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TREATY LAND ENTITLEMENT AND URBAN RESERVES IN SASKATCHEWAN

A Statistical Evaluation

BY TOM FLANAGAN AND LEE HARDING



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TOM FLANAGAN

Dr. Tom Flanagan was the Chair of the Aboriginal Futures program at the Frontier Centre for Public Policy and is now a Senior Fellow of the Fraser Institute. He is Professor Emeritus of Political Science at University of Calgary, where he taught for more than 45 years, serving as Department Head, Advisor to the President and a Distinguished Fellow at the School of Public Policy. Dr. Flanagan has been Chief of Staff to Prime Minister Stephen Harper and a strategy and campaign advisor to numerous federal and provincial political campaigns. He is a Fellow of the Royal Society of Canada. He is a monthly columnist for the *Globe & Mail* and frequent contributor to national and international press such as *Maclean's* and *Time* magazines, and is the author of several award-winning books on aboriginal topics.

LEE HARDING

Lee Harding was an Intern at the Frontier Centre for Public Policy and received his Master of Public Policy degree from the School of Public Policy at the University of Calgary. He has a Bachelor of Arts in Journalism from the University of Regina and a Bachelor of Arts in Theology from Briercrest College and Seminary. After working as a television reporter for CBC, CTV, and Global in Regina, Saskatchewan, he joined the Canadian Taxpayers Federation in 2007 to become its Saskatchewan Director. He has also worked as a field agent to fundraise for the Canadian Taxpayers Federation.



203-2727 Portage Avenue, Winnipeg, Manitoba Canada R3J 0R2

Tel: 204-957-1567

Email: manitoba@fcpp.org

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EXECUTIVE SUMMARY

Saskatchewan's Treaty Land Entitlement (TLE) initiative provides funds for First Nations to purchase land to compensate for shortfalls in the size of Indian reserves as originally surveyed. First Nations may also use the money to purchase non-contiguous lands in urban areas, which can then be given reserve status (urban reserves). This paper uses the Community Well-Being (CWB) index to investigate whether First Nations that have participated in the TLE and urban reserve initiatives have shown more rapid improvement in their CWB scores than other Saskatchewan First Nations. Results are mixed. Participation in the TLE and urban reserve initiatives in itself has not led to measurable improvement in well-being. However, the improvement has been quite dramatic for a subset of eight First Nations that have used their urban reserves for intensive economic development, including casinos and other recreational facilities, restaurants, shopping centres, and gas stations. Urban reserves appear to be a promising path for improvements in the standard of living for those First Nations that approach them with an entrepreneurial spirit.

INTRODUCTION

Saskatchewan is a leader in creating policy solutions for First Nations land claims and provincial institutions for aboriginal self-government and social advancement. Since 1992, Saskatchewan has approved 33 Treaty Land Entitlement (TLE) agreements granting additional acreage to First Nations reserves. Saskatchewan crafted its TLE agreement with Canada to allow First Nations to use some of their entitlement to purchase non-contiguous land in both small towns and large cities, and request that Canada add it to their reserves. This led to the formation of 51 new urban reserves — far more than in any other province.

Saskatchewan has also been innovative in areas of social policy. The First Nations University of Canada goes back to a 1976 agreement between the provincial government and the Federation of Saskatchewan Indian Nations to found the Saskatchewan Indian Federated College, which assumed its present name in 2003.¹ Also in 1976, discussions began that would lead to the establishment four years later of an educational institution for the Métis, the Gabriel Dumont Institute of Native Studies and Applied Research.² And in 1995, provincial legislation created the Saskatchewan Indian Gaming Authority to manage First Nations casinos.³

New Democratic Party governments originally undertook these innovations but Grant Devine's Progressive Conservatives and Brad Wall's Saskatchewan Party continued and supported them, even in the face of serious financial problems in the administration of the First Nations University and the Gaming Authority.⁴ These unique land-claims initiatives and social-service

institutions seem to represent an all-party consensus about facilitating progress for Saskatchewan's burgeoning Aboriginal population, which represented 15.6 per cent of provincial population in the 2011 National Household Survey.⁵

Now that these unique processes and institutions have acquired bipartisan support, it is important to evaluate their performance, to see whether they are indeed making a positive contribution to the welfare of Aboriginal people. This report will focus on one part of the overall picture, namely the contribution of Saskatchewan's special land arrangements — Treaty Land Entitlement and urban reserves — to the well-being of status Indians living on reserve. All segments of the Aboriginal population are important, but First Nations on-reserve communities face the largest social and economic deficits, so a focus on their circumstances is justifiable.

The Community Well-Being Index (CWB), computed by researchers in the department of Indigenous and Northern Affairs Canada (INAC), is a tool for measuring social and economic progress among First Nations.⁶ By combining measurements of income, education, housing, and labour market participation in First Nations communities, the CWB offers a balanced measure of some of the most important aspects of well-being on Indian reserves. As a measure of community, not individual well-being, it says nothing about First Nations people who do not live on reserve. Despite that limitation, it is a useful tool for evaluating the progress of reserve communities. With the exception of 1986, the government has calculated it for every census year from 1981 through 2011, thus offering a 30-year time span for longitudinal analysis.

TREATY LAND ENTITLEMENT

The origins of the TLE initiative go back more than a century, to the time when Canada negotiated treaties with First Nations in what is now Saskatchewan.⁷ Canada signed Treaties 2, 4, 5, and 6, which covered what is now southern and central Saskatchewan, in the 1870s when many bands were travelling as far as Montana in pursuit of the last buffalo.⁸ Dispersion often made it difficult to get an accurate count of band membership, which Canada used to determine the size of land reserves using the formula of 640 acres per family of five (160 acres in Treaties 2 and 5). Disruption caused by the North-West Rebellion of 1885 further interfered with surveying the land and accurately enumerating the people. Treaty 8 in 1899 and Treaty 10 in 1906, which covered northern Saskatchewan, faced additional difficulties in contacting all band members hunting and trapping across the vast, inaccessible northern landscape. For all these reasons, many First Nations of Saskatchewan received less land than their true size at the time of first survey would have warranted, and the Natural Resources Transfer Agreement of 1930 obliged the province to provide Crown land to Canada as necessary to fulfill treaty obligations.

In 1975, Allan Blakeney's NDP provincial government entered into discussions with the federal government and the Federation of Saskatchewan Indian Nations, resulting in the so-called Saskatchewan Formula of 1976. Although the provincial government did transfer 92,000 acres of Crown land to First Nations in the north, the Saskatchewan Formula fell apart after the election of Grant Devine's Progressive Conservative government in 1981.⁹

Devine's main objection to the Saskatchewan Formula was that it provided only for the transfer of unoccupied Crown land. Not much of this was left in the province, and most of what was left did not have great present value or future potential. Devine wanted to use this initiative to promote aboriginal economic progress as part of his greater concern with rural economic development in Saskatchewan, including irrigation, fertilizer manufacturing, natural gas distribution, petroleum upgrading, and forest product processing.¹⁰

Premier Devine worked closely with Roland Crowe, who

was chief of the Federation of Saskatchewan Indian Nations from 1986 to 1994. The two became friends, and today both credit the TLE agreement to time spent horseback riding together in the Qu'Appelle Valley. The main ideas on which they reached an accord included buying land according to the principle of "willing buyer, willing seller," joint funding by Saskatchewan and Canada, and the addition of non-contiguous land to Indian reserves.

Gaining political support for these new principles from Saskatchewan municipalities as well as the Progressive Conservative federal government of Brian Mulroney required time. Crowe says he visited every rural municipality in the province to build support.¹¹ Federally, it helped that Grant Devine's former campaign manager, Bill McKnight, was the Minister of Indian Affairs and Northern Development 1986-89. The Saskatchewan treaty commissioner, first appointed in 1989, recommended the Framework Agreement that was finally accepted by all parties.¹² After the Progressive Conservatives were defeated in the provincial election of October 1991, new NDP premier Roy Romanow wanted to sideline the Framework Agreement, claiming the provincial government could not afford its share of the funding. Roland Crowe, however, persuaded him to follow through, and it was formally signed in 1992 in a meeting attended by Mulroney and several federal cabinet ministers. Twenty-five First Nations were involved in the original agreement, and since then eight more have adhered, for a total of 33 participants in the TLE initiative.¹³

The Framework Agreement provides for the transfer of "shortfall acres" to bring reserve size up to what it should have been at the time of first survey, plus "equity acres" in recognition of both population growth since then as well as the opportunity cost of having smaller reserves. Perhaps oversimplifying a bit, the shortfall acres can be thought of as correcting past errors, while the equity acres are an opportunity for future self-improvement for eligible First Nations.

The agreement allots money, dispensed in equal instalments over 12 years, to First Nations to purchase both shortfall and equity acres, but does not transfer land directly. The deal calculates the amount of money at a rate of about \$260 per acre. For the 33 First Nations who have now adhered to the Framework Agreement,

the total amount of money is \$595.5 million, to purchase a minimum of 548,000 acres (shortfall acreage) and up to a maximum of 2,671,000 acres (including all equity acres).¹⁴ The province of Saskatchewan embraces 161 million acres, so this TLE land is potentially about 1.4 per cent of the provincial total to be added to the First Nations' land base, approximately doubling the size of the land reserves originally allocated to First Nations.¹⁵ At the time of writing, federal orders-in-council or ministerial orders have added about 48 per cent of the total TLE acreage to Saskatchewan Indian reserves, leaving as much as 1,285,000 acres still to be selected and transferred.

The authors of this report have not found any published literature or government reports evaluating the TLE agreement in terms of its impact on living standards or well-being of the affected First Nations. This is a gap that should be filled, for TLE is a major initiative with substantial costs to federal and provincial treasuries. Policy makers should have an informed view of its results, especially because Manitoba, and to a lesser extent British Columbia, Alberta and Ontario are now implementing similar measures.¹⁶

URBAN RESERVES

For most First Nations, the 1992 TLE Framework Agreement is the foundation of urban reserves in Saskatchewan,¹⁷ although some are founded on earlier land claims negotiations as well as the special claims process.¹⁸ Article 9 of the Framework Agreement allows TLE money to be used to purchase non-contiguous urban land to be added to the First Nation's reserve. All purchases are to be market transactions on a "willing buyer, willing seller" basis; transfers can be made either from private owners or from any level of government holding surplus land. Before the transfer can be completed, arrangements have to be worked out with the municipality regarding land use and zoning, infrastructure and services, and payment of a service fee in lieu of local taxation (urban reserves, like all Indian reserves, are exempt from taxation under s. 87 of the *Indian Act*).

As of 2015, 51 parcels of land had been set apart as urban reserves in Saskatchewan. Twenty First Nations own 48 of these urban reserves. Beyond that, three urban reserves, embracing the area where Treaty 4 was negotiated at Fort Qu'Appelle, are held collectively by the 33 Treaty 4 nations, 30 of which are in Saskatchewan, and three in Manitoba. One First Nation, the Peter Ballantyne Cree Nation, holds 18 urban reserves. Ten of these parcels relate to small northern villages, inhabited mainly by First Nations and Métis people, which have been consolidated and set apart as reserves under the so-called Northern Community Transfer (NCT). Of the 41 urban reserves not in the NCT, four have been designated under the *Indian Act* as "institutional," to be used for educational or administrative purposes. The other 37 are designated "commercial" sites for business premises, which can range from small gas stations and convenience stores to large shopping centres and business parks.¹⁹

Urban reserves give band-owned businesses as well as individual Aboriginal entrepreneurs access to larger markets than they would find on their original reserves, which in Saskatchewan were all in rural areas. They also provide tax advantages: businesses owned by First Nations bands or individuals do not have to

collect federal payroll taxes for status Indian employees working on the reserve; they pay a service fee rather than property taxes to the municipality; and they do not have to charge the federal Goods and Services Tax or the Provincial Sales Tax to status Indian customers. Also, status Indian employees of businesses on urban reserves do not have to pay provincial or federal taxes on income earned on reserve. The municipal governments of host cities seem satisfied with the arrangements because the service fees they collect from urban reserves are equivalent to typical property taxes, but the partial tax-haven status may contribute to friction with outside business competitors and with the general population. In a 2012 survey of public opinion in Saskatchewan, 75 per cent of non-Aboriginal respondents agreed either "strongly" or "somewhat" that "Aboriginal people do not pay enough taxes."²⁰ However, urban reserves are only a small part of the larger issue of exemption of First Nations from taxation.

There is a sizable body of literature on the formation and legal status of urban reserves,²¹ but only one evaluation study of which the authors are aware. The consulting firm Fiscal Realities carried out a study of seven of these reserves in Saskatchewan (as well as one in Manitoba) for the National Aboriginal Economic Development Board.²² These seven reserves were home to business operations ranging from gas station-convenience stores to large shopping centres and a casino. The study reached two main conclusions. The first was that all the urban reserves reviewed in the study were hosting viable business operations, whether large or small, and were creating substantial numbers of jobs as well as spillover benefits for the host communities. The second conclusion was that the First Nation governments of the urban reserves were not exercising their legal powers to levy property and sales taxes on reserve, and thus foregoing potential own-source revenue.²³ This thorough analysis of business activities on a subset of urban reserves will provide useful guidance for future projects. The remainder of this report examines whether urban reserves, and the TLE Framework Agreement which underpins most of them, have produced measurable improvements in the well-being of Saskatchewan First Nations who have participated in these programs.

PROGRESS FOR PEOPLE?

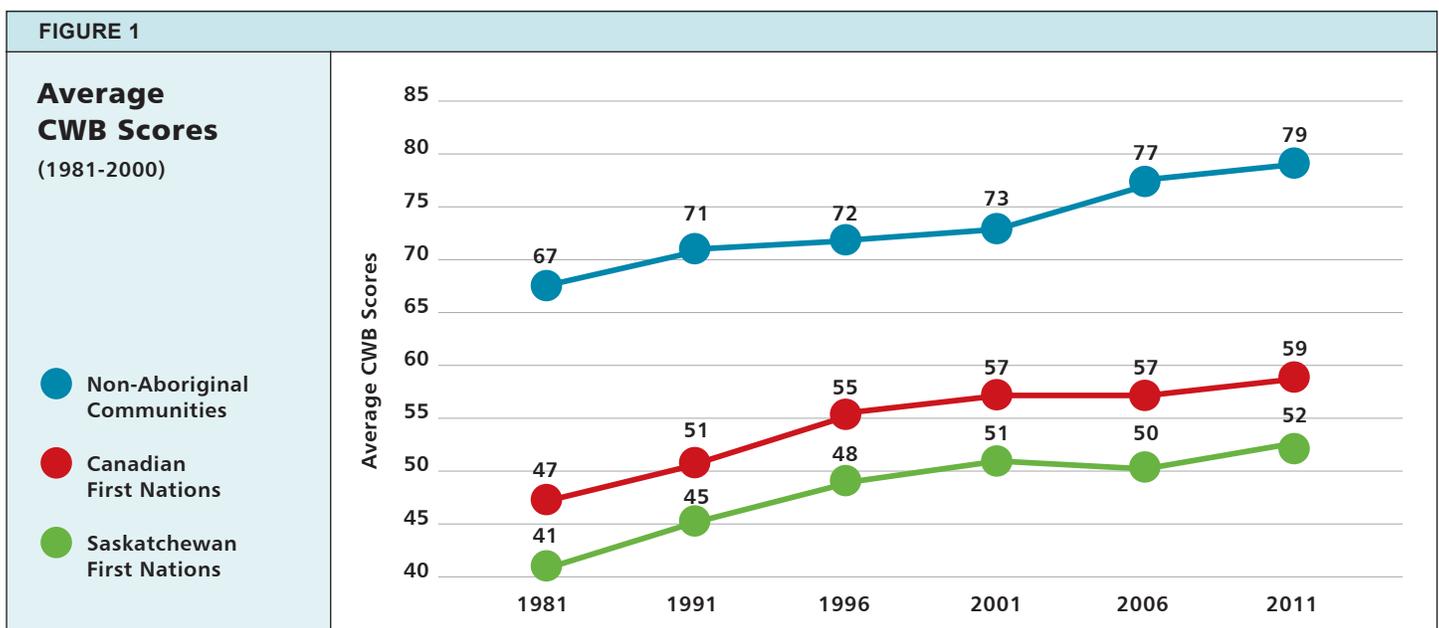
Figure 1 shows the change in the CWB over the 30 years from 1981 to 2011 for Canadian non-Aboriginal communities (blue), First Nations communities (red), and Saskatchewan First Nations (green).²⁴ Remarkably, the CWB scores increased by 12 points for each of the three groups over this period of time, and the three lines are more or less parallel with each other. This suggests, though it is not conclusive proof, that increases in the well-being of First Nations result more from Canadian economic and social trends than from government policy.

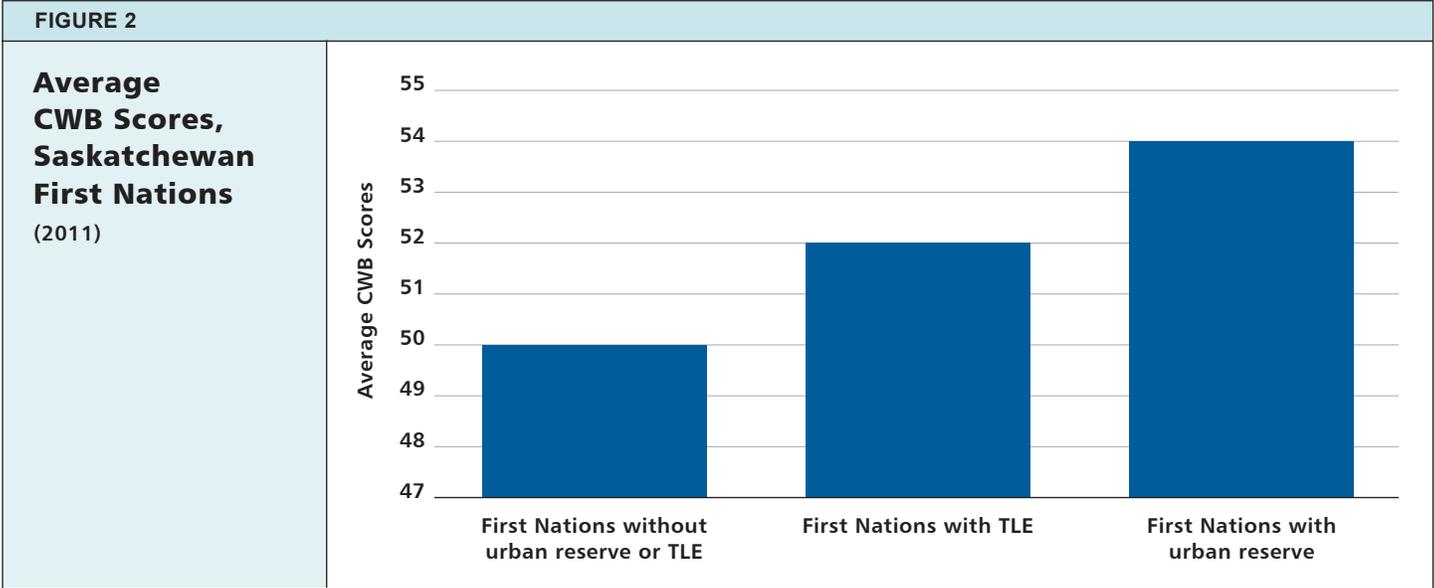
Although Figure 1 portrays the gap between First Nations and other communities as constant, the rate of increase for First Nations is greater because their starting point was lower. The CWB Index of other communities has increased 18 per cent over 30 years, compared to an increase of 26 per cent for Canadian First Nations and 29 per cent for Saskatchewan First Nations. Projecting these rates of increase into the future, First Nations will eventually catch up to other communities because the CWB Index cannot rise over 100, but the catch-up is slow, and convergence will not take place for many decades.

A study by INAC analysts has shown a much faster

increase in CWB scores for First Nations in Canada's territories and in the northern parts of provinces where modern land-claims agreements have been signed.²⁵ The researchers attribute the striking improvement to the clarification of property rights, which has facilitated resource development and attendant job creation. Obviously, the right kind of policy initiative can make a difference in certain circumstances. However, there is no evidence in the data of such a sustained upward surge for Saskatchewan First Nations.

There is one further observation to be made about the data. The average CWB score of Saskatchewan First Nations dropped in the 2006 census but then rebounded sharply in 2011. Historically, Saskatchewan First Nations had always had the lowest CWB in Canada or been tied with Manitoba for that unfortunate distinction; but in the 2011 data, Saskatchewan First Nations, while still behind other provinces, moved a full four points ahead of Manitoba, 52 to 48. Is this the beginning of a progressive trend or simply statistical noise arising from small sub-samples? An answer is not likely to come until after data from the 2016 census are processed and released. In any case, looking at averages for all Saskatchewan First Nations is a blunt approach, because fewer than half of First Nations have participated in the TLE and urban reserve initiatives. Therefore, in order to compare the results of First Nations that are inside these initiatives with those that



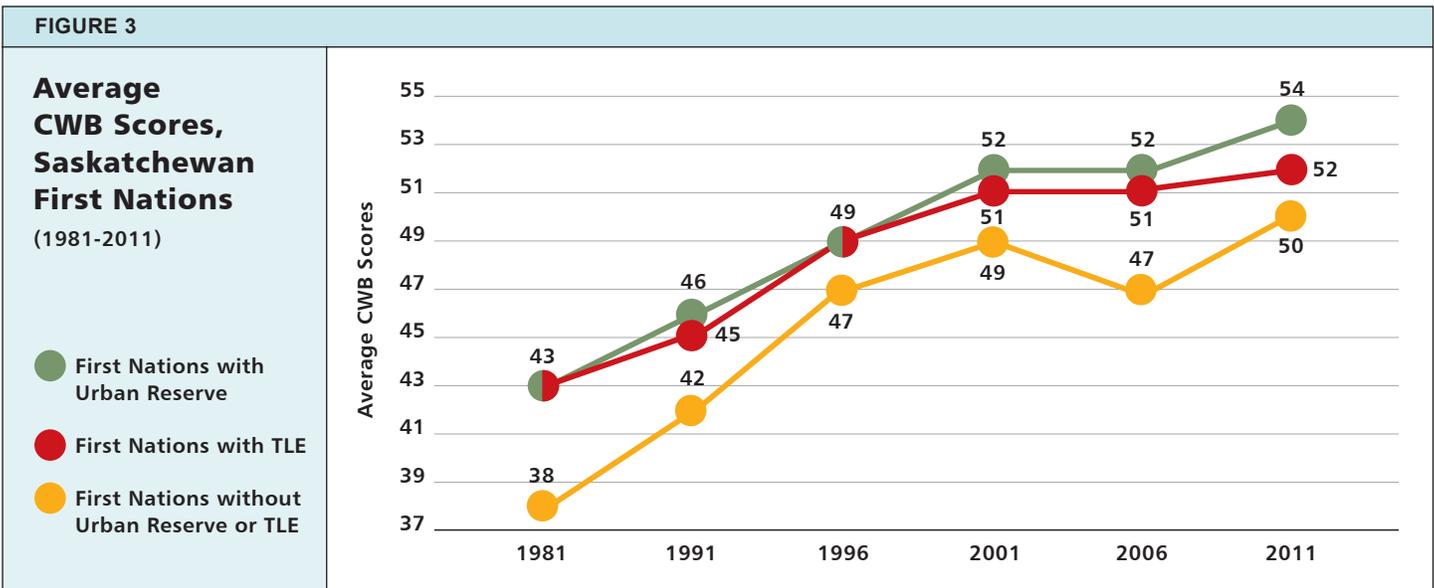


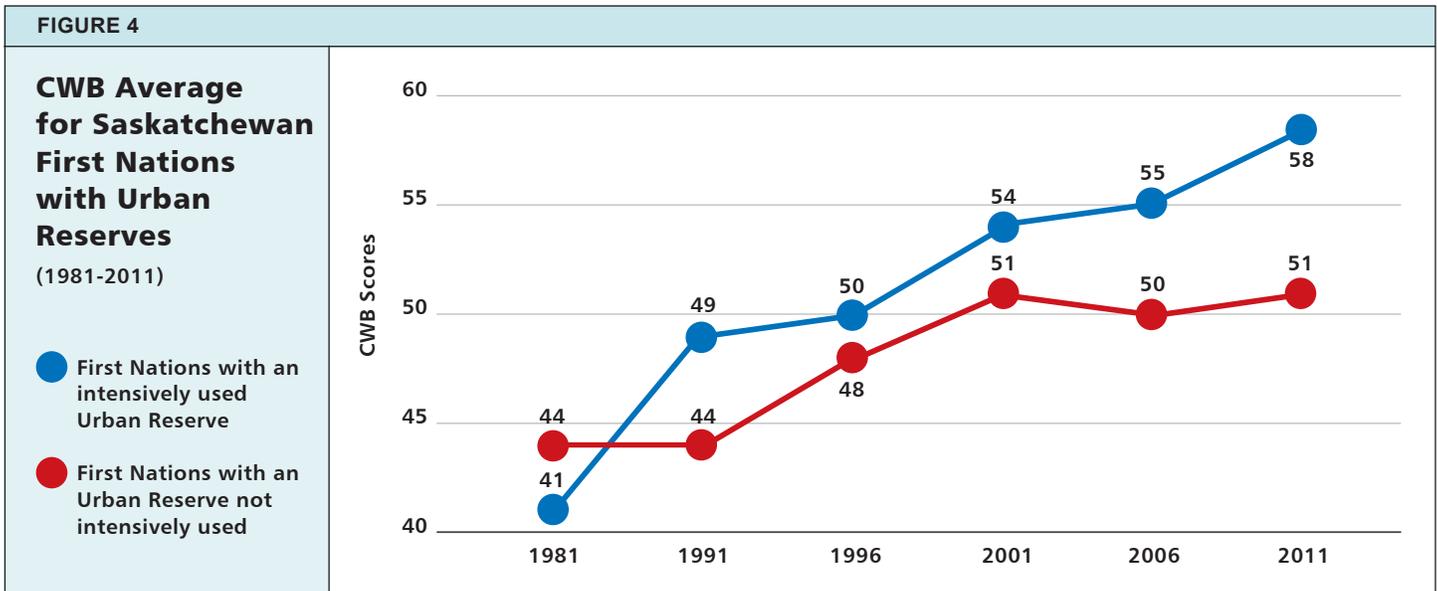
are not, a closer look at the data is necessary.

Figure 2 shows the mean 2011 CWB index for three categories of Saskatchewan First Nations: Group 1, those that have neither TLE land nor urban reserves; Group 2, those that have TLE land but no urban reserves; and Group 3, those that have urban reserves. (This third group includes five First Nations whose urban reserves are not located on TLE lands.) Group 1, which has benefited from neither the TLE nor urban reserve programs, can be understood as a control group against which the program effects on Groups 2 and 3 can be measured.

These initial data seem to provide some confirmation that the TLE and urban reserve initiatives have had a positive impact. Those who are eligible for neither have a mean CWB of 50, while those with TLE have a mean score of 52, and those with urban reserves have the highest average CWB, at 54. The four-point difference between 50 and 54 may not seem like much, but it is equivalent to about 10 years of progress (see Figure 1). If it is true that TLE and urban reserves lead to this sort of improvement, they would constitute worthwhile policy innovations.

However, this simple cross-sectional comparison





takes no account of possible differences among First Nations in geographical location, physical endowment, cultural background, and political leadership. A more sophisticated approach is taken in Figure 3, which shows the changes in CWB of the same three groups of Saskatchewan First Nations over the 30-year period.

The curves for all three categories have the same general shape, always increasing from one census to the next, except for the unexplained drop affecting all of them in 2006. The TLE and urban reserve First Nations had a higher average mean CWB than the control group in 1981 before these programs began, and they still have a higher CWB in 2011. The gap between the urban reserve group and the control group is about the same in 2011 as it was in 1981, while the gap between the control group and the TLE group has actually narrowed a bit.

Drilling even deeper into the data, Figure 4 divides the First Nations with urban reserves into two groups, eight that are making intensive economic use of their urban reserves, and 13 that are not.²⁶ (This report defines “intensive use” as hosting multiple business enterprises, such as casinos, hotels, golf courses, shopping centres, gas stations, and convenience stores. It codes “non-intensive use” as no use at all at the present time, non-revenue-generating administrative or social-service facilities, or minimal economic use such as a single gas station.)

Figure 4 tells a remarkable story. In 1981, when the CWB was first calculated and before any urban reserves existed, the eight First Nations that now make intensive use of urban reserves had no obvious advantage. Indeed, their average CWB of 41 was below the comparator group. But by 1991 (the CWB was not calculated in 1986), the intensive group had moved well ahead and has remained ahead ever since.

Table 1 lists these eight First Nations and their business enterprises. Of these, six include casinos. Whitecap Dakota has capitalized on the fact that its original reserve is close to Saskatoon, making it for practical purposes an urban reserve. It features Dakota Dunes Casino, the Dakota Dunes Golf Links, and the Whitecap Trail Gas Bar & Confectionary. A hotel and spa have also been completed, though after the 2011 National Household Survey, which is the latest point of data for this study. Sakimay First Nation had the Painted Hand Casino until 2008 when it was rebuilt on the urban reserve of Kahkewistahaw. Both are part of the Yorkton Tribal Council. The Painted Hand Casino also features a gas and convenience store, as well as a hotel, similar to the arrangement at the Gold Eagle Casino, run by Mosquito, Grizzly Bear’s Head, and Lean Man First Nation in North Battleford. Nekaneet First Nation has a casino on its urban reserve in Swift Current, but also owns office space in Regina, with plans for a gas station and convenience store. The Peter Ballantyne First Nation alone has 18 of Saskatchewan’s 51 urban

Table 1

| Saskatchewan First Nations with Intensive Use Urban Reserves | First Nation | City | Uses |
|---|---|----------------------------|--|
| | English River | Saskatoon Beauval | <ul style="list-style-type: none"> • Gas bar, convenience store • Restaurant • Grocery store |
| | Kahkewistahaw | Yorkton | <ul style="list-style-type: none"> • Painted Hand Casino with lounge and restaurant • Gas bar and convenience store • Yorkton Home Inn & Suites • Broadway Shopping Centre |
| | Mosquito, Grizzly Bear's Head, Lean Man | North Battleford | <ul style="list-style-type: none"> • Gold Eagle Casino • Kihiw Restaurant |
| | Muskeg Lake | Saskatoon | <ul style="list-style-type: none"> • Three commercial facilities housing 40 businesses by lease • CreeWay Gas East |
| | Nekaneet | Swift Current Regina | <ul style="list-style-type: none"> • Living Sky Casino • Commercial properties • Office building with law offices • Gas station and convenience store (in development) |
| | Peter Ballantyne | Prince Albert Creighton | <ul style="list-style-type: none"> • Northern Lights Casino • Three gas bars with convenience stores • Administrative offices • Prince Albert Grand Council's executive office • Peter Ballantyne Health Services • Education facilities • Office complex • Newspaper office • Fitness centre • Retail store |
| | Sakimay | Yorkton Regina | <ul style="list-style-type: none"> • Painted Hand Casino (until 2008) • Office complex • Gas bar, convenience store and car wash |
| | Whitecap | Saskatoon | <ul style="list-style-type: none"> • Dakota Dunes Casino • Dakota Dunes Golf Links • Whitecap Trail Gas Bar & Confectionary • Dakota Dunes Hotel & Spa (opened 2015) |

reserves. Business ventures include a casino, gas bar and convenience store, retail ventures, commercial building rentals, management, forestry, hospitality, insurance, trucking and manufacturing.

Two of the eight bands have not had a casino on their lands. English River First Nation has a gas bar and restaurant on its Grasslands development south of Saskatoon. It also offers the northern community of Beauval its only grocery store. Muskeg Lake Cree Nation has created three commercial facilities that host 40 businesses in Saskatoon, plus two gas stations in different holdings.

The group's progress provides some support for Grant Devine's vision of First Nations' progress through entrepreneurship. Their story shows that self-improvement, though not inevitable, is definitely possible. Acquiring an urban reserve does not guarantee higher living standards, but does create opportunities for First Nations to make themselves better off by producing goods and services that other Canadians want to buy.

One important question is whether the success of the eight First Nations with intensive-use reserves is simply a result of casino gaming. Six of the eight fully or

partially own a casino. Yet the two First Nations not involved in casino gaming have an average CWB of 60, which is two points higher than the average for all eight intensive-use First Nations. In another research project, the authors looked at a cross-Canada sample of 21 First Nations with very high CWB scores (73 to 83) and found that only four of these hosted casinos.²⁷ The evidence suggests that, while casino gaming may be very rewarding, it is not the only viable strategy for economic development.

Finally, we do not maintain that intensive-use urban reserves are the only explanation for the progress made by these First Nations. Indeed, they started to pull ahead as early as 1991, before urban reserves could have had much impact. Maybe these eight had better leadership and better community spirit, which made it possible for them to take advantage of the urban reserve initiative, along with making other improvements. But even if that is true, it is also true that their urban reserves have become an effective and continuing means toward improving their well-being.

SUMMARY AND CONCLUSION

There has been a steady and general tendency for the CWB scores of all Saskatchewan First Nations to improve over time, just as the standard of living has been improving on average in Saskatchewan and Canada over the same time period (see Figure 1). This looks very much like a tide that lifts all boats, with the tide being the general Canadian and Saskatchewan economies, plus the social policy measures that these economies pay for. This is good news for Saskatchewan First Nations, because it means that incomes, housing, jobs, and educational opportunities are measurably improving on Indian reserves. It would be even better news if the gap between First Nations and other communities were decreasing rather than remaining stable, but the complex causes of gaps in living standards between groups may require generations to be fully addressed.

The TLE initiative by itself has not yet had a measurable impact upon the entire group. The average CWB score for First Nations who have received TLE money has not risen any faster than for First Nations who have not received that benefit. In fact, the TLE First Nations have lost a little of the lead that they had in 1981. It is, however, too early to pronounce TLE a failure in raising First Nations' living standards. The money for acquiring land is paid out in 12 instalments, then it takes many more years to find and negotiate the purchase of suitable parcels of land, after which it can take five to seven or more years for the land to be set apart as a reserve. Acquisition of farm and ranch land without other value is unlikely to make a big difference in the future, but First Nations such as Onion Lake are buying TLE land with sub-surface rights or forestry potential that may become valuable in the future, and urban growth may eventually bring development potential to some TLE land. But these are future possibilities. As of 2011, the evidence did not show that TLE was having an impact on living standards, as measured by the CWB index.

Of course, TLE was not only about improving First Nations' standard of living; it was a justice measure for bands that had not received the land quantum due to them under treaty. From that point of view, TLE would have been worth doing anyway, even if it did not

lead to a measurable improvement in the standard of living. But the TLE initiative was not just about righting historical wrongs; it was also about improving future opportunities for First Nations. Only the 20 per cent of the acreage to be purchased under the heading of shortfall acres could be construed as living up to treaty obligations, while the equity acres (80 per cent of the total) were clearly about facilitating future progress. From that point of view, positive evidence of progress is not yet there.

Urban reserves have also not had any measurable positive impact overall. First Nations that have acquired urban reserves were five points ahead of the control group in 1981 and only four points ahead in 2011 — no change, really. But again, more time may be needed. It is not enough to acquire an urban reserve; time and investment are required to start businesses, create jobs, and produce revenues that can be used to improve a First Nation's housing and other aspects of standard of living. A hopeful pointer in that direction is the success of the eight First Nations that have made intensive economic use of their urban reserves and whose average CWB score is rising more quickly than the mean for any other group.

A final observation is that the bands who later opted into the TLE and urban reserve initiatives were already better off on average in 1981 than their counterpart bands in the control group who received no such benefits. This suggests that better-off First Nations were more able to work through the years of research, negotiation, and legal work required to obtain TLE and urban reserve benefits. This observation should not be surprising; it is exactly what Thomas Sowell found in his landmark study, *Preferential Policies: An International Perspective*.²⁸ Sowell found that in countries all over world, policies designed to help designated racial, ethnic, and religious groups helped better-off members of those groups more than less well-off. This was true for preferential employment policies, contract set-asides, or affirmative-action admission into schools and universities. Indeed, affirmative action is once again under discussion in the United States because preferential university admission programs targeted at African- and Hispanic-Americans have been found to benefit primarily upper income recipients, who are far from typical of those groups.²⁹ Their well-to-do parents have been able to provide their

children with many advantages, ranging from private schools to international travel, that contribute to academic success.

This, however, is not in itself an argument against the TLE and urban reserve initiatives. If these are shown to be effective in raising living standards over enough time to give them a fair trial, they can be considered

economically beneficial, even if they cannot help all First Nations. Not being able to help everyone is not a good argument for helping no one. But TLE and urban reserves may not be the best way to help all First Nations. For provinces such as Manitoba, which are now moving to create their own urban reserves, it would be advisable to make a close study of what has worked and not worked in Saskatchewan.



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