering running for re-election, they have to be careful about what they say.

1. I have identified Tim Raybould because, though he was at one time a WFN employee, he has been an external consultant for many years and has published about WFN.

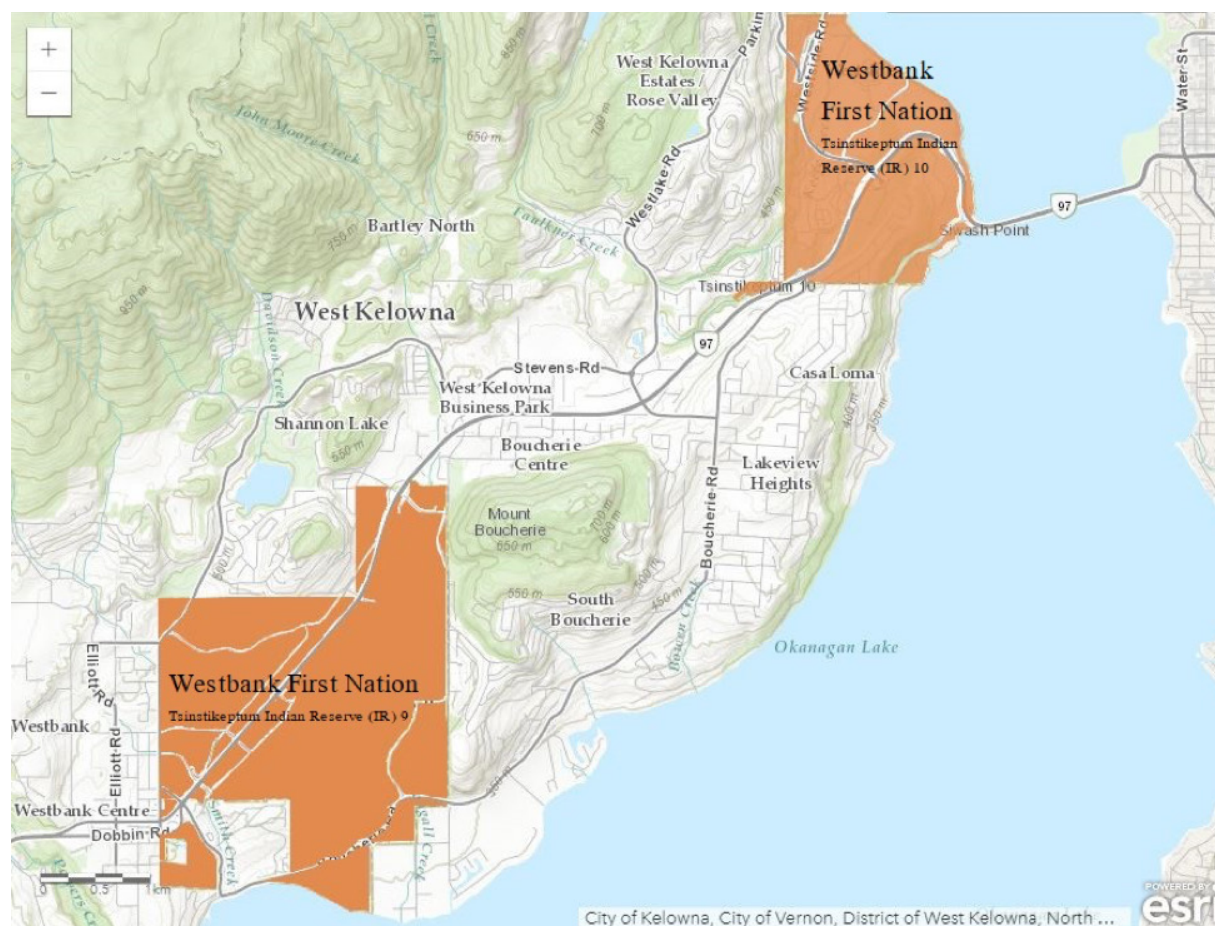
History

The Westbank experience is a story of incremental learning through doing. **Figure 1** is a timeline showing landmark events in the 50-year period from 1955 to 2005, when WFN achieved self-government. The people of WFN are part of the extended Okanagan Nation, whose traditional territory ranges from Spokane in the south to the northern end of Okanagan Lake, near contemporary Vernon, and from the Columbia River watershed in the east to about Merritt in the west. **Map 1** shows the location of the major WFN land reserves—IR 9 and IR 10 on the west side of Okanagan Lake. These are the only reserves inhabited at the present time and that is where all the land development has taken place. These reserves are now an integral part of the city of West Kelowna.

Figure 1: Westbank First Nation, timeline 1955–2005



Other reserves have been acquired in more recent years with cash from various land surrender and cut-off settlements, and there are also some small parcels that have been purchased but are awaiting ATR (“addition to reserve”) orders-in-council from the federal cabinet (McDonald, 2016, May 31). These lands are largely uninhabited now, but some or all may be developed eventually. They may be considered an investment in the future, though only time will tell whether investing in land is more profitable than setting up a trust fund to hold financial instruments. Of course, First Nations find a spiritual and emotional significance in land ownership that is beyond financial calculation.

Map 1: Main WFN land reserves on west side of Okanagan Lake

Source: Mandi Carroll, Manager of Economic Development and Communications, Westbank First Nation, via e-mail to author, June 10, 2019.

Initially the Westbank people were part of the Okanagan Indian Band, whose agency was at Vernon. As early as 1957, they petitioned Indian Affairs to become a separate band. They felt that Vernon was too remote and that, with only one member on the Okanagan Indian Band Council, their interests were not being looked after. Awareness of the potential value of land was also a factor (Hall, 1988: 7–8). The floating bridge over the lake installed at Kelowna in 1956 promised to bring more people to the west side for tourism and retirement, thus increasing the value of real estate. Opening of the Trans-Canada Highway in 1962, making it easier for Albertans to drive to the Okanagan Valley, was another sign that the Westbank Indian Band reserves could become valuable.

Separation was completed in 1963, and the first government was elected in 1964 for a two-year term. There were about 170 members of WFN when it was created (WFN, 2019a). The first Chief was Norman Lindley and the first two councillors were Harry and Margaret Derrickson, parents of Ron Derrickson, who would play such a prominent part subsequently as Chief and successful businessman (WFN, 2019e).

Once the Westbank Government was achieved, those interested in real-estate development began to acquire CPs. Initially this was a matter of applying to Chief and Council and getting approval from the Minister for land previously used for housing, ranching, and farming. The financially more farsighted also purchased CPs from members who felt they had more land than they needed or perhaps did not understand its significance (Raybould, 1993: 140–141). Land development in these early years was limited by lack of water infrastructure and was mainly confined to mobile-home parks that could be located on the lakeshore or near streams for water supply. Typically, the owner of the CP would sell a head lease to an external partner who would act as the operator, granting subleases on developed sites to tenants owning their own mobile homes (Hall, 1998: 171–172). Today they seem like low-value projects to be located on ultra-valuable lakefront property, but they were a way to get development started at the time.

In 1974, members voted to surrender land for leasing to establish Lakeridge Park, a subdivision of high-priced homes overlooking the lake (WFN, 2019a). The land was not part of a CP; it was community land, or “band land,” as it would have been called then. Under the *Indian Act*, leasing of band land required a referendum to surrender the land to the federal government, which then acted as the leasing agent (s.53). This was the first major foray of the Westbank government into the business world on behalf of the entire community, as opposed to facilitating the private development of CPs. The development was to be conducted by the Westbank Indian Band Development Company, whose directors were appointed by Chief and Council (Hall, 1988: 16).

The pace of development quickened after 1976, when Ron Derrickson was elected Chief. He proved to be ambitious, aggressive, and not too worried about fine points of procedure. External developments also helped to give Chief Derrickson more latitude. The Department of Indian Affairs at the time was trying to implement a policy of self-government for Indian bands, not yet called First Nations. In 1974 the Department also closed the Indian Agency in Vernon, leaving the closest office in Vancouver. And WFN also got greater control over its reserves through ss. 53 and 60 of the *Indian Act*, which allow the Minister to delegate management of reserve lands, including surrendered and designated lands. Amid the ongoing reorganization, it was sometimes unclear who should approve initiatives of Chief and Council, or indeed whether departmental approval was even required (Hall, 1998: 227–283).

An important initiative in these years was the establishment in 1981 of an area in IR 9 for band-owned housing for members. Eighty-four units were completed by 1986 (WFN, 2019a). This was at least in part a response to political pressure from those members who did not own land or houses and had begun to worry about where they would live. The original homes may have been modest, but WFN, like many other First Nations, has an ongoing program of modernization and replacement (WFN, 2019c).

This area is now called the “Community Core” and has also become the location for a seniors’ home, recreational facilities, school, youth centre, school, and offices providing health and wellness services.

In spite of the housing initiative, Chief Derrickson’s activist approach and perceived lack of accountability caused complaints about secrecy and conflict of interest to multiply. Some members thought Chief and Council were awarding CPs with little or no payment to politically connected insiders, including themselves. Some owners of CPs with trailer parks complained that their access to roads and water was being manipulated. Some mobile-home park operators alleged that rule changes were affecting the value of their investments.

Matters came to a head when Chief and Council decided in fall 1983 to buy stock in Northland Bank, where they had already deposited much of the band’s money and in which Chief Derrickson was a personal shareholder. Northland went bankrupt two years later, and WFN ended up losing over \$1 million (Hall, 1988: 143). The grievances culminating in the Northland fiasco led a group of dissident members to petition Indian Affairs to remove Chief and Council and appoint a commission of inquiry. The commission was appointed on August 12, 1986, and reported in April 1988 (Hall, 1988: iii). It did not find that Chief Derrickson and the councillors had committed legal offences, but it did point out many instances of secrecy and possible conflict of interest. Meanwhile, Chief Derrickson resigned and the young lawyer Robert Louie, whom Derrickson had defeated twice previously, won the election for Chief in summer 1986.

Chief Louie’s election proved to be a major turning point in WFN history. He went on to serve as Chief from 1986 to 1996, and again from 2002 to 2016, while Derrickson would have only one more short term as Chief, 1998–2000. Chief Louie represented a philosophical change of direction, seemingly desired by most members, away from personalized, activist leadership and toward formal structure and process. The Hall Commission had made various recommendations for self-government, including less secrecy, more accountability to members, and a better legal framework for CPs (Hall, 1988). While not implemented in exact detail, Hall’s recommendations pointed out the direction that WFN would travel.

Once the new Council was elected, WFN started assembling the ingredients of meaningful self-government. The first step was to get back the limited powers of land management available under ss. 53 and 60 of the *Indian Act* that had been taken away during the turmoil of the petition and the Hall investigation. After the “Kamloops Amendment” of 1988 (*Indian Act*, s.83(1)), WFN obtained the power to levy property taxes on leaseholds. The amount of revenue was not large at first—\$750,000 in 1990 (FNTPC, 2017)—but it has grown to be WFN’s biggest and most reliable funding source. In 1990s, WFN together with other First Nations asked the federal government to create what eventually became the First Nations Land Management Agreement (Flanagan, Alcantara, and Le Dressay, 2010: 108). WFN participated for a few years

but eventually moved to even greater local control through its self-government agreement.² In the same time period, WFN also secured its water supply for IR 9 and IR 10 by installing intakes far out in Okanagan Lake. Without water, large-scale development would never have been possible.

Progress towards self-government took time, working through the multi-stage Community Based Self-Government process established by the Mulroney government (Raybould, 1993: 97–100). The Assembly of First Nations condemned the process for not recognizing Aboriginal sovereignty, but WFN took a pragmatic decision to get what it could by moving ahead. A Self-Government Agreement in Principle was signed in 1998, the full agreement was signed in 2003 (WFN, 2003), and it was legislated by Parliament in 2004 and came into effect in 2005 (Vogl, 2013: 113; Alcantara, Spicer, and Leone, 2012). Political scientist Tim Raybould, who was an employee of, or consultant to, WFN during this period says progress was slow because the federal government was often unclear about what it was trying to achieve (Raybould, 2019). On the other hand, WFN had to hold three referendums before finally obtaining majority membership approval for the agreement (WFN, 2019a). All self-government agreements in Canada have taken a long time to negotiate and implement (INAC, 2013), and in the broad scheme of things, the WFN process was not particularly slow moving.

All informants agree that WFN members were deeply involved in developing their model of self-government. They speak of hundreds of meetings of membership committees in which the details were hammered out. Outside experts such as Dr. Raybould and lawyers were used to arrive at legal language, but the result was truly a community product. After perceptions of secrecy and conflict of interest in earlier years, community members insisted on publication and participation.

2. WFN, 2003. Ratified by members 2003, came into effect 2005.

Constitution and Laws

The WFN Constitution that resulted from the self-government negotiations is 99 pages long. It is long because it contains material that for non-self-governing First Nations might be found in by-laws and an administrative manual. But after so much turmoil, the WFN membership wanted legal certainty. WFN members and staff see the Constitution as the source of the remarkable economic growth they have enjoyed since its adoption in 2005 and speak of it with pride. They have a similar attitude to the laws passed pursuant to the Constitution, which they stress should be referred to as “laws,” in recognition of WFN’s self-governing status, rather than the “by-laws” authorized by the *Indian Act*.

The Constitution is a blend of representative and direct democracy designed to prevent the arbitrary exercise of authority. Decision-making processes are laid down in great detail. Publication of information and notification of meetings is required at every stage to ensure that members know what Chief and Council and staff are doing.

Chief and Council are chosen every three years in fixed-date elections presided over by an Electoral Officer selected by Council more than 90 days in advance. An Arbitrator to handle appeals is also chosen at the same time (WFN, 2016: ss.21–23, 26). Upon receiving a petition signed by at least 20% of electors, the Arbitrator can remove a Chief or Councillor from office for violating the Constitution or oath of office (WFN, 2016: s.42). Payment was initially set at \$100,000 a year for the Chief and \$60,000 for Councillors, both to be adjusted annually for inflation (WFN, 2008). Though not extremely high, this is a bit higher than average for First Nations (Flanagan, 2019: 23), perhaps understandably so in view of the scope and complexity of WFN operations.

Laws are drafted by Council but, before final passage, they must be approved at so-called “second reading” in a special meeting of membership (WFN, 2016: s.62). Laws to impose taxes or to amend the Constitution must be approved in a formal referendum (WFN, 2016: ss.60.7, 134.9), and other proposed laws can also be put to referendum by petition. Council is in charge of financial matters, but there must be discussion of the Financial Plan and the Provisional Budget at separate membership meetings before the final budget is adopted (WFN, 2016: ss.76.6, 80.6). Any deficit in the budget must be approved by a vote at the membership meeting (WFN, 2016: ss.80.11).

The Constitution involves traditional representative democracy (election of Chief and Council) as well as something like an independent judiciary in the person of the Arbitrator. It also incorporates the direct democratic practices of town-hall meetings, initiative and petition, referendum, and recall, as well as contemporary proposals for governmental reform—fixed election dates, balanced budget provisions, and open

government. The Constitution confers enough power on elected officials and staff to ensure efficient operation, while balancing mechanisms prevent the arbitrary exercise of authority; and publication ensures that members can remain informed.

Importantly, the aggregate of institutions promotes the consensus style of decision-making that is traditional for many Indigenous peoples and for the Okanagan Nation in particular. Research conducted by the Harvard Project has suggested that governmental institutions work best when they are consistent with tribal traditions (Cornell, 2015). In this instance, the framers of the WFN Constitution adopted formal institutions from the Western history of governance but arranged them to promote consensus decision-making consistent with their own cultural traditions.

The Constitution also sets forth a detailed scheme for land management, necessary because self-government meant that the Minister would no longer have a supervisory role. It covers CPs (now called allotments); leases and subleases of both allotments and community lands; other interests in land such as easements, licenses, and permits; mortgages; transfers of allotments and other interests; and expropriation with compensation (WFN, 2016: ss.98–120). One notable innovation was establishment of a Westbank Lands Registry to record all interests in land, including those not previously accommodated by the Indian Land Registry in Ottawa (WFN, 2016: s.111). It is considered a sub-registry of the one maintained in Ottawa.

The first law passed after the Constitution came into effect set up the non-members' Advisory Council as required by the Self-Government Agreement (WFN, 2017). The Advisory Council consists of five non-WFN-members elected by WFN's non-member resident population. It does not have a veto or other decision-making authority, but it has a right to be consulted on any proposed laws that would affect non-member residents. In particular, it has a right to be consulted about the annual Property Tax Budget (also called Local Services Budget), which balances property tax revenues against expenditures on community services enjoyed by non-member residents, who thus receive assurance that their taxes are being spent to their own benefit (WFN, 2017: ss.5.1[b], [c]). Discussions between the WFN Council and the Advisory Council result in the setting of the annual mill rate and thus the tax levy.

Twenty-two other laws were enacted on April 1, 2005 (Self-Government Day), including the Allotment Law. The general approach was that any new allotments would have to be approved at a Special Membership Meeting (WFN, 2006: s.5.2), except housing allotments, which would be under the control of a five-member Allotment Commission appointed for three-year terms by resolution of Council (WFN, 2006: ss.13–28). Originally, certificates of possession had to be approved by the Minister upon the recommendation of Chief and Council, but the Hall Commission found that at certain times CPs were being granted locally without recourse to the Minister. By setting up the Allotment Commission and requiring Special Membership Meetings, the new law erected barriers against cronyism and conflicts of interest.

The Real-Estate Market

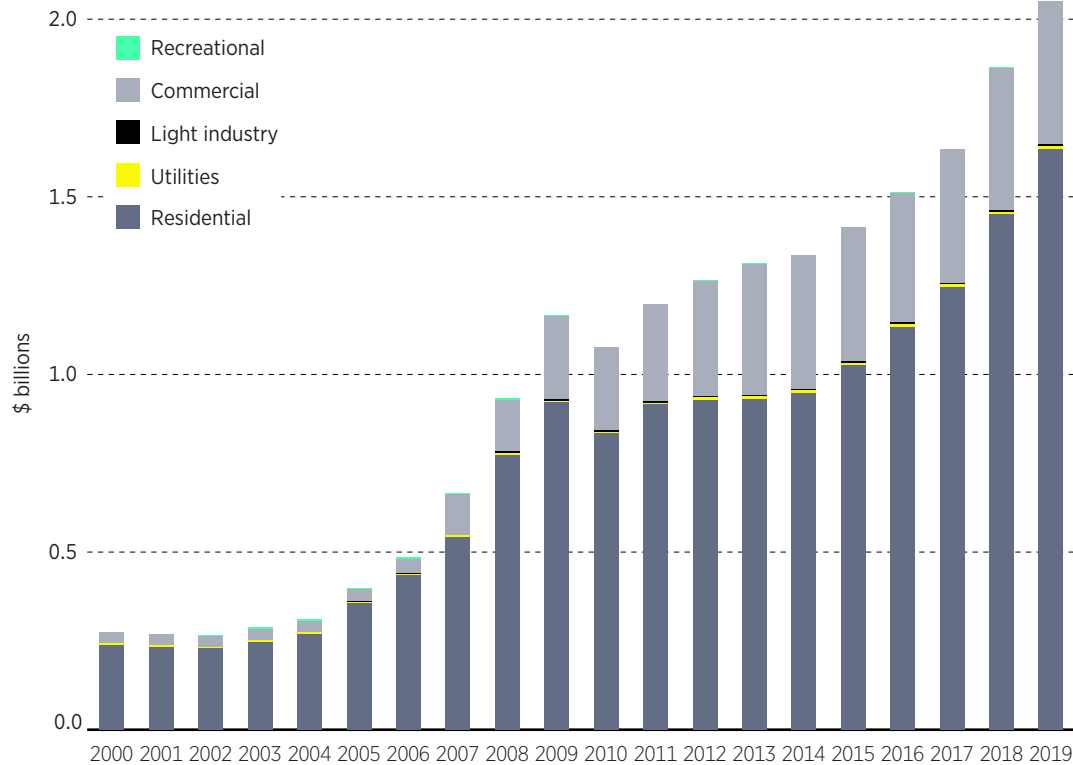
Adoption of the Constitution and these two laws cemented in place a dramatic improvement in property rights. Under the new legal regime, all allotments and other interests in land would be methodically recorded in a registry open to the public. The allotment process would be carried out in public under constitutional rules. Property rights would be enforced by impartial authorities. Well-placed insiders would not be able to grab valuable land or to manipulate utility services and land-development rules to enhance the value of their own allotments. And keeping all decision-making in WFN rather than in Ottawa promised to cut delay and reduce transaction costs.

The new regime gave confidence to all interested parties—WFN members, non-member residents, and business investors—that their interests would be treated fairly. With the legal environment secured and physical infrastructure in place, the stage was set for remarkable growth in the WFN real estate market. **Figure 2** tells the story of how activity surged forward after adoption of the Constitution.

The coming-into-effect of self-government was almost a natural experiment designed to test the impact of institutional change upon economic activity. The result was nothing short of dramatic. The figure shows that activity started to creep up after the self-government agreement was negotiated in 2003, then jumped ahead after legislative entrenchment in 2005. Of course, the whole city of West Kelowna was growing rapidly at the same time; so another way of describing the results would be to say that the new WFN self-government regime allowed it to participate in surrounding economic trends.

The total of assessed values on WFN land rose more than 600% from 2005 to 2019. Only 24 percentage points of this increase can be attributed to general price inflation (CPI Inflation Calculator, 2019); the rest came from new construction and rising real estate values. As the figure shows, the increase was mainly in residential housing, but there was also an increase in commercial assessments as stores and business were opened to serve the growing population. There is still much undeveloped land on IR 9 and IR 10, so the real-estate market should thrive for the foreseeable future. In the longer term, WFN may also develop some of the land that it has purchased with proceeds from land claims settlements and highway surrenders.

Based on allotments and leases, the WFN real-estate market functions much like the larger Canadian real-estate market based on fee-simple ownership. Leases can be sold, gifted, inherited, and mortgaged without legal impediment. And it is not just big developers who can get mortgages to finance their projects. The Constitution makes it possible for individual allotment holders to obtain housing mortgages through a

Figure 2: Property assessment by class, Westbank First Nation, 2000–2019

Source: Mandi Carroll, Manager of Economic Development and Communications, Westbank First Nation, via e-mail to author, June 10, 2019.

legal device known as an “A to A” lease (WFN, 2010: s.106.1.1). An allotment holder who wants to build a new home or improve an existing one can grant himself a lease, which can then be mortgaged to a lender. If the owner does not keep up the payments, the lender can seize the house and lease, and sell or re-lease them to cover the debt (WFN, 2010: s.107.2.1). In the outside world, the lender would also get ownership of the land, but that is not possible with an allotment, which remains in the possession of the holder. But this distinction does not make much practical difference as long as the lease and house can be seized and sold.

Of course, there remains a difference between a leased allotment and fee-simple ownership because fee-simple titles last forever unless expropriated by the state, whereas leases are temporary by nature. The anticipated expiry of the lease inevitably introduces some level of discount into the value of the lease, and that discount tends to rise as the termination date approaches. However, measures can be taken to ameliorate the effect of expiry. Longer-term leases have greater present value than those that are shorter term, and most leases on WFN territory are for 99 years or even longer. Also, leases can be written to include procedures for renewal and way stations for review that will reduce a purchaser’s anxiety. Indeed, WFN’s corporate entity, Ntityix Development Corporation, is now examining the original Lakeridge Park leases

to see if they can be improved (Ntityix Development Corporation, 2019). The WFN government is aware that its long-term interest lies in promoting legal certainty and stability. However, individual allotment holders pursue their own strategies regarding termination and renewal, so problems in the private sector could arise some decades down the road as existing long-term leases come closer to their expiry date.

No one seems to have conducted an econometric study of the value of lease land located in the WFN reserves compared to the value of fee-simple land in surrounding West Kelowna. In the absence of hard data, I solicited opinions from members of the Advisory Council and other informed observers. Respondents generally suggested discounts in the range of 20%–25%, though some thought the discount might be lower in specific cases. One very well-informed observer thought that commercial developers might even be willing to pay a premium for WFN land because the regulatory process is simpler. Because WFN land is not subject to British Columbia legislation and the Canadian government has ceded control through the *Self-Government Act* (Gov't of Canada, 2013), the WFN is the only legal authority on issues such as zoning, environmental controls, and archeological sites. Developers thus face less chance of being whipsawed between multiple levels of government.

In its decision in *Musqueam v. Glass* ([2000] 2 SCR 663), the Supreme Court of Canada held that land on the Musqueam Reserve in Vancouver was worth only 50% of comparable land in the city, but also noted that the applicable discount would depend on the facts of the specific situation.³ Litigation over the issue continues in various First Nations (Appraisal Institute of Canada, 2017), but WFN has achieved a better result by avoiding litigation, creating a stable legal environment with open government, and crafting long-term leases with protection for tenants' interests. Whatever the precise discount on WFN lands may be, it is much less than the 50% baseline that the courts established in the *Glass* case, showing how intelligent governance can enhance the value of property rights.

The development of WFN lands has obviously benefitted leaseholders by providing them with attractive places to live at a lower cost than they might encounter at similar locations in the region. There is also arguably a benefit to the wider public. It has been estimated that the Gross Domestic Product on Westbank lands was over \$800 million in 2014, while federal and provincial governments collected over \$100 million in taxes from businesses and residents on these lands in the same year (Fiscal Realities, 2015). Prosperity and market transactions have spillovers that ramify in many directions.

3. *Musqueam Indian Band v. Glass*, [2000] 2 SCR 633.

Budgets

As described in the Constitution, there is only one WFN Government, but it governs and provides services to two communities: the approximately 10,000 non-members who live on leased land in IR 9 and IR 10; and the 850-plus WFN members, of whom about 60% live on the two reserves. Of those who do not live on the reserves, many live nearby and may benefit from WFN member services in areas such health, education, and recreation. Only WFN members, both off and on reserve, can vote to elect the Government, but non-member residents' voices are heard through the Advisory Council, which they vote to elect. It is a complex structure, to be sure, but there is no obvious sign at the moment of major unhappiness with it among either members or non-members.

Property Tax Budget

The WFN Government publishes two annual budgets. The Property Tax Budget highlights the interest of non-member residents by balancing municipal services against property taxes. **Table 1** is the Property Tax Budget for 2018/19. Property tax revenue is not a form of profit for WFN because it is offset by the expenses of running what is effectively a small town—streets, utilities, police protection, administration, and so on. In compiling the budget and striking the annual mill rate, WFN officials work closely with the non-member residents' Advisory Council to make sure that taxes and fees are in approximate balance to the cost of maintaining the town for the benefit of non-member residents. Assessments are carried out by a provincial authority, so they are consistent with off-reserve values. WFN Council then strikes the mill rate after consultation with the Advisory Council.

General Budget

The General Budget aggregates revenue and expenses for WFN members together with non-member residents. **Table 2a** and **table 2b** show the General Budget for 2017 and 2018. In 2018, WFN took in \$38.2 million and spent \$34.4 million, for a surplus of \$3.8 million. On the revenue side, the largest item is property tax, which yielded a net of \$12.3 million after WFN Homeowner Grants (effectively partial property-tax rebates) (WFN, 2019f) were paid out. Water, sewer, development charges, and permits together brought in another \$1.7 million. Given the large number of non-members living on the reserves, most of the First Nations Sales Tax (\$2.5 million) on gasoline, tobacco, and alcohol must also come from them. Substantial amounts of revenue from non-members must also be contained in some of the other revenue line items, such

Table 1: WFN Property Tax Budget, 2018/19 and 2017/18

	2018/19	2017/18	Difference	Change (%)
Revenues				
Taxation revenue	14,509,042	13,795,456	713,586	5.2%
Penalties & interest	122,000	150,000	(28,000)	-18.7%
Interest earned on bank operating	50,000	50,000	—	0.0%
Misc. revenue	37,000	38,000	(1,000)	-2.6%
Total revenues	14,718,042	14,033,456	684,586	4.9%
Expenses				
WFN Home Owner Grants	1,800,000	1,700,000	100,000	5.9%
General government services	4,622,772	4,513,358	109,414	2.4%
Protective services	2,286,406	1,904,664	381,742	20.0%
Recreation services	665,995	633,864	32,131	5.1%
Collections for other governments	1,950,295	1,920,701	29,594	1.5%
Community development services	1,528,189	1,522,327	5,862	0.4%
Fiscal services	1,839,385	1,813,542	25,843	1.4%
Environmental health services	25,000	25,000	—	0.0%
Total expenses	14,718,042	14,033,456	684,586	4.9%
Less interest and other revenues	(209,000)	(238,000)	29,000	-12.2%
Total tax requisition	14,509,042	13,795,456	713,586	5.2%

Source: Westbank First Nation, 2018.

as Operations (\$0.6 million) and Miscellaneous (\$3.1 million). Precise values cannot be teased out of the publicly reported data, but a significant amount of the revenue other than property tax generated by the presence on non-members on WFN lands must be spent in ways that benefit members.

Overall, what do WFN members derive from all this real-estate development? Allotment owners are clearly the biggest beneficiaries. The creation of a stable legal environment together with provision of municipal services has made it possible for large land-holders to become millionaires. Some have already taken the profit by selling prepaid leases, others are leaving land undeveloped for now as an estate for their heirs. Owners of small allotments are also benefitting from programs that subsidize home ownership for members—lease-to-purchase arrangements, cash grants, and the ability to get a mortgage on an “A to A” lease (WFN, 2019b). WFN members of

Table 2a: WFN General Budget: Revenue, 2017/18

Revenue (for the year ended March 31)	Budget 2018	Actual 2018	Actual 2017
Department of Indigenous Services Canada	8,930,547	9,528,751	9,022,923
Ottawa Trust Funds	2,000	1,990	1,969
BC Ministry of Education	217,500	272,864	331,387
BC Ministry of Health	2,684,792	2,943,667	2,934,099
CMHC subsidy and additional financial contribution	226,136	237,771	232,375
Commercial rent	462,740	384,201	437,400
Daycare centre and education services	325,291	296,850	290,153
First Nations Sales Tax	2,537,578	2,523,007	2,497,369
Interest and penalties	304,500	619,025	548,021
Land registration fees	255,000	184,255	186,125
Ministry of Transportation	150,000	242,120	557,842
Miscellaneous	1,904,982	3,099,111	2,695,032
Operations, maintenance, parks and public works	708,000	589,800	258,603
Other government grants	856,087	1,144,704	1,194,850
Property taxation, net of WFN Home Owner Grants	12,262,357	12,331,905	11,733,358
Residents—long-term care facility maintenance	381,232	473,771	623,005
Social housing rent	386,563	378,175	372,138
Trading Post sales	766,700	570,314	
Water, sewer, development charges and permits	1,560,750	1,714,399	1,648,408
Contributed assets		3,500	303,478
Income from business enterprises		8,724	681,138
Income from limited partnerships		631,413	589,526
Total	34,922,755	38,180,317	37,139,199

Source: Consolidated Statement of Financial Activities, in Westbank First Nation, 2018: 18–19.

modest means, if they want to be homeowners, can acquire houses of better quality at a lower cost than would be possible in the open market off reserve. All members, whether their land holdings are large or small, also benefit from the enhanced public services that are paid for by WFN taxes and fees.

Members also benefit indirectly from the presence of so many non-members. Businesses that sell goods and services to non-members also serve members, saving them the time and expense of trips to Kelowna. Moreover, these businesses create a

Table 2b: WFN General Budget: Expenses, 2017/18

Expenses (for the year ended March 31)	Budget 2018	Actual 2018	Actual 2017
Administration	6,786,623	5,939,167	6,059,164
Education	2,994,249	3,085,541	2,786,667
Government services	2,399,871	2,552,413	2,449,152
Lands registry	332,311	278,385	275,177
Local government services	10,410,931	9,440,399	8,805,093
Long term care facility program	4,029,010	4,545,553	4,495,631
Membership services	1,013,449	1,039,185	914,875
Non-profit housing program	186,456	150,913	199,555
Sensisyusten school society	1,035,119	993,568	954,885
Social development	5,240,876	2,878,016	2,719,565
The Trading Post	746,683	569,386	
WFN Taxation program	244,635	430,624	425,320
Treaty negotiations fund		2,974	3,096
Loss (recovery) on Sneena Road Overlook Land			(300,000)
Amortization	437,822	2,498,348	2,357,996
Total	35,858,035	34,404,472	32,146,176
Annual surplus	(935,280)	3,775,815	4,993,023
Accumulated surplus (beginning of year, as reported)	107,577,076	107,577,076	102,584,053
Accumulated surplus (end of year)	106,641,796	111,352,891	107,577,076

Source: Consolidated Statement of Financial Activities, in Westbank First Nation, 2018: 18-19.

private-sector job market for employees and contractors, in contrast to many First Nations where the band council is virtually the only employer. Of course, the WFN government is a major employer, because it provides services to all, members and non-members alike, living on WFN lands. Of approximately 200 WFN full-time and part-time employees, about 60% to 65% are status Indians (WFN, 2019d). Ninety-three were WFN members in 2018. The Constitution provides for a form of affirmative action in employment, entrenching “preference to qualified Members in the appointment of officers and the hiring of other employees” (WFN, 2016: ss.20.1), subject to the higher imperative of “the appointment of officers and the hiring of other employees to administer the affairs of Westbank in an effective and fiscally responsible manner” (WFN, 2016: ss.18.1).

Non-members can use facilities such as the youth centre, seniors' residence, soft-ball field, and Senesysten House of Learning. Such facilities would probably not be affordable without the economies of scale stemming from a larger population. Members have had to sacrifice some of the intimacy and solidarity of their original small community, but they have gained access to the commercial and other benefits of contemporary Canadian society.

Realizing that the direct benefits of real-estate development flow especially to allotment owners, the WFN Government from the 1970s on has attempted to engage in business activities that would generate profits on behalf of the entire membership. To some degree this has been successful. The 2018 budget shows income of about \$640,000 from business enterprises and limited partnerships, as well as about \$384,000 for "commercial rent." The commercial rent line item for 2017 was even better, \$437,000, and the business and limited partnership total for that year was also better, almost \$1.3 million.

There have, however, been business failures along the way. The decision to invest in the Northland Bank cost WFN over \$1 million and led to the resignation of Ron Derrickson as Chief. More recently, the failure of plans to build a private hospital on IR 10 led to a loss of about \$8 million and the defeat of Chief Robert Louie in the 2016 election. Under both Derrickson and Louie, business investment decisions were made by Chief and Council. These business failures associated with different WFN political factions suggest that the pressures of political office make it difficult for elected leaders to carry out due diligence, even if they have a history of success in private business dealings. It is not so much an issue of personal attributes as of political incentive structures.

In addition to these major failures, there have been other sub-optimal ventures along the way. Lakeridge Park encountered legal and regulatory problems right from its beginning in 1974. The Hall Report devoted an entire chapter to other problematic business ventures of the early 1980s, including the Wild N' Wet Waterslide, Chancery Hair Design, and Toussowasket Custom Framers. Justice Hall concluded that "some ... were undertaken more to fill the new Band building than for any logical economic or Band employment reason. There appeared to be lacking any comprehensive economic plan or vision for the band" (Hall, 1998: 153).

Recognizing that it faced problems in this area, WFN went through a year-long consultation and deliberation culminating in July 2016 with a Corporate Charter for its Ntityix Development Corporation (Ntityix Development Corporation, 2016). In a major break with past practice, the Board of Directors was to have only one representative from Chief and Council, along with two to nine other members; directors are to be chosen by a Board Nomination Committee composed of four members from Chief and Council and four WFN members (Ntityix Development Corporation, 2016: 16, 32). The Charter contains extensive provisions to minimize patronage and conflict of interest. The intent of the document is to separate business from politics, while

ensuring that the Board operates in the interests of the community. This reformulation of the Ntityix Development Corporation is still a work in progress, but it seems consistent with how modern governments try to establish the commercial autonomy of businesses they own, as in the independent boards of Canada Post and the Alberta Treasury Branches.

Current Ntityix portfolio

The current Ntityix portfolio embraces five corporations:

1. **Lakeridge Park Subdivision:** 208 lots for single-family houses in IR 10 overlooking the lake, established in 1974, with leases expiring in 2073. This is the oldest continuing WFN business enterprise.
2. **Ntityix Resources LP:** manages forestry operations. The annual cut is about 75,000–100,000 cubic metres (the exact number varies from year to year), sold mainly to local saw mills. The cut is planned on a hundred-year cycle, along with tree replanting, to keep the operation sustainable for the long term.
3. **Okanagan Lake Shopping Centre:** joint venture partnership between WFN, Churchill International Property Corporation (the operator), and PDG Investments. Located on Highway 97 in IR 10, just south of the William R. Bennett Bridge crossing Okanagan Lake, it contains 127,000 square feet of retail space.
4. **Snyatan Shopping Centre:** joint venture partnership with Anthem Westbank Power Centre South LP, located on Highway 97 in IR 9, it has 94,000 square feet of retail space.
5. **WIBCO Construction:** wholly owned general contractor, building both residential and commercial properties. Operates mainly but not exclusively on WFN lands. Could it compete more aggressively in the ever-growing Kelowna construction market?

Balance sheets for these ventures are not publicly available, but I was told that the logging company is the biggest cash provider. Its profitability stems in part from the fact that its main logging area is designated as a British Columbia community forest (British Columbia, 2019), which guarantees a low stumpage rate.

WFN and Ntityix are starting to discuss creation of a trust fund as a long-term savings and investment vehicle. Throughout its history, WFN has invested heavily in buildings and facilities with an evaluation of \$72.5 million at the end of 2018; but its net financial assets at the same point in time were only \$36.4 million, mainly in cash, investments, and accounts receivable (WFN, 2018: 17). WFN has also used money

from land claims settlements and surrenders to purchase additional lands, which at present remain undeveloped. Land can be considered an investment for the future, but there is an opportunity cost on the money used for the purchase because undeveloped land, although it may generate capital gains, pays no interest or dividends.

A trust fund would constitute a segregated savings and investment account to earn interest and dividends for the community's future. Control by a mandated board of trustees would protect it from losses stemming from overly risky investments or from politically motivated expenditures. Given the level of economic maturity that WFN has reached after its sometimes checkered history of investments, this type of long-range vehicle might be a useful part of its overall development strategy. The earnings from a trust fund could help to stabilize the WFN budget if the local real-estate market experiences a major downturn—as happens to all real-estate markets sooner or later.

Westbank First Nation in Comparative Perspective

Because so many non-members of WFN live on IR 9 and IR 10, no Community Well-Being (CWB) index has been published for WFN. It was, therefore, not contained in the database used to arrive at the generalizations about First Nations' prosperity summarized in the recent book *The Wealth of First Nations* (Flanagan, 2019). Because WFN was not in the earlier database, it constitutes a new test case of the validity of previous findings about how First Nations achieve economic success. In fact, WFN turns out to be an almost perfect match for the collective portrait of First Nation success generated by previous research.

WFN has the advantage of being located near a city, which offers many economic opportunities (Flanagan, 2019: 53). Prior to the installation of a bridge across Okanagan Lake in 1956, IR 9 and IR 10 would have been considered remote reserves devoid of opportunity, but the bridge made them effectively part of Kelowna, and completion of the Trans-Canada Highway brought more people into the area looking for recreation and housing. Today Kelowna and West Kelowna make up one of the most rapidly growing metropolitan areas in Canada, offering numerous opportunities for First Nation entrepreneurship.

As with other high-performing First Nations, WFN's small population has also been an advantage, because entrepreneurship can yield higher benefits per capita (Flanagan, 2019: 55). WFN had only 170 members when it achieved independent band status in 1963 and has 850-plus today, making it smaller than the First Nation average of slightly over 1,500 (Statistics Canada, 2019). In fact, however, WFN has been growing rapidly. Its population has more than quadrupled since 1963, whereas Canada's population has approximately doubled in the same period of time, even with large-scale immigration year after year. WFN's unusual growth has mainly been driven by changes in the membership rules in Bill C-31 (1985) and subsequent legislation and litigation (Flanagan, 2017). Women and their children who had lost Indian status by "marrying out" were now able to get back on the Indian Registry. Economic success also created a pull factor, encouraging members of other Okanagan bands to seek a transfer to WFN, along with former members trying to regain Indian status.

Population growth through recovery of Indian status and transfer of membership from other bands poses a particular problem for Westbank. Because the land of IR 9 and IR 10 is largely allotted, new members will be landless, except perhaps for a small allotment for housing, generating a class divide between original landholding families

and new members. Recognizing the difficulties, the WFN community amended its Constitution in 2015 to impose more restrictive membership rules. Those seeking to join WFN must now show they are descended from both a parent and a grandparent who had, or would have been entitled to, WFN membership.⁴ The issue is not completely settled because in the meantime Parliament passed Bill S-3, which has again expanded eligibility for Indian status; but the new legislation has not yet been implemented, to allow time for further consultation with affected First Nations (Flanagan, 2018: 10–11). Whatever the precise outcome, WFN will probably continue to maintain stricter criteria for membership than the federal government’s criteria for being listed on the Indian Registry, thus preventing original WFN families from being swamped by newcomers.

Moving now to factors under WFN’s direct control, we again find a match with other successful First Nations. One is the presence of consistent and energetic leadership (Flanagan, 2019: 21–22). Ron Derrickson was Chief for 12 years (1976–86, 1998–2000) and Robert Louie for 24 (1986–96, 2002–16). Although the two men were political opponents, both were active leaders who have been highly successful in business and public affairs outside WFN politics. Derrickson pioneered the use of CPs and leases in his ten years as Chief, and in his second term drove the political action that led to WFN gaining a community forest and timber licences. Chief Louie was a major force in developing the WFN Constitution and obtaining self-government.

The prevalence of CPs is generally associated with a higher level of Community Well-Being for First Nations (Flanagan, 2019: 29–33). Allotments and leases are the backbone of the WFN economy; about 80% of the land on IR 9 and IR 10 is now under allotment. New allotments are still being created, but only on a small scale to encourage owner-occupied housing. Related to this commodification of land is the use of property taxation to generate revenue for governmental purposes (Flanagan, 2019: 34–35). Working with the First Nations Tax Commission, WFN started to levy property tax as soon as possible after the 1988 “Kamloops Amendment” to the *Indian Act* created the legal basis for it. Property tax on commercial and residential leases held by non-members is now WFN’s biggest income generator. But WFN has also gone farther by legislating a First Nations Tax of 7% on gasoline, alcohol, and tobacco products—paid by both members and non-members when they shop on WFN lands. WFN is thus one of the small but growing numbers of First Nations to tax their own members (Government of Canada, 2019).

Like other successful First Nations, WFN has also sought and achieved greater control over its own affairs, starting with a degree of local autonomy for land management under ss. 53 and 60 of the *Indian Act*, then pioneering the land Management Agreement in concert with a few other First Nations, and finally achieving full-scale self-government

4. WFN, 2016: s.8.1; amended 2015.

backed up by Canadian legislation. WFN is still bound by the Constitution of Canada, but within that framework it manages its lands and other assets without having to seek approval from the Minister. Recent research has shown how self-government agreements, particularly in conjunction with comprehensive claims settlements, tend to boost the income of First Nations people (Pendakur and Pendakur, 2017).

The WFN Government runs in the black (Flanagan, 2019: 26–28), having built an accumulated surplus of about \$110 million. In this respect it resembles other prosperous First Nations. But it has gone even farther: its Constitution requires Chief and Council to run a balanced budget unless a majority of those present at a membership meeting vote to accept a deficit that year (WFN, 2016: ss.80.11–12). The heavily indebted senior governments of Canada could profit from studying the fiscal discipline of Indigenous communities such as WFN and the Fort McKay First Nation (Flanagan, 2018, March 17).

Previous research has shown that higher payment for councillors (not the chief) is negatively related to scores on the Community Well-Being Index, perhaps because high rewards for elective office excessively politicize First Nations' affairs. In 2008, WFN set Councillors' annual salary at \$60,000 a year. Adjusted for inflation, that should be around \$72,000 today, though the precise values are made known only to members. That's only a little higher than average for First Nations in Canada, even though WFN's budget is much larger and more complex than average (Flanagan, 2019: 22–26).

Successful First Nations generate “own source revenue” (OSR) through their business activities and thus rely proportionately less on government transfers. In 2018, about 63% of overall WFN revenue was generated by its own activities, against an average of about 36% for First Nations in general (Flanagan and Jackson, 2017: 12). Some of the 37% of WFN revenue coming from government grants would have benefited non-members who make use of its health, educational, and recreational resources. WFN's dual structure as a government for both members and non-members makes it difficult to estimate OSR precisely, because revenues and expenditures for members and non-members cannot be clearly distinguished, at least in publicly available data. However, by any standard WFN is largely, though not entirely, independent of senior governments for financing its activities.

The case study of WFN also offers some additional insights not previously highlighted in the Canadian literature. In an economy built mainly on certificates of possession, the initial distribution of CPs can cause long-lasting problems of inequality. If some individuals and families control large amounts of valuable land, while others control little or nothing, leasing can create polarization between a wealthy economic elite and ordinary members. There is nothing wrong with First Nations people becoming wealthy, as often happens with real-estate developers elsewhere, but extreme polarization can be troubling in small communities. First Nations wishing to promote economic development through the use of CPs may wish to consider the distribution of CP holdings before going down that path.

A First Nation government striving for prosperity must have wide and deep popular support to be able to survive electoral changes. It must be consistent with the cultural norms of the community to have that support, but it must also use modern structures and processes of government in order to be consistent with the Constitution of Canada. WFN provides a model in the way it developed its Government slowly through extensive consultation and embedded the results in a constitution backed by federal legislation. Whether or not any of the participants in that process were thinking about the Roman statesman Cicero, they re-created the wisdom of his adage, “We are all slaves of the law that we might be free.”

Good government is essential to create a flourishing economy based on CPs, but government is not always a good investor and entrepreneur. Creating a legal framework for the market is a different function than seeking to operate within the market. Government is better at the first than at the second. Yet, a First Nation’s legal structure makes its members the collective owner of all business enterprises. To achieve profitability, members would be better advised to give control of business operations not to elected politicians but to an independent board of directors, as WFN has now chosen to do.

WFN provides a useful case study about how to use government jurisdiction to support individual wealth creation while ensuring that the whole community benefits as intergenerational wealth transfers are directed toward future generations. All governments face the challenge of drawing this balance, and we can all learn from the example of successful First Nation experiments.

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