THE HIGH COSTS OF DOING BUSINESS ON FIRST NATION LANDS IN CANADA

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ABSTRACT

This study analyzed investment projects on some of the best situated Indian reserves in Canada and compared them to projects off-reserve. It found that the lack of opportunities on reserve has resulted from the imposed system of First Nation governance, which has artificially raised the costs of doing business. It can cost four to six times as much to put together a major investment project on reserve and it takes much longer to take a project from the proposal to operating stages. As a result, even favorably located reserves have low business presence and see potential investment diverted to adjacent jurisdictions even when these alternative locations are less favorably sited.

Keywords: First Nations, Transaction Costs, Economic Development, Market Failure, Investment

1. INTRODUCTION

Canadians often voice disappointment with the results of government spending aimed at improving the economic fortunes of First Nation persons. They see billions of dollars spent each year which seems to result in very little difference in peoples' well being. There is a familiar litany of unchanging circumstances: joblessness; low business presence; low life expectancy; low average incomes; substandard housing, services and infrastructure; and above all else, a pervasive sense of hopelessness (Armstrong, 2001, Statistics Canada, 2006, and The Assembly of First Nations, 2008). The question that is often asked is where does this money go?

The failure to improve the economic circumstances of even the most favorably located First Nation lands is puzzling to policy makers and neoclassical economists as well. In theory, lower land costs and wages coupled with government assistance should cause investment to flow towards well sited First Nation lands (McMillan, 2002, and Backhouse, 2002). Yet this is clearly not happening. In many cases a First Nation is demonstrating all the symptoms of economic depression and yet it is only separated from a region with strong economic growth by a road, a creek or an arbitrary administration boundary (Anderson and Parker, 2006, Huffman and Miller, 2006).

This paper explores the hypothesis that the fundamental source of under development of First Nation economies in Canada is not universally a result of poor location or lack of resources as is commonly surmised. Instead, it is a market failure that occurs on even the best sited First Nation lands in Canada caused by high transaction costs associated with investment (Cootler and Ulen, 2000, Weisner, 1998, and Hobbs, 2004). In short, the institutional framework that supports all the components of a typical investment in a land improvement elsewhere in Canada are absent on First Nation lands. This would include obtaining clearly specified and enforceable property rights, information acquisition related to the site, contractual stipulations addressing the provision of services and infrastructure, identifying heritage and environmental issues, and obtaining insurance and financing to list just a few. The informal/formal rules governing markets and the public infrastructure to support trade is what makes markets work or fail. Where these rules are absent, transaction costs are high (Coase, 1960, and Allen, 1988).

This paper presents evidence that transaction costs related to investment on First Nation lands in Canada are high and that this is the most fundamental cause of their under development. It further suggests that the origin of this problem lies in a lack of market oriented governance institutions. Markets need governments. The role of governments in making markets work is to develop a legal and administrative framework that protects property rights, ensures quality, provides standards, currency, reliable information and security for buyers and sellers and builds the public infrastructure necessary to facilitate trade (Commons, 1959, North, 1993, Williamson, 1985, and Rosenberg and Birdzell 1986).

2. METHODS

This paper is based on completed projects on First Nation lands in the 1990s. Some of the content of this paper is based on a report titled Expanding Commercial Activities on First Nation Lands, completed for the Indian Taxation Advisory Board and the Department of Indian Affairs. Data was taken from case studies of completed residential and/or commercial projects to evaluate the costs associated with the regulatory and consultative processes in First Nation land development. Because of the difficulties and confidentiality issues raised in determining professional fees and hours associated with specific projects, the time spent in completing each component of a land development deal is used as a proxy for professional costs. Time is also used to estimate the opportunity costs associated with project delays. A similar case study approach for measuring transaction costs is common in the literature. (DeSoto, 2000, Lorentz, 2007, Bartezzaghi, 2003, and Wagner, 2002)

There are no industry standards for the costs associated with the various components of land development. In general, assuming community interests and regulatory safeguards are met, the shorter the time frame for finishing each component of a land deal, the lower the costs and the greater the net benefit produced. Also, in general the shorter the time to proceed from concept to construction the lower the opportunity costs and the greater the net benefit.

To provide benchmarking, comparisons will be made to off-reserve land developments. Three First Nation case studies were selected.

- Real Canadian Superstore at Seymour Creek I.R. No. 2, a Squamish Nation reserve in North Vancouver, British Columbia.
- Sun Rivers golf course and residential development at Kamloops I.R. No. 1, a Kamloops Indian Band reserve in Kamloops, British Columbia.
- Mixed use development (commercial/office) at Siksika I.R. No. 146, a Siksika Nation reserve near Calgary, Alberta. and,

People involved in all aspects of these deals were interviewed. People representing both sides of the deal were also interviewed.

These case studies are not typical First Nation communities in Canada but presented a good opportunity to disprove the theory that the costs of doing business on reserve are high. The First Nations discussed in the case studies have favorably located reserves and a history of active management of their land and resources. All have developed additional capacity and sophistication in terms of the administration from their experience with all aspects of major commercial and/or residential developments. All of the projects have been completed.

Some other similar characteristics include.

- All were located on First Nation lands and required a designation.
- All required infrastructure to be upgraded.
- In three cases, the developer had a proven track record off-reserve and significant financial capacity.
- In all cases there was little doubt that if completed, the project would be economically viable.

Despite the success of the projects, evidence emerged suggesting the deals were difficult to put together. This included.

- A reluctance by the Crown to take risk. This protracted negotiations and increased the time to completion.
- A requirement in some cases that cash flows from other projects be used to guarantee financing for infrastructure improvements.

- A desire by the adjacent local authority to exert control over the reserve development through the application of their by-laws.
- A lack of regulatory certainty or in some cases the need to draft new regulations.
- A lack of suitable precedent documents.

Two types of costs are estimated. The professional costs incurred in putting a development deal together, and the opportunity costs incurred by delays in putting a deal together. In both cases, time is used as a proxy for costs and simply benchmarked against time spent in similar functions in off-reserve deals. Total costs were not really calculated, as there was no common unit of measure. However, the difference between costs on and off-reserve is estimated by the sum of the difference in total time spent on all components of a deal and the difference in average time that elapses from initiation to completion of a deal.

2.1 Land Development Steps

The six broad steps involved in land development on and off reserve and are listed below. Although the land tenure and legal regime is different on Indian Reserves as compared to adjacent municipal jurisdictions, the broad steps involved in land development are similar. For example, land tenure certainty requires a designation for commercial purposes on an Indian Reserve; in a municipal jurisdiction a rezoning may be required. The time from start to finish was used as a proxy for the cost of each component.

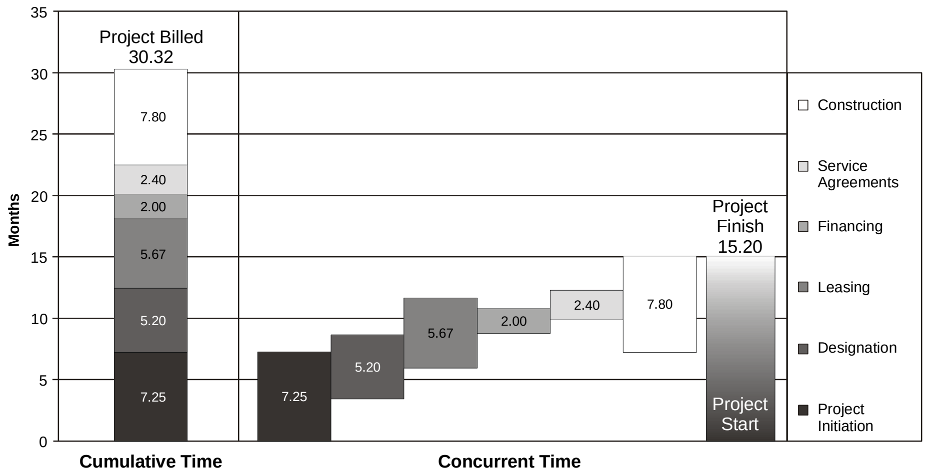
- **Project Initiation/Concept** – This is the initial phase of the project where the developer or community leaders pitch the idea to the community. It also includes the community performing due diligence on the developer and conducting economic and financial feasibility studies.
- **Land Tenure Certainty** – This is the process the community uses to create land tenure certainty for the development.
- **Land Leasing** – This is the development of the actual land lease agreement between the developer and the community, or the certificate of possession holder. It includes all the standard elements of a lease agreement and features unique to a First Nation context, such as employment policies or guarantees about tax rates.
- **Financing** – This refers to financing the costs of the development.
- **Infrastructure Development and Services** – Most significant projects on reserve require upgrading the existing physical infrastructure, building new infrastructure or obtaining access to the services and infrastructure in other jurisdictions. This component includes everything necessary to guarantee that sufficient infrastructure and services will be in place.
- **Construction** – This is probably the most heavily regulated of all components. It includes all the regulations associated with getting the project ready for use such as building standards, development approval processes, and risk, heritage and environmental assessments.

2.2 Opportunity Costs

Opportunity costs refer to the costs incurred by developer and First Nation alike during the period between the project's first conception and the beginning of its operational life. In general, the longer this period, the higher are the associated opportunity costs. This study assumes a direct linear relationship between the time needed to bring an operation to life and total opportunity cost. It therefore estimates the opportunity cost based on the amount of time that elapses between the initial project proposal and final approval. This is a crude assumption but sufficient for the purposes of this study.

Opportunity costs cannot be calculated by simply summing all the time incurred in the components of a deal that are listed above. That would assume that deals proceed in stages, with each one occurring upon completion of the previous one. In fact, many of these elements proceed concurrently or overlap substantially. They certainly do not follow a neat sequential order as illustrated in Figure 1.

FIGURE 1 – MEASURING THE COST OF DOING BUSINESS



Opportunity costs borne by the First Nation can include.

- Lost lease revenue.
- Lost property tax revenue.
- Lost employment benefits.
- Lost cost savings to members (ie GST savings).
- Lost residual infrastructure benefits that may reduce the cost of future development on the reserve.
- Lost reduction in social assistance of membership.
- Lost opportunity for future development on reserve if the experience is sufficiently negative to eliminate any interest for exploring future project possibilities.

A developer also bears opportunity costs if a project is delayed or not completed.

- Lost interest on financing during the delay
- Lost profit from operations of the project during the delay.
- Lost profitability over the life of the project if the delay caused a competitive development to become viable.
- Lost opportunity for future development on reserve if the experience is sufficiently negative to eliminate any interest for exploring future project possibilities.

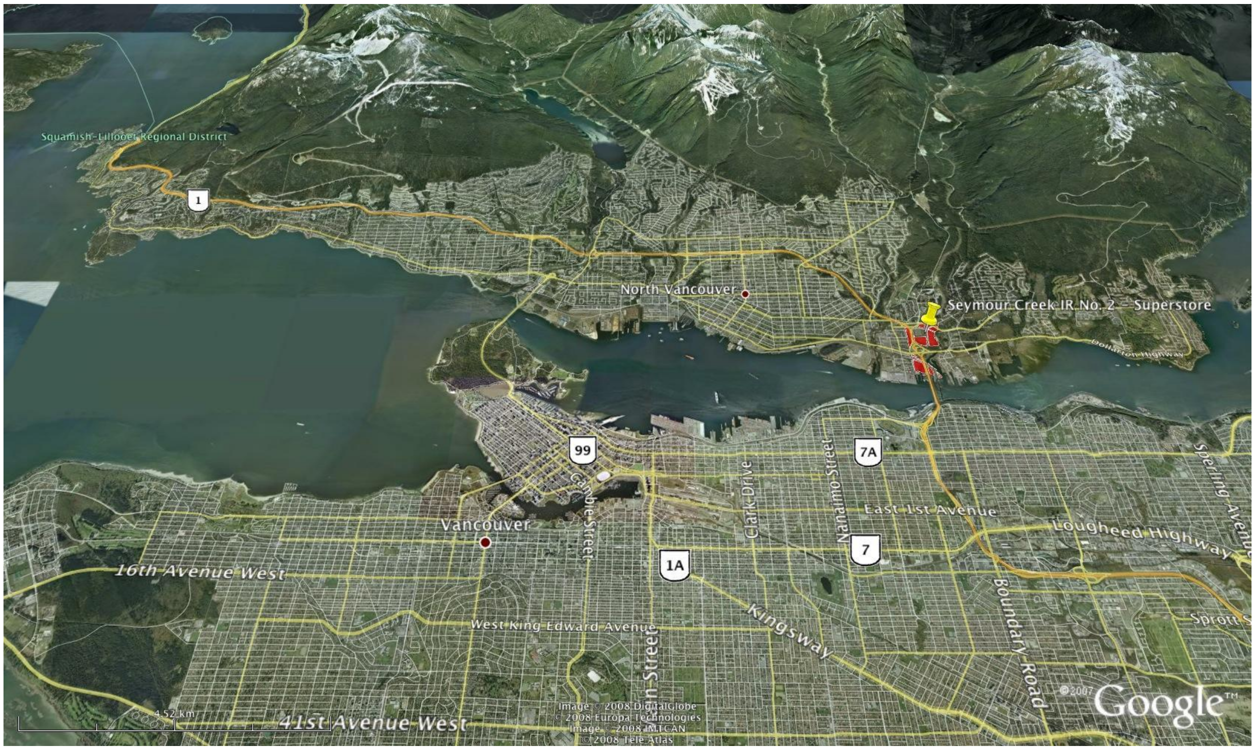
It should be noted that this study focuses on the "costs of *doing* business" and not the "costs of business". For example, it does not consider whether transportation costs are higher because of a remote location or whether labour costs are cheaper because of high unemployment and the possibility of making exempt earnings on reserve. As a rule of thumb it only assesses costs that are a function of the system of government and property rights prevailing on First Nation lands.

3. CASE STUDY 1 SEYMOUR CREEK INDIAN RESERVE NO. 2 – THE REAL CANADIAN SUPERSTORE

This case study examines the Real Canadian Superstore that is located on Seymour Creek Indian Reserve (I.R.) No. 2, one of twenty-three reserves that are held by the Crown for the sole benefit and use of the Squamish Nation membership. The Real Canadian Superstore is operated by Westfair Foods Ltd. ("Westfair"), a subsidiary of Loblaw Companies Ltd. The building comprises approximately 115,000 square feet on approximately 8 acres of I.R. No. 2.

The Squamish Nation ("Squamish") is comprised of approximately 3,000 members, two thirds of which live on one of the reserves. These reserves are located on the North Shore of Vancouver, the Howe Sound and the Squamish Valley. Seymour Creek I.R. No. 2 is located on the North Shore in close proximity to downtown Vancouver and is adjacent to the District of North Vancouver.

FIGURE 2 – PROJECT LOCATION AT SEYMOUR CREEK NO. 2 IN NORTH VANCOUVER, BC



The rapid growth of Vancouver as an urban centre has presented challenges to the Squamish Nation Council and membership. The strategic location of Squamish Nation reserves near Vancouver has meant that there has been increasing demand for development that has challenged the Squamish Nation Council and administration to adapt rapidly and develop additional capacity in terms of their ability to respond to development proposals.

The community expected to benefit from land rent revenue, property tax revenue, gas bar revenue, and employment through construction and operation of the Real Canadian Superstore. To date all of these benefits have accrued to Squamish Nation membership. The Squamish Nation has also benefited from the infrastructure investment that was made during the construction of the Superstore.

Future possible benefits from this project include reducing the cost of other projects on Seymour and other reserves. The infrastructure improvement will allow Squamish to further develop the Seymour reserve, as there is now better access to the reserve. The substantial amount of work done on the lease document will serve the Squamish Nation in their negotiations for development not only on the Seymour reserve but also on other Squamish Nation reserves.

The community expected the project to take no more than two years to complete. In reality, it took four and a half years from the expression of interest until the doors of the store opened.

TABLE 1 – EXPECTED TIME VS. ACTUAL TIME

Phase	Expected time spent on each component	Actual time spent on each component
Concept/Initiation	6	24
Designation	2	6
Leasing	6	18
Financing	2	2
Service Agreements	1	3
Construction	6	6
Total	23	59

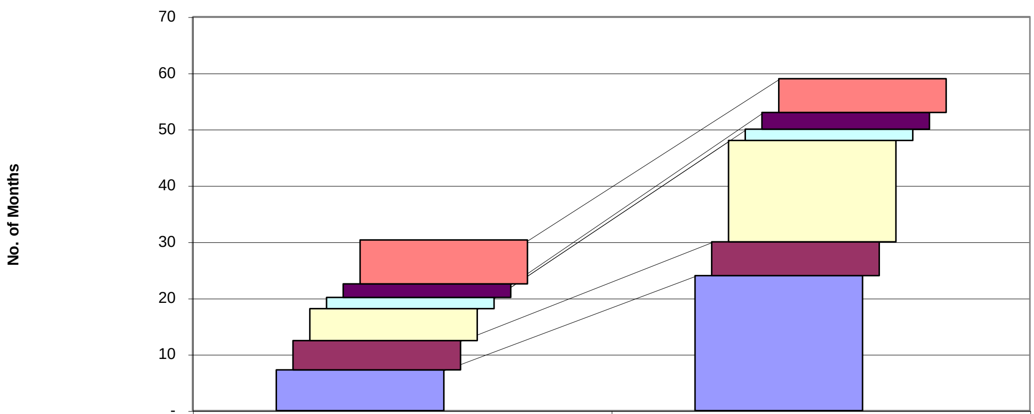
The Squamish Nation felt that the fiduciary duty the Crown has to the Squamish people played a significant role in delaying the completion of the project. The fiduciary duty manifested itself in the lease negotiations. The necessity for land assembly further complicated the negotiations. The land assembly required additional lease documents in which the fiduciary duty could manifest itself again.

This situation continues in the Squamish Nation. Although these infrastructure improvements have been made and lease documents developed, there has been considerable difficulty bringing additional development onto Seymour IR No. 2. A proposed 430,000 square foot retail centre has been under negotiation for close to eight (8) years. Delays appear to be occurring at concept/initiation (nature of development proposal and selection of partner) and leasing (valuation of land and negotiation of leasehold interest/business relationship) stages. Although these obstacles mirror the experience of the Superstore several differences in the development should be noted including: (a) proposed retail centre is close to four times as large as the Superstore; (b) proposed development would involve multiple tenants, and require ongoing property management and leasing; and (c) the Squamish Nation is considering an ownership stake in the centre.

The figure below illustrates a comparison of how long it took to complete each stage of the development process for the Superstore project as compared to an average off-reserve development. To construct an average off-reserve development, eight development projects (including retail, light industrial and residential uses) were reviewed. Developers were surveyed to provide information on the projects. Average time for each component was calculated.

FIGURE 3 – COMPARISON OF TIMELINES: SEYMOUR CREEK INDIAN RESERVE NO. 2

Comparison of Timelines: Real Canadian Superstore at Seymour Creek I.R. No. 2 and Average Off-Reserve Development



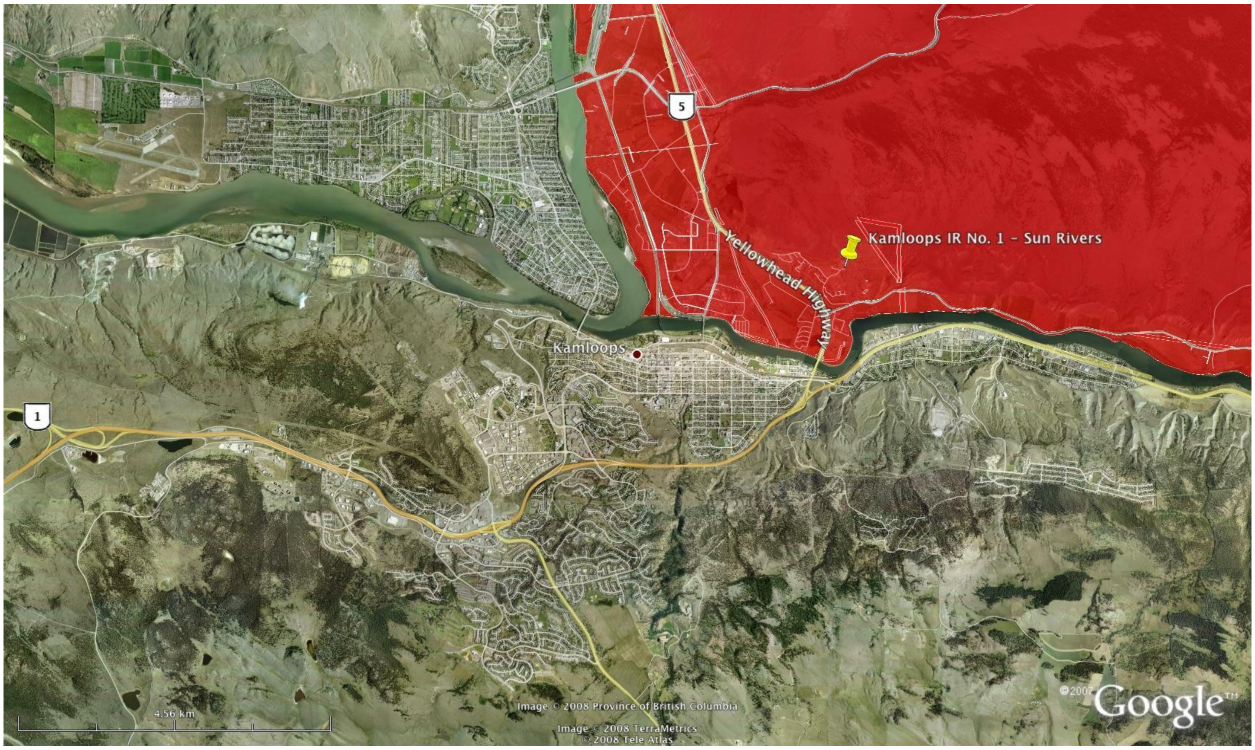
	Average Off-Reserve Development	Superstore
Construction	7.80	6
Service Agreements	2.40	3
Financing	2.00	2
Leasing	5.67	18
Designation	5.20	6
Project Initiation	7.25	24

Project Name

4. CASE STUDY 2 KAMLOOPS INDIAN RESERVE NO. 1 – SUN RIVERS

The Sun Rivers development is located on approximately 460 acres on the Kamloops Indian Reserve (I.R.) No. 1. The project is comprised of an 18-hole championship golf course, approximately 2,000 residential units, a school, and office/commercial space. The main reserve for the Kamloops Shuswaps (Secwepmc people) is located near the junction of the North and South Thompson Rivers near the city of Kamloops.

FIGURE 4 – PROJECT LOCATION AT KAMLOOPS IR NO. 1 NEAR KAMLOOPS, BC



Beginning with the fur trade and extending through the time of Chief Louis (1855-1915) until the present, the leaders of the Kamloops Shuswaps have always been concerned with viable economic co-existence between their community and the surrounding non-Shuswap communities. It was this concern that led to the 1962 passage of a by-law by the Chief and Council to formally establish the Mount Paul Industrial Park. The park has grown from 11 original businesses to over 150 today, with annual sales of over $150 million.

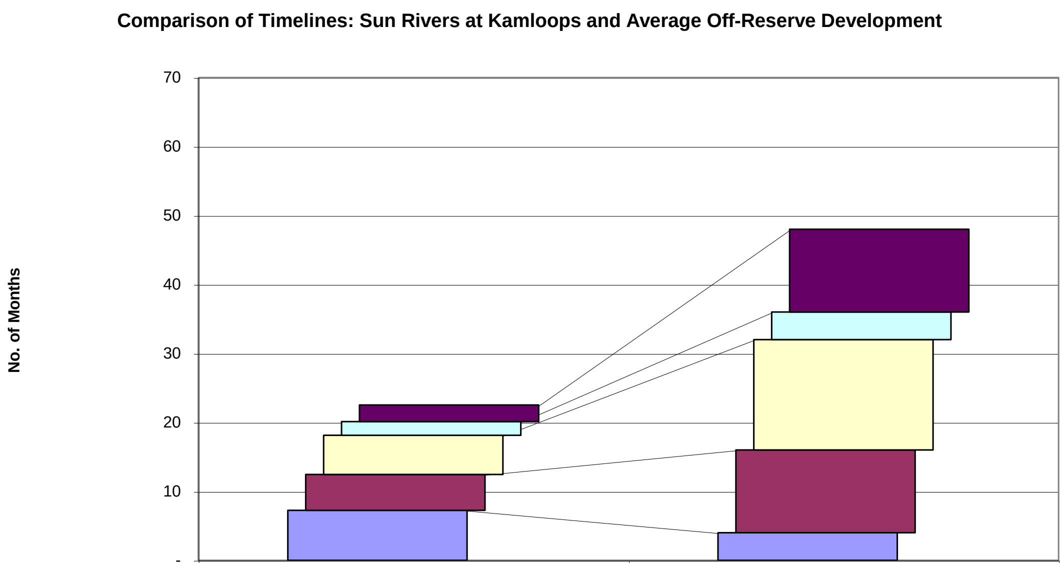
Current reserve lands of the Kamloops Shuswaps cover 33,000 acres and total membership is over 900. The reserve lands for the Kamloops Shuswaps are prime development lands in the area. The city of Kamloops, with a population just under 100,000, has nearly reached its infrastructural limits. As population and demographic pressures increase on the city of Kamloops, pressure to have a residential development on the Kamloops reserve has increased.

The Sun Rivers proposal was similar to the Superstore at Seymour Creek I.R. No. 2 in that both projects were proposed for sites that were defined as “band lands” by the *Indian Act*. This meant that the land had to be designated for lease via the designation process set forth by the Department of Indian Affairs.

Sun Rivers and the Kamloops Indian Band also entered into a Master Development and Services Agreement. This agreement details specific development issues such as permitted uses, servicing development approval process, parks, environmental matters, heritage matters, and property taxes.

Those closest to the project cite three principle reasons for their delays; lack of a local regulatory environment, lack of local administrative capacity, and limited physical infrastructure. The solutions developed in Sun Rivers relating to long term residential leases and master development plans are now being used in other Canadian First Nation communities such as the Dakota Sioux just south of Saskatoon, Saskatchewan. The chart below summarizes the times associated with the Sun Rivers development and a comparable development in the city of Kamloops.

FIGURE 5 – COMPARISON OF TIMELINES: SUN RIVERS AND AVERAGE



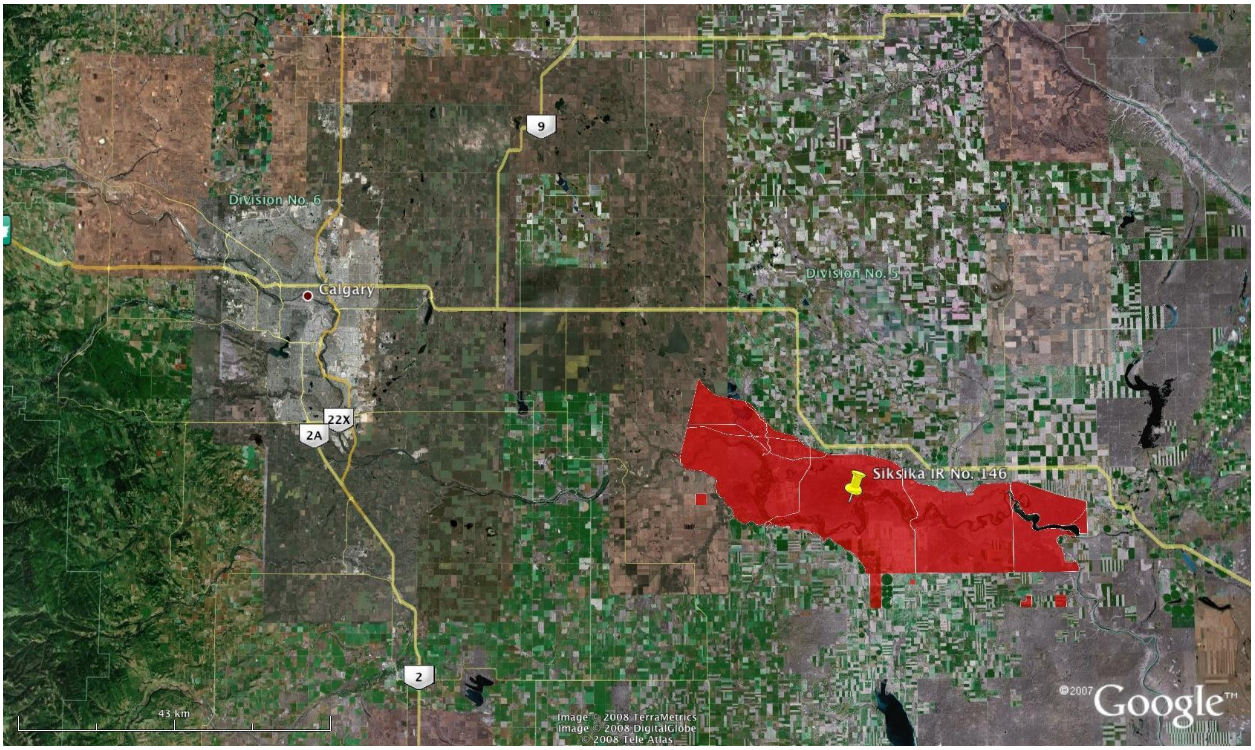
	Average Off-Reserve Development	Sun Rivers
Service Agreements	2.40	12
Financing	2.00	4
Leasing	5.67	16
Designation	5.20	12
Project Initiation	7.25	4

5. CASE STUDY 3 SIKSIKA NATION INDIAN RESERVE NO. 146 – COMMERCIAL DEVELOPMENT

5.1 Project Description

The case study examines the mixed use complex located on the Siksika Indian Reserve No. 146, approximately 80 km east of the city of Calgary, Alberta. The complex is located on the reserve that is held by the Crown for the use and benefit of the Siksika Nation's membership. The reserve is comprised of over 70,000 hectares and more than 3,000 members live on the reserve.

FIGURE 6 – PROJECT LOCATION AT SISKSIKA IR NO. 146 OUTSIDE CALGARY, AB



The project is a mixed use building on an approximately five-acre site that is comprised of both office and commercial space. This case study is different from the previous two in that a portion of the project (just over 40%) was funded publicly through the federal Native Economic Development Program (NEDP).

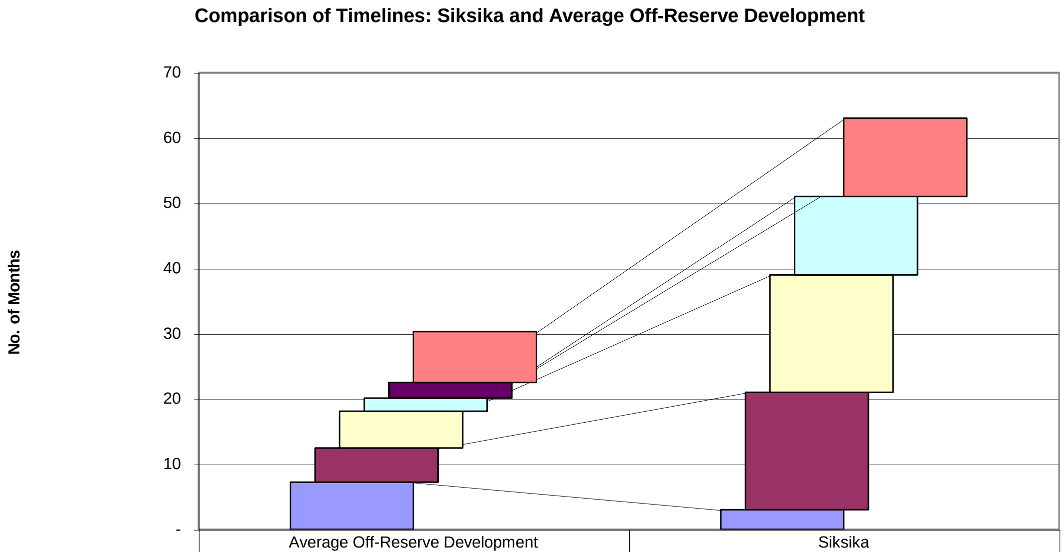
The Siksika Nation had been attempting to obtain financing for a new office building since 1980 and when the Native Economic Development Program (NEDP) was announced in 1988, they made an application for funding. The proposed structure was to satisfy the need for office space as well as to provide some commercial space that would satisfy the local demand for space and generate revenue for the Siksika Nation.

The Siksika Nation's own demand for office space combined with a positive business climate in the area convinced them that a mixed use building of office and commercial space would be economically viable. The availability of complementary services was also noted as criteria for locating this development on the Siksika Reserve. SEDCo concluded that the lack of comparable space in the area meant that the development would be able to attract tenants.

Just as the developments on the Squamish and Kamloops reserves are located on First Nations lands, so is the development at Siksika. There was no land use plan or zoning bylaw in place for this site but the close proximity of other non-residential uses and its location near the highway made it a likely choice for a commercial or office type development. The Siksika Nation had already designated a site immediately south of the complex and developed four institutional buildings in the late 1960s.

The subject property is comprised of approximately 5.41 acres, which was valued by an appraiser based on regional comparisons for leased commercial land in a rural setting. The community expected to accrue benefits from employment for its membership, lease revenues, and investments. Figure 4 compares the Siksika development components to off reserve development components in Calgary.

FIGURE 7 – COMPARISON OF TIMELINES: SIKSIKA AND AVERAGE

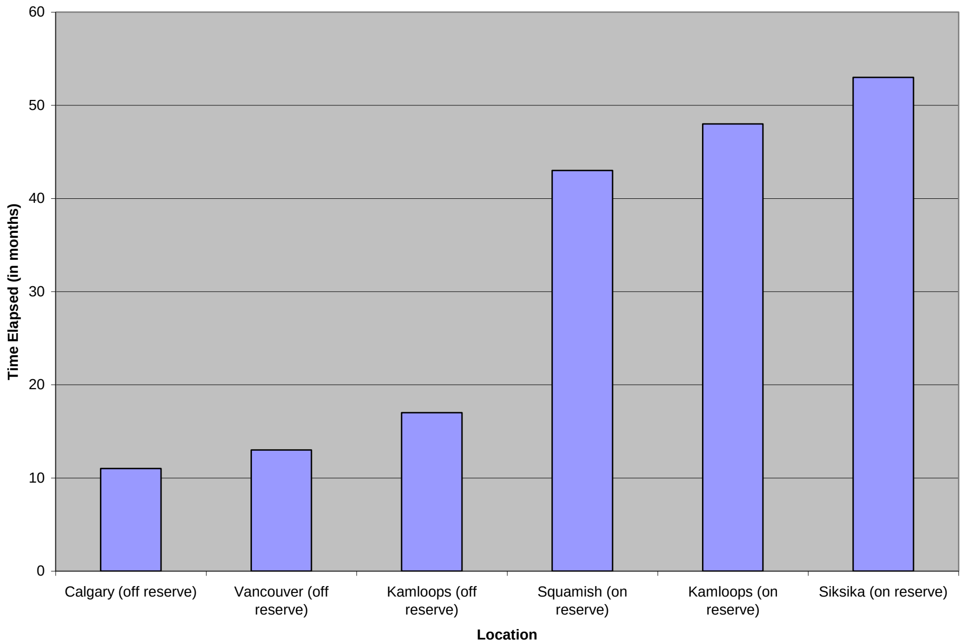


	Average Off-Reserve Development	Siksika
Construction	7.80	12
Service Agreements	2.40	0
Financing	2.00	12
Leasing	5.67	18
Designation	5.20	18
Project Initiation	7.25	3

6. CONCLUSIONS

The time elapsed in completing development approval processes is illustrated in the figure below. Comparisons made include Calgary/Siksika, Vancouver/ Squamish, and Kamloops/Kamloops Shuswap. Developers confirmed that these time frames were roughly indicative of the higher professional costs they incurred in the project approval process. Additionally, these time frames precisely matched the opportunity costs of foregoing the revenue earning stages of the development. For the most part, developers confirmed that these differences and their related uncertainty were significant and would continue to be a factor in site location decisions where First Nation sites are under consideration.

FIGURE 8 – COMPARISON OF DEVELOPMENT TIMEFRAMES



The experiences of these developers suggest that considerable more time, uncertainty and professional costs can be expected in clearing project approval processes on First Nation lands. This conclusion held up in First Nations in three different provinces when compared to adjacent municipalities. While, the three case studies are a relatively small sample, common sense suggests that these case studies likely *underestimated* the average cost differences between on and off-reserve projects. Only successful developments were studied and these were conducted by developers who had some experience with First Nation processes and First Nations who had some experience with developers.

This study identified several impediments to successful development on First Nation lands.

1. **Difficulties creating land use and land tenure certainty.** This is the bedrock of investor certainty. However, appropriate land use and tenure certainty was often difficult to secure owing to difficulties in securing approvals from Ottawa and the inadequacy of the current land registry system.

2. **Absence of an appropriate regulatory framework.** First Nation jurisdiction has for the most part either not established the laws and regulations needed to eliminate investment uncertainty or it is subject to jurisdictional uncertainty.

3. **Incomplete separation of politics and administration**. Because of resource limitations, qualified persons are often called upon to perform both political and administrative roles. This can create a perception of political influence on projects.

4. **Poor access to financing -** The financing problem is twofold. First many on-reserve projects must be financed through retained earnings and this reduces the pool of potential investors. Second, the land tenure system does not adequately support collateralization.

5. **Non-competitive infrastructure.** Most large investment projects on First Nation lands require extensive infrastructure improvements. Local government infrastructure is generally financed from 5 sources; property taxes, other local revenues, reserves, development cost charges, contributions from other governments and long term infrastructure debentures (this includes contributions from developers and public private partnerships. First Nations in Canada only have access to property taxes a few other local revenues and reserves. Moreover, they are in a catch 22 where they need revenues to finance infrastructure but cannot generate revenues without infrastructure. The result is that most economic infrastructure on First Nation lands is sub-standard.

6. **Reluctance of the Crown to take risk**. The Department of Indian Affairs has conflicting obligations. On one hand it must improve the welfare of First Nation people. On the other hand the Department must operate within the restrictions of the financial administration act and in an environment of scare resources. Improving welfare often means crown investment and such investment carries risk, which are difficult to assimilate within the current federal fiscal regime. This problem manifests itself in the negotiation of lease documents and contributes to lengthy delays in approval times.

7. **Lack of Information Infrastructure**. It is often difficult for developers to obtain the information needed to analyze site suitability when First Nation lands are under consideration. Information that is generally available through title search and linked information systems is generally not available to them. Statistical information is also often not available.

8. **Political Uncertainty.** Many investors are reluctant to do business on First Nation lands because they lack a business history and there is often little continuity of policies after regime changes. This has created a need to seek more certainty through contractual arrangements than is the case in other settings.

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